

**Cour
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**International
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Court**



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

Date: 31 March 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

Confidential

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)

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. In accordance with regulation 64(6) of the Regulations of the Court and the Appeals Chamber's order on the conduct of the appeal proceedings,¹ Counsel representing the collective interests of future applicants as well as of applicants in the proceedings (the "Legal Representative"),² hereby submits her 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*" (the "Defence Appeal").³

2. The Legal Representative submits that the Defence Appeal should be rejected in its entirety since the Defence fails to show any error of law or fact in the Impugned Decision. Instead, its arguments misrepresent the Chamber's reasoning and the Court's jurisprudence, and express mere disagreements with the "Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions" (the "Impugned Decision").⁴

¹ See the "Order on the conduct of the appeal proceedings" (Appeals Chamber), [No. ICC-01/14-01/21-254](#), 11 March 2022.

² See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG ET](#), p. 47, lines 1-13.

³ 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 (the "Defence Appeal").

⁴ 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 "Impugned Decision").

II. PROCEDURAL BACKGROUND⁵

3. On 9 December 2021, Pre-Trial Chamber II issued the “Decision on the confirmation of charges against Mahamat Said Abdel Kani”.⁶

4. On 10 December 2021, the Registrar transmitted the record of the proceedings to the Presidency, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani (“Mr Saïd” or the “Accused”).⁷

5. On 14 December 2021, the Presidency referred the case to the newly constituted Chamber,⁸ which elected its Presiding Judge and its Single Judge the following day.⁹

6. On 21 December 2021, the Registrar transmitted the record of the proceedings to the Trial Chamber VI (the “Chamber”).¹⁰

7. On 11 January 2022, the Chamber notified the parties and participants by email that, pursuant to rule 118(3) of the Rules of Procedure and Evidence (the “Rules”), it would convene the annual review of Mr Saïd’s detention on 28 January 2022.¹¹

⁵ The procedural background included in these submissions is non-exhaustive and primarily focuses on the procedure relevant to these submissions.

⁶ See the “Decision on the confirmation of charges against Mahamat Said Abdel Kani” (Pre-Trial Chamber II), [No. ICC-01/14-01/21-218-Conf](#) and [No. ICC-01/14-01/21-218-Red](#), 9 December 2021.

⁷ See the “Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf, dated 09 December 2021” (Registry), [No. ICC-01/14-01/21-219-Conf](#), 10 December 2021.

⁸ See the “Decision constituting Trial Chamber VI and referring to it the case of *The Prosecutor v. Mahamat Said Abdel Kani*” (Presidency), [No. ICC-01/14-01/21-220](#), 14 December 2021.

⁹ See the “Decision notifying the election of the Presiding Judge and Single Judge” (Trial Chamber VI), [No. ICC-01/14-01/21-221](#), 15 December 2021.

¹⁰ See the “Transmission to Trial Chamber VI of the record of the proceedings, including the Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21-218-Conf, dated 09 December 2021” (Registry), [No. ICC-01/14-01/21-223-Conf](#), 21 December 2021.

¹¹ See the email from Trial Chamber VI to the parties and participants, entitled “Convening of hearing on detention (Rule 118(3))”, 11 January 2022 at 17:15.

8. On 14 January 2022, the Chamber issued an order convening the first Status Conference¹² and instructing the parties, participants and the Registry to file submissions on listed items in preparation of the trial.¹³
9. On 24 January 2022, the Registry filed the confidential “Registry Report on the Implementation of the Restrictions on Contact Ordered by Trial Chamber VI” together with an *ex parte* annex. A public redacted version thereof was filed on 28 March 2022.¹⁴
10. On 25 January 2022, the Defence filed the “*Demande de mise en liberté provisoire de Mahamat Said Abdel Kani*” (the “Defence Request”).¹⁵
11. On 28 January 2022, the first Status Conference was held,¹⁶ during which, *inter alia*: (i) the Chamber appointed the Office of Public Counsel for Victims to represent the collective interests of future applicants in the proceedings until one or more common legal representatives is or are appointed to represent victims in trial proceedings;¹⁷ (ii) the Prosecution and the Legal Representative presented their arguments on the Defence Request;¹⁸ and (iii) the Chamber invited the parties and participants to submit further written submissions on the Defence Request.¹⁹

¹² See the “Order Scheduling the First Status Conference” (Trial Chamber VI), [No. ICC-01/14-01/21-226](#), 14 January 2022.

¹³ See the “Prosecution’s submissions pursuant to the ‘Order scheduling first status conference’”, [No. ICC-01/14-01/21-230-Conf](#) and [No. ICC-01/14-01/21-230-Red](#), 21 January 2022 (the “Prosecution’s submissions pursuant to the Order scheduling first status conference”); the “*Version confidentielle expurgée des ‘Observations de la Défense de Monsieur Saïd en application de l’ ‘Order Scheduling the First Status Conference’ (ICC-01/14-01/21-226)’*”, [No. ICC-01/14-01/21-231-Conf-Red](#) and [No. ICC-01/14-01/21-231-Red2](#), 21 January 2022 the “Submissions on behalf of victims on the matters identified in the ‘Order Scheduling the First Status Conference’ (ICC-01/14-01/21-226)”, [No. ICC-01/14-01/21-228](#), 21 January 2022; and the “Registry Submissions in view of the 28 January 2022 Status Conference”, [No. ICC-01/14-01/21-229](#), 21 January 2022.

¹⁴ See the “Public Redacted Version of the ‘Registry Report on the Implementation of the Restrictions on Contact Ordered by Trial Chamber VI’”, [No. ICC-01/14-01/21-232-Red](#), 24 January 2022. The annex remains *ex parte*.

¹⁵ See the “*Demande de mise en liberté provisoire de Mahamat Said Abdel Kani*”, [No. ICC-01/14-01/21-233-Conf](#) and [No. ICC-01/14-01/21-233-Red](#), 25 January 2022.

¹⁶ See the transcript of the hearing held on 28 January 2022, *supra* note 2.

¹⁷ *Idem*, p. 47, lines 1-13.

¹⁸ *Idem*, p. 62, line 9 to p. 72, line 10; *idem*, p. 73, line 10 to p. 75, line 1.

¹⁹ *Idem*, p. 78, lines 12-17.

12. On 4 February 2022, the Prosecution filed the "Prosecution's additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani" (the "Prosecution's Additional Submissions").²⁰

13. On 11 February 2022, the Defence filed its response to the Prosecution's Additional Submissions.²¹

14. On 3 March 2022, the Chamber issued the Impugned Decision.²²

15. On 9 March 2022, the Defence filed its notice of appeal against the Impugned Decision.²³

16. On 11 March 2022, the Appeals Chamber issued the "Order on the conduct of the appeal proceedings",²⁴ instructing the Defence to file its appeal brief on 21 March 2022, and the Prosecution and the Legal Representative to file their responses thereon on 31 March 2022.

17. On 21 March 2022, the Defence filed its appeal brief.²⁵

III. CONFIDENTIALITY

Pursuant to regulation 23bis(1) and (2) of the Regulations of the Court, the present filing is classified as confidential, since it refers to the content of documents likewise

²⁰ See the "Prosecution's additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani", [No. ICC-01/14-01/21/236-Conf](#) and [No. ICC-01/14-01/21/236-Red](#), 4 February 2022.

²¹ See the "*Réponse de la Défense à la demande de maintien en détention de Monsieur Said et en maintien des mesures de restrictions aux communications de Monsieur Said formulée à l'oral lors de l'audience du 28 janvier 2022 (ICC-01/14-01/21-T-007-CONF-FRA ET) et dans les 'additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani' (ICC-01/14-01/21-236-Conf) déposées le 4 février 2022*", [No. ICC-01/14-01/21-239-Conf-Red](#) and [No. ICC-01/14-01/21-239-Red2](#), 11 February 2022.

²² See the Impugned Decision, *supra* note 4.

²³ 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 Said et du maintien des mesures de restrictions à ses communications*", [No. ICC-01/14-01/21-252 OA3](#), 9 March 2022.

²⁴ See the "Order on the conduct of the appeal proceedings", *supra* note 1.

²⁵ See the Defence Appeal, *supra* note 3.

classified as confidential. A public redacted version of this document will be filed in due course.

IV. SUBMISSIONS

A. Applicable law

18. Article 60(2) of the Rome Statute (the “Statute”) enables a person subject to a warrant of arrest to apply for interim release pending trial. Contrary to a Chamber’s periodic review of a ruling on the release or detention of the person concerned, under article 60(3), which is limited to an assessment of “*changed circumstances*”, a review under article 60(2) involves a *de novo* assessment of the requirements of article 58(1) of the Statute.²⁶

19. Pursuant to article 58(1) of the Statute, a Chamber must be satisfied that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” and that the person’s detention remains “*necessary: (i) To ensure the person’s appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances*”.²⁷

20. The Appeals Chamber has confirmed that these three conditions are “*in the alternative*”,²⁸ and as such, “*the fulfilment of one of them is sufficient to negate the need to address the remaining conditions*”.²⁹

²⁶ 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.

²⁷ See article 58(1) of the Statute.

²⁸ See 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](#), 13 February 2007 (the “*Lubanga Appeals Judgment*”), para. 139.

²⁹ See the “Decision on the Defence’s Application for Interim Release” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-147](#), 18 November 2013, para. 39.

21. When determining whether the continued detention of a suspect appears “necessary”, the Appeals Chamber specified that “the question revolves around the possibility, not the inevitability, of a future occurrence”.³⁰ A Chamber’s determination “necessarily involves an element of prediction”,³¹ based on “an analysis of all relevant factors taken together.”³² Consequently, it is sufficient for a Chamber to establish, on a case-by-case basis, that there is a possibility that the suspect will abscond, or will obstruct or endanger the investigation or the court proceedings, in order to decide on the suspect’s continued detention.

22. Pursuant to rule 158(1) of the Rules, on an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the Impugned Decision.

B. Response to the Defence Appeal

1. First Ground

23. Under its first ground of appeal, the Defence argues that the Chamber erred in law in deciding to remand Mr Saïd in detention based on unfounded and unsubstantiated hypotheses.³³ According to the Defence, the Impugned Decision thus

³⁰ See the “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” (Appeals Chamber), [No. ICC-01/04-01/07-572 OA4](#), 9 June 2008, para. 21. See also 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 (the “Bemba 2008 Appeals Judgment”), para. 55; the “Public redacted version of the 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’” (Appeals Chamber), [No. ICC-02/11-01/11-278-Red OA](#), 26 October 2012 (the “Gbagbo Appeals Judgment”), para. 56; and the “Public redacted version of the Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-180-Red](#), 13 July 2012 (the “Gbagbo 2012 Decision”), para. 48.

³¹ See the *Lubanga* Appeals Judgment, *supra* note 28, para. 137; see also the *Gbagbo* 2012 Decision, *supra* note 30, para. 48.

³² See the *Bemba* 2008 Appeals Judgment, *supra* note 30, para. 55. See also the *Gbagbo* 2012 Decision, *supra* note 30, para. 48.

³³ See the Defence Appeal, *supra* note 3, paras. 28-39.

reverses the burden of proof;³⁴ creates a presumption of continued detention for all accused persons before the Court which violates the principle according to which detention should be the exception rather than the rule;³⁵ and lacks motivation.³⁶

24. First and foremost, notwithstanding the fact that the fulfilment of one of the conditions under article 58(1)(b) is sufficient for a Chamber to decide to remand the Accused in detention,³⁷ the Legal Representative scrutinises the Defence's submissions on both the risk of absconding under article 58(1)(b)(i) of the Statute, and the risk of obstruction or endangerment of the investigation or the Court proceedings under article 58(1)(b)(ii) of the Statute.

25. The Legal Representative notes 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"),³⁸ explicitly took into account several relevant factors, more precisely: the seriousness of the charges and the fact that they have, at least partially, been confirmed;³⁹ the possible lengthy prison sentence that may be ordered upon conviction;⁴⁰ 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");⁴¹ and the current situation of insecurity and instability in the CAR.⁴² In this regard, the Appeals Chamber confirmed the relevance of such factors in assessing the risk of absconding.⁴³

³⁴ *Idem*, para. 34.

³⁵ *Idem*, para. 35.

³⁶ *Idem*, paras. 36-39.

³⁷ See *supra* para. 20.

³⁸ See the Impugned Decision, *supra* note 4, para. 30.

³⁹ *Idem*, para. 26.

⁴⁰ *Ibid.*

⁴¹ *Idem*, paras. 27-28.

⁴² *Idem*, para. 29.

⁴³ See the "Public redacted version of the Decision on Mr Gbagbo's Detention" (Trial Chamber I), [No. ICC-02/11-01/15-1038-Red](#), 26 September 2017 (the "*Gbagbo* 2017 Decision"), para. 65 (citing the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March

26. Similarly, in concluding, in accordance with article 58(1)(b)(ii) of the Statute, that the risk of potential witness interference remains high,⁴⁴ the Legal Representative posits that the Chamber correctly stated that it “*must weigh the magnitude of the overall potential risk of future obstruction of justice if the detained person were to be released*”,⁴⁵ and based itself on a number of relevant factors, namely: previous security threats for witnesses;⁴⁶ the existing dire security situation in the CAR;⁴⁷ indications of support for Mr Saïd in the CAR;⁴⁸ 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.⁴⁹

27. Specifically with regard to the security situation, the Appeals Chamber 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*”,⁵⁰ in line with a Chamber’s obligation under article 68(1) of the Statute to ensure the protection of victims and witnesses. In this regard, the Legal Representative recalls her previous submissions as to the remaining volatile situation on the ground, and the correlated vulnerable position of victims, leading to the permanent fear they are living in, as expressed repeatedly.⁵¹

2017 entitled ‘Decision on Mr Gbagbo’s Detention’” (Appeals Chamber), [No. ICC-02/11-01/15-992-Red OA10](#), 19 July 2017, paras. 41-43, 54, and 66-67.

⁴⁴ See the Impugned Decision, *supra* note 4, para. 36.

⁴⁵ *Idem*, para. 33.

⁴⁶ *Idem*, para. 32.

⁴⁷ *Idem*, para. 33.

⁴⁸ *Ibid.*

⁴⁹ *Idem*, para. 35.

⁵⁰ See the “Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled ‘Decision on the Defence Request for Interim Release’” (Appeals Chamber), [No. ICC-02/05-01/20-177 OA2](#), 8 October 2020, para. 27.

⁵¹ 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”.

28. Furthermore, as per the jurisprudence of this Court, pre-trial detention does not breach internationally recognised human rights or criminal law principles under article 21(3) of the Statute, such as the exceptionality of detention and the presumption of innocence, “*insofar it is justified on any of the grounds of articles 58(1) and 60(2) of the Statute*”.⁵² Indeed, the exceptionality of detention and the presumption of innocence, while relevant to the interpretation of articles 58(1) and 60(2) of the Statute, are not in themselves determinative in assessing whether provisional release should be granted, but must be balanced with other factors.⁵³

29. As such, the Legal Representative submits that the Defence’s submissions under the first ground should be dismissed as they fail to show any error of law. Instead, the Defence’s arguments reflect a mere disagreement with the Impugned Decision.

2. Second Ground

30. Under its second ground of appeal, the Defence argues that the Chamber erred in law and fact in deciding to remand Mr Saïd in detention based on the gravity of the charges, while not defining the notion of gravity itself,⁵⁴ nor analysing the gravity of Mr Saïd’s charges specifically.⁵⁵ In relation to the notion of gravity, the Defence submits that the jurisprudence of the Court creates a presumption of continued detention for an accused whose charges have been confirmed, violating thus the exceptionality of detention, the presumption of innocence and the right to a fair trial.⁵⁶ The Defence argues as well that the possibility of a lengthy prison sentence should not

⁵² See the *Gbagbo* 2017 Decision, *supra* note 43, para. 59. See also the “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 Maitre Aimé Kilolo Musamba’” (Appeals Chamber), [No. ICC-01/05-01/13-558 OA2](#), paras. 67-68.

⁵³ *Ibid.*

⁵⁴ See the Defence Appeal, *supra* note 3, paras. 40-49.

⁵⁵ *Idem*, paras. 50-53.

⁵⁶ *Idem*, paras. 45-46.

be taken into account as a factor determining the gravity of the charges, since all accused persons before the Court can be convicted to lengthy sentences.⁵⁷

31. With regard to Mr Saïd's charges specifically, the Defence submits that the temporal and geographical scope of the confirmed charges, as well as the number of victims, are limited, and that the charges do not include the crime of murder nor sexual and gender-based crimes.⁵⁸

32. First, the Legal Representative notes that the Chamber did not only base its conclusion that there is a significant risk of Mr Saïd absconding on the gravity of the charges, but also on a number of other concrete factors, such as the current situation of insecurity and instability in the CAR.⁵⁹

33. The need for a Chamber to analyse all relevant factors together in order to decide on the continued detention or provisional release of a detained person is all the more apparent from the Court's jurisprudence to which the Chamber and the Defence both refer.⁶⁰ In this regard, the Appeals Chamber already affirmed that the Pre-Trial Chamber should have given more consideration to other relevant factors, for instance the potential lengthy prison sentence,⁶¹ and the detained person's professional position and his international contacts and ties.⁶² Accordingly, the Legal Representative submits that the Chamber did not err in taking the gravity of the charges into account as a part of "*all relevant factors taken together*".⁶³

⁵⁷ *Idem*, para. 48.

⁵⁸ *Idem*, paras. 51-53.

⁵⁹ See *supra* paras. 25 and 27.

⁶⁰ See the Impugned Decision, *supra* note 4, footnote 49; and the Defence Appeal, *supra* note 3, paras. 43-44.

⁶¹ See the "Public redacted version of 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](#), para. 70.

⁶² *Idem*, para. 72.

⁶³ See *supra* note 32 and accompanying text.

34. Second, regarding the alleged limited scope of the case, the Legal Representative recalls the Prosecution's submissions that, "[w]hile the Prosecution's case is focused on one incident, this incident includes several sub-incidents and episodes of severe mistreatment".⁶⁴

35. In this regard, the Legal Representative simply recalls that the jurisdiction of the Court is over the most serious crimes of concern to the international community as a whole, regardless of the alleged scope of the charges or even their content. Attempting to establish a hierarchy of crimes against individuals ignores the extent of victimisation and suffering endured by the victims in the present case.

36. In conclusion, the Legal Representative submits that the Defence's submissions under the second ground should be dismissed as they misrepresent the Chamber's reasoning and the applicable law, and in any case fail to show any error of law or fact.

3. *Third Ground*

37. Under its third ground of appeal, the Defence contends that the Chamber erred in law in deciding to remand Mr Saïd in detention based on alleged security incidents concerning witnesses, without demonstrating a link between Mr Saïd and those incidents.⁶⁵

38. The Legal Representative reiterates that the occurrence of security incidents concerning witnesses in the CAR is just one of the elements taken into account by the Chamber in concluding that the condition for continued detention under article 58(1)(b)(ii) of the Statute is met.

39. Indeed, she notes that the Chamber clearly establishes a link between Mr Saïd and the risk of witness interference on the basis of an analysis of all relevant factors

⁶⁴ See the Prosecution's submissions pursuant to the Order scheduling first status conference, *supra* note 13, para. 46.

⁶⁵ See the Defence Appeal, *supra* note 3, paras. 54-58.

taken together.⁶⁶ Moreover, the Legal Representative refers to the jurisprudence of this Chamber according to which “*the question revolves around the possibility, not the inevitability, of a future occurrence*”⁶⁷. Accordingly, the mere possibility that, if Mr Saïd were to be released with or without conditions, he could obstruct or endanger the investigation or the court proceedings through witness interference suffices for the Chamber to decide that the condition for continued detention under article 58(1)(b)(ii) of the Statute is fulfilled.⁶⁸

40. Accordingly, the Legal Representative submits that the Defence’s submissions under the third ground should be dismissed as they misrepresent the Chamber’s findings and the applicable law, and in any case fail to show any error of law.

4. Fourth Ground

41. Under its fourth ground of appeal, the Defence argues that the Chamber erred in law in deciding to remand Mr Saïd in detention based on a report from the Registry which was not communicated to the Defence, violating thus the “*principe du contradictoire*”.⁶⁹

42. Contrary to what the Defence seems to suggest, the Registry is not a party in the proceedings, but a neutral organ of the Court providing administrative and operational support, *inter alia*, in order to safeguard the rights of victims, witnesses and the Defence.⁷⁰

⁶⁶ See *supra* para. 26.

⁶⁷ See the “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”, *supra* note 30, para. 21 (we underline). See also *supra* para. 21.

⁶⁸ *Ibid.*

⁶⁹ See the Defence Appeal, *supra* note 3, paras. 59-61.

⁷⁰ See articles 43(1), 43(6), 67 and 68 of the Statute, rules 14(2), 15-22, 27, 42-43, 59, 67(3), 87-90, 92, 94-96, 99, 100(2), 121(10), 122(1), 131, 135(3), 137(1), 138, 150(3), 151-152, 156-157, 192-193, and 206 of the Rules, regulations 21(8)-(9), 24*bis*, 26, 31, 32(3), 40-42, 44(1), 69-71, 73, 75-77, 80-81, 83-88, 90-106, 113(2), and 116-117 of the Regulations of the Court, and regulations 46(4), 47-48, 76-146, and 150-223 of the Regulations of the Registry.

43. The Legal Representative notes that the Defence does not provide any basis to assume that the Registry, in this specific case, would be violating its duties relating to Mr Saïd's rights, which instead reveals the Defence's mere disagreement with the Chamber's findings. Such a violation is also not apparent from the public redacted version of the report.⁷¹

44. In any case, since there are, as set out *supra*, numerous factors that justify the continued detention of Mr Saïd, the absence of disclosure of the Registry's report to the Defence, at the time of the Defence's Appeal, cannot be the sole basis of the fourth ground of appeal.⁷²

45. Thus, the Legal Representative submits that the Defence's submissions under the fourth ground should be dismissed as they fail to show any error of law.

5. *Fifth Ground*

46. Under its fifth ground of appeal, the Defence submits that the Chamber erred in law in deciding to remand Mr Saïd in detention because of the disclosure of confidential information to Mr Saïd.⁷³ According to the Defence, such an approach presents Mr Saïd with the impossible choice between two of his fundamental rights, namely his right to be informed of the charges and his right to liberty.⁷⁴

47. While the Defence does recognise, contrary to its arguments under the other grounds of appeal, that the disclosure of evidence is but one of the elements to take into account when deciding on the continued detention or provisional release of the Accused,⁷⁵ it misrepresents the Court's jurisprudence in arguing that this element

⁷¹ See *supra* note 14.

⁷² See the Defence Appeal, *supra* note 3, para. 59.

⁷³ *Idem*, paras. 62-65.

⁷⁴ *Idem*, para. 62.

⁷⁵ *Idem*, para. 64.

constitutes a generic and automatic basis for a Chamber to always decide to remand a detained person in detention.⁷⁶

48. Concretely, it is not because the Appeals Chamber considers that a Chamber “[does] *not have to explain the specific circumstances relating to the disclosure of evidence and how they amplif[y] the risk*”,⁷⁷ that a Chamber’s finding that there is a risk for obstruction or endangerment of the investigation or the court proceedings, simply because evidence has been disclosed to the detained person, would not be on a concrete, case-by-case basis. Indeed, the Legal Representative recalls that a Chamber’s analysis under article 58(1) of the Statute is sufficiently concrete, insofar as it is based on all relevant factors, such as the disclosure of evidence, pertaining to an accused person’s personal situation.⁷⁸ The Legal Representative thus submits that a Chamber does not use the disclosure of evidence as a generic and automatic basis to remand a detained person in detention, as long as that finding is based on an analysis of the specific situation of that person, including all other relevant factors pertaining to that person.

49. Furthermore, the Chamber precisely mentions that, in the concrete case of Mr Saïd, “*the disclosure process has reached an advanced stage and that Mr Said is now in possession of a lot of confidential information, including the identities of a large number of witnesses*”.⁷⁹ As such, it did look concretely into the specificities of the disclosure of evidence to Mr Saïd, even though it is not required to do so according to the Appeals Chamber’s jurisprudence. Moreover, the mere possibility that the disclosed information could pose a threat to the security of witnesses suffices to take this potential risk into account.⁸⁰

50. Finally, the Legal Representative recalls that the Accused’s fundamental rights, while relevant to the interpretation of articles 58(1) and 60(2) of the Statute, are not in

⁷⁶ *Ibid.*

⁷⁷ See the *Gbagbo* Appeals Judgment, *supra* note 30, para. 65.

⁷⁸ See *supra* para. 21. See also the *Bemba* 2008 Appeals Judgment, *supra* note 30, para. 55; and the *Gbagbo* 2012 Decision, *supra* note 30, para. 48.

⁷⁹ See the Impugned Decision, *supra* note 4, para. 35.

⁸⁰ See *supra* note 30 and accompanying text.

themselves determinative in assessing whether provisional release should be granted, but must be balanced with other factors.⁸¹

51. In conclusion, the Legal Representative submits that the Defence's submissions under the fifth ground should be dismissed as they fail to show any error of law.

FOR THESE REASONS, the Legal Representative respectfully requests the Appeals Chamber to dismiss the Defence Appeal in its entirety since the Defence fails to show any error of law or fact. Since the Defence simply misrepresents the Chamber's reasoning and the Court's jurisprudence, and expresses mere disagreements or differences of opinions with the Impugned Decision, she respectfully requests the Appeals Chamber to confirm the Impugned Decision.



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Counsel

Dated this 31st day of March 2022

At The Hague, The Netherlands

⁸¹ See *supra* para. 28.