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

THE APPEALS CHAMBER

Before: **Judge Gocha Lordkipanidze, Presiding Judge**
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

Public Redacted Version of the "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" Filed on 21 March 2022

Source: **Defence Team for Mahamat Said Abdel Kani**

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

Office of the Prosecutor
Mr Karim A. A. Khan
Ms Helen Brady
Mr Eric MacDonald

Counsel for the Defense
Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims
Ms Sarah Pellet

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section
Mr Harry Tjonk

Victims Participation and Reparations Section

Other

Classification:

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

I. Procedural history

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

3. On 28 January 2022, a hearing was held on Mr Said's detention, at which the Prosecution stated [REDACTED].[2]

4. That day, at the hearing, the Chamber informed the parties that they could file written submissions,[3] by 4 February 2022 for the Prosecution and by 11 February 2022 for the Defence and OPCV.[4]

5. On 4 February 2022, the Prosecution filed "additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani".[5]

6. On 11 February 2022, the Defence filed its response "[TRANSLATION] to the oral request for the continuation of Mr Said's detention and the restrictions on Mr Said's communications made at the hearing of 28 January 2022 (ICC-01/14-01/21-T-007-CONF-FRA ET) and in the 'additional submissions related to the detention and contact restrictions of Mahamat Said Abdel Kani' (ICC-01/14-01/21-236-Conf) filed on 4 February 2022".[6]

[1] ICC-01/14-01/21-233-Conf.
[2] ICC-01/14-01/21-T-007-CONF-FRA, p. 67.
[3] ICC-01/14-01/21-T-007-CONF-FRA, p. 67, lines 1-11.
[4] ICC-01/14-01/21-T-007-CONF-FRA, p. 84, lines 26-28.
[5] ICC-01/14-01/21-236-Conf.
[6] ICC-01/14-01/21-239-Conf-Exp.

7. On 3 March 2022, the Trial Chamber issued its "Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions" (the impugned decision) in which it decided to continue Mr Said's detention and to maintain the restrictions, albeit relaxing them.

8. On 9 March 2022, the Defence for Mr Said filed the notice of appeal "against the 'Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions' (ICC-01/14-01/21-247-Conf) of Trial Chamber VI Deciding to Continue Mr Said's Detention and Maintain the Restrictions on His Communication".[7]

9. On 11 March 2022, the Appeals Chamber issued an order in which it stated that the proceedings would be conducted in writing. It ordered the Defence to file its appeal brief by 21 March 2022 and specified that the Prosecution and OPCV could file their briefs in response by 31 March 2022.[8]

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

1. The international standards

10. In accordance with article 21(3) of the Rome Statute, the interpretation and application of the entire Statute must be consonant with internationally recognized human rights, not least the standards pertaining to pre-trial detention.[9] Those rules provide the general framework for this request and must be taken into account for the proper interpretation of the provisions of the Statute.

11. In international law, deprivation of liberty is governed by a strict regime, given the seriousness of this measure. The slightest deviation equates to arbitrary detention, in contravention of international law. This point is all the more critical in

[7] ICC-01/14-01/21-252-tENG.
[8] ICC-01/14-01/21-254.
[9] Article 21 of the Rome Statute; ICC-01/04-01/07-OA-4, para. 15.

the case of pre-trial detention since a person is presumed innocent.

12. The right to liberty is a fundamental right which a person possesses by virtue of being human and is guaranteed by international human rights law.[10] Detention, on the other hand, is an exception to this principle. As such, and in order for the right to liberty to be effective, detention is circumscribed by strictly defined and exhaustively enumerated legal criteria. In the words of the International Covenant on Civil and Political Rights: "It shall not be the general rule that persons awaiting trial shall be detained in custody".[11] Those words have been echoed on many an occasion by various human rights courts and bodies,[12] which consider detention "an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases." [13]

13. That principle has often been reaffirmed by the judges of the Court, who thus in no uncertain terms agreed that, "when dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule." [14]

2. The presumption of innocence

14. The presumption of innocence is central to the concept of a fair trial.[15] Article 66 of the Statute adopts the principle and provides that everyone shall be presumed

[10] Universal Declaration of Human Rights, 10 December 1948, article 3; International Covenant on Civil and Political Rights, article 9; African Charter on Human and Peoples' Rights, article 6; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 5; American Convention on Human Rights, article 7; "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", adopted by the United Nations General Assembly, resolution A/RES/43/173, 9 December 1988, Principle 2.
[11] International Covenant on Civil and Political Rights, article 9(3).
[12] ECtHR, *Al-Jeda v. The United Kingdom*, Application no. 27021/08, 7 July 2011, para. 99; Inter-American Commission on Human Rights, Lysias Fleury and his family against the Republic of Haiti, Case 12.549, 5 August 2009, para. 42.
[13] ECtHR, *Ilijkov v. Bulgaria*, Application no. 33977/96, 26 July 2001, para. 85.
[14] ICC-01/05-01/08-403, para. 36; ICC-01/04-01/07-426, p. 6; ICC-01/05-01/08-475, para. 36.
[15] ECHR, art. 6(2); International Covenant on Civil and Political Rights, art. 14(2); African Charter on Human and Peoples' Rights, art. 7(b); American Convention on Human Rights, art. 8(2).

innocent until proved guilty before the Court in accordance with the applicable law. As liberty is the corollary to this presumption, respect of this fundamental right must inform the bench's assessment of the need to continue Mr Said's detention.

3. The duty to give reasons

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

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

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

> is at the heart of a judicial decision and an important aspect of the right to a fair trial […] reasoning is a requirement of a fair trial that contributes to the acceptance of the decision by the parties and to preserving the rights of the defence. It requires that courts indicate with sufficient clarity the grounds upon which they base their decisions. While they arenot obliged to give a detailed answer to every argument raised, the courts must base their reasoning on objective arguments and it must be clear from the decision that the essential issues of the case have been addressed. Further, and importantly, reasoning is the basis for raising an appeal and allows the appellate body to review a decision.[16]

18. The duty to provide reasons, *viz.* to set out grounds, has been affirmed by all the international human rights bodies. The European Court of Human Rights has, on a number of occasions, underlined that the duty cast on courts to supply reasons for

[16] ICC-02/11-01/11-278-Red, dissenting opinion, paras. 8-9.

their decisions is among the guarantees pertaining to the right to a fair hearing enshrined in article 6 of the ECHR.[17] In *Hadjianastassiou v. Greece*,[18] the ECtHR made plain that courts must "indicate with sufficient clarity the grounds on which they based their decision."

19. The Defence would in particular point out that, when the denial of interim release to a person charged is at stake, the ECtHR requires considerable detail and specificity from the reasoning on the risks that might arise were the accused to be accorded interim release. On the alleged risk that release of an accused would pose to witnesses, for example, the ECtHR has stated that "it did not suffice merely to refer to an abstract risk unsupported by any evidence".[19] In the same vein, on the risk of obstruction to investigations that interim release might pose, the ECtHR has said: "The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*; it has to be supported by factual evidence."[20] Judge Ušacka encapsulates this stream of authority thus:

> In sum, the ECtHR has repeatedly found domestic courts' reasons on detention matters neither relevant nor sufficient whenever a domestic court merely repeated abstract and stereotypical grounds, instead of indicating reasons why they considered those abstract statements to be well-founded in the case before them.[21]

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

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

21. The Appeals Chamber of the ICTY has held that the right to a reasoned decision is part of the right to a fair trial and that only reasoned decisions can rightly be canvassed,[22] not least because "at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision."[23] The International Criminal Court has consistently held, in keeping with human rights and ad hoc tribunal authority, that the Chambers are duty-bound to provide reasons for judicial decisions.[24]

III. Discussion

Introduction

22. Since liberty is the rule and detention the exception, in accordance with all the international human rights standards, it falls to the Prosecution to make a showing, on the basis of substantiated facts, of the need for continued detention. If a Chamber finds that the Prosecution has not adduced evidence in support of its request, it must order the release of the accused. Article 60(2) pertaining to interim release refers to article 58(1) for the purpose of determining whether the conditions warranting continued detention are met. If detention cannot be justified under that provision, the Chamber is duty-bound to order interim release. That decision on whether to continue detention is not a matter of discretion on the part of the bench, as the Appeals Chamber clarified in *Lubanga*,[25] but simply one of the application of the criteria laid down in the Statute. The Chamber must therefore assess the concrete evidence placed before it by the Prosecution and may not go beyond the evidence presented to it in support of a request for continued detention. Otherwise stated, the Chamber must base continued detention on that concrete evidence or, if the

[22] *Nikolić*, 8 March 2006, no. IT-02-60/1-A, para. 96; *Kunarac*, 12 June 2002, no. IT-96-23 and 23/1-A, para. 41.
[23] *Milutinović*, no. IT-05-87-AR65.1, para. 11.
[24] ICC-01/04-01/06-773, para. 20.
[25] ICC-01/04-01/06-824, para. 134; ICC-01/04-01/06-824.

Prosecution fails to present tangible evidence in support of its request, make a finding of the lack thereof and order release. It should be noted that in the impugned decision, the Chamber ensured that it analysed the evidence adduced by the Prosecution and drew conclusions on its relevance to establishing that continued detention is warranted. The Chamber explains in the impugned decision why the evidence is not relevant but does not act on those conclusions. To compensate for the Prosecution's shortcomings, the Chamber, in the impugned decision, infers from the Prosecution's request theoretical assumptions or generic premises which purportedly form the basis for continued detention.

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

24. In the same vein, the consideration given in the impugned decision to generic "factors" – such as the "seriousness" of the charges, the possible sentence, the fact that the charges were confirmed or that the Accused was able to acquaint himself with the record of the Accused's case – contributes to the creation of a presumption of continued detention of persons charged.

25. Ultimately, the cumulative effect of considering generic "factors", without applying them to the circumstances of the instant case, is to create, at the International Criminal Court, an irrebuttable presumption of continued detention of persons charged, in violation of the presumption of innocence and the right to liberty.

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

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

1. Grounds of appeal

1.1. First ground of appeal: the errors of law arising from a decision based on theoretical factual assumptions

1.1.1. First limb of the ground of appeal: the Chamber's reversal of the burden of proof constitutes an error of law.

28. It should be noted that the impugned decision bases the continued detention on theoretical factual assumptions unsubstantiated by concrete and objective evidence. Those assumptions are as follows:

29. At paragraph 27 of the impugned decision, the Chamber acknowledges that the Prosecution has failed to advance any evidence to support the claim that Mr Said has held any role in an organization since his transfer to the Court and yet asserts that "there is also no indication that Mr Said has broken ranks with the FPRC or has fallen out with its current leadership, former colleagues or subordinates."

30. Also at paragraph 27, the Chamber states: "It is therefore reasonable to conclude that Mr Said can still count on the support of former comrades, some of whom still occupy senior positions."[26] To buttress this conclusion, the Chamber adverts in the footnote to two pieces of evidence that provide no support: document CAR-OTP-2001-5739 is an NGO report from November 2014 on the crisis in the CAR at that time, i.e. nearly eight years ago; this report therefore is not capable of establishing the facts as they may stand in 2022. Similarly, document CAR-OTP-2130-2018 appears to be an unsigned declaration by the CPC from a year and a half ago, which is merely an official record of the creation of the CPC in a quest for national reconciliation. This document makes no mention whatsoever of Mr Said, bearing in mind for that matter that, in the impugned decision, the Chamber concluded that there was no link between Mr Said and the CPC.[27] The Defence further notes regarding that document that the Prosecution has not provided the Chamber or the parties with a shred of information about the source or authenticity of the document: [REDACTED] no other indication of the source on which to ascertain its provenance. Additionally, from the information at the Defence's disposal, it does not appear that the Prosecution has undertaken the slightest investigation to authenticate or verify the source of the declaration. On analysis, it therefore seems that this conclusion is conjectural for lack of anything tangible to sustain it.

31. At paragraph 28 of the impugned decision, while the Chamber states that "[t]he Chamber is aware of the Registry's report of 24 January 2022, which suggests that no evidence has been found indicating that the FPRC has, so far, done anything to interfere with the current proceedings", it nonetheless goes on to say:

> However, this does not show that it would not do so if given the opportunity. Moreover, the Chamber is not only concerned about the possibility that the FPRC as an organisation might offer assistance to Mr Said, but equally that individual members may do so in their private capacity.

[26] Emphasis added.
[27] ICC-01/14-01/21-247-Conf, para. 31.

32. At paragraphs 32-35 of the impugned decision, the Chamber, while noting that it has no material evidence on which to say that Mr Said has any connection with the alleged incidents concerning witnesses – incidents which, in the Chamber's own words, "are based on uncorroborated hearsay evidence and raise a lot of questions"[28] – or that Mr Said has the slightest intention of interfering with the proceedings, nevertheless concludes that Mr Said "may have a strong motive to influence the Prosecution's witnesses before the start of the trial."[29]

33. It appears from the impugned decision, therefore, that the Chamber relied on the identification of theoretical and abstract risks to continue Mr Said's detention despite the lack of concrete evidence to lend support to the existence of the alleged risks.

34. The consequence of such an approach is that the burden of proof is reversed, since the onus would then fall on the Defence to prove – by definition, impossible – that no risks exist. The reversal of the burden of proof constitutes an error of law which invalidates the impugned decision.

35. Such an approach also gives rise to a presumption of continued detention for any person who stands charged in proceedings before the Court, since it will always be possible to justify 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. This presumption of continued detention, which violates the principle that "liberty is the rule and detention the exception", also constitutes an error of law which invalidates the impugned decision.

1.1.2. Second limb of the ground of appeal: lack of reasoning

36. The Defence considers that the consequence of basing Mr Said's detention on

[28] ICC-01/14-01/21-247-Conf, para. 32.
[29] ICC-01/14-01/21-247-Conf, para. 35, emphasis added.

assumptions that are unfounded and unsubstantiated by evidence and, hence, on theoretical assumptions, is not only a reversal of the burden of proof to the detriment of the Defence but also a lack of reasoning in the impugned decision.

37. As recalled previously, it is the settled view of the ECtHR that "it did not suffice merely to refer to an abstract risk unsupported by any evidence"[30] to justify the continued detention of a person presumed innocent. Yet, that is precisely what has happened here, since, as the Chamber itself has routinely observed (see above), the Chamber makes assumptions about risk that are "unsupported by any evidence". To so proceed precludes any reasoning: reference to risks that are not substantiated by evidence to justify continued detention dispenses with any need to show the existence of risk and therefore relieves the Chamber of providing reasoning for its conclusions.

38. It is worth emphasizing the importance here of requiring detailed reasoning where the Chamber performs the initial examination *de novo* of the existence of risks enumerated at article 58(1)(b), pursuant to article 60(2). This is because, following the first decision on the Prosecution's request for continued detention, the parties will, in canvassing the matter of Mr Said's detention, fall within the ambit of article 60(3), which establishes the parameters of the discussion of "changed circumstances". However, the question arises as to how the Prosecutor – on whom the burden of proof will still lie – will be able to show that circumstances have not changed and how the Defence will then be able to go on to show the contrary if the impugned decision rests on theoretical assumptions and, as a result, the parties are not cognizant of which factual "circumstances" actually informed the decision. If the Chamber's conclusions on the risk of obstruction to the investigation or the risk of flight do not rest on any concrete evidence but only on abstract premises and theoretical assumptions, it may prove difficult for the Defence to show a change in

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

circumstances. The Chamber's approach puts the Defence in a situation where it must prove the impossible: that factual circumstances never specified by the Chamber have changed.

39. A decision on detention devoid of reasoning therefore bars the Defence from fully challenging the decision on appeal and, above all, denies it the factual grounds to be able to challenge it in the future.

1.2. Second ground of appeal: the error of law and the error of fact arising from the failure to define and properly apply the concept of seriousness in the impugned decision

1.2.1. The error of law consisting of failure to define the "seriousness" of the charges that warrants continued detention of a person charged

40. At paragraph 26 of the impugned decision, the Chamber states: "Although Mr Said still benefits from the presumption of innocence, the Chamber agrees that the knowledge of the risk of incurring a lengthy sentence may motivate the accused to abscond if given the opportunity."[31] The Chamber adverts in the footnote to a decision in *Al Hassan* in support of its assertion. The Defence notes that the bench in *Al Hassan* had – if only succinctly – set out an analysis of the content of the charges against Mr Al Hassan which included "13 different counts of war crimes and crimes against humanity, including torture, passing of sentences without due process, rape, sexual slavery, forced marriage, attacks against protected objects and persecution",[32] concluding that "the charges are numerous and of such gravity that they might result in a lengthy overall sentence, which creates an incentive for Mr Al Hassan to abscond."[33] The judges in *Al Hassan* had therefore analysed the seriousness of the charges in the *Al Hassan* case; the Chamber performed no such analysis in the

[31] ICC-01/14-01/21-247-Conf, para. 26.
[32] ICC-01/12-01/18-786-Red, para. 58.
[33] ICC-01/12-01/18-786-Red, para. 58.

impugned decision.

41. Also at paragraph 26, the Chamber states: "The Chamber recalls, in this regard, that it has been consistently held that the confirmation of charges increases the risk that an accused may abscond."[34] The Chamber adverts in the footnote to a series of decisions in other cases − *Bemba, Ntaganda*, *Gbagbo, Katanga* and *Lubanga*.

42. The Defence notes that, in the *Lubanga* decision to which reference is made, the Single Judge considered that the fact the charges were confirmed would increase the flight risk,[35] without providing a footnote and the reasons for his conclusion. The same holds true in *Katanga*, where the judges were no more informative regarding the basis for their conclusions (no footnotes and no reasons).[36] Likewise, in *Gbagbo*, the Single Judge stated the same conclusion, relying solely on the previous decisions – which, as just seen, are devoid of grounds and lack reasoning – and providing nothing else by way of reasons.[37] Lastly, the picture is similar − conclusion based on the previous decisions which lack reasoning − in *Ntaganda* to which the impugned decision refers.[38]

43. Lastly, in the only appellate judgment to which the Chamber adverts in the impugned decision, one handed down in *Bemba*, the reasoning gives rise to question marks of a legal nature, given that the Appeals Chamber asserted:

> In the Impugned Decision at paragraph 59, the Pre-Trial Chamber acknowledges that the charges now confirmed against Mr Bemba "may still result in a conviction leading to an overall lengthy sentence". However, the Chamber in assessing this factor merely stated that it "could constitute an incentive" to abscond but alone could not justify long periods of pre-trial detention. The Appeals Chamber finds merit in the arguments of the Appellant in this regard. Whilst the confirmation of charges in itself constitutes a "changed circumstance" the finding by the Pre-Trial Chamber that there were substantial grounds to believe that Mr Bemba committed the crimes charged, increased the likelihood that he might abscond. In addition, the length of sentence that Mr Bemba is

[34] ICC-01/14-01/21-247-Conf, para. 26.
[35] ICC-01/04-01/06-826, p. 6.
[36] ICC-01/04-01/07-794-tENG, para. 10.
[37] ICC-02/11-01/11-668, para. 41.
[38] ICC-01/04-02/06-335, para. 34.

> likely to serve if convicted on these charges is a further incentive for him to abscond. In the view of the Appeals Chamber, the Pre-Trial Chamber misappreciated the weight to be attached to this factor to which it had previously attached much importance.[39]

44. In the first place, it is of note that in *Bemba* the Appeals Chamber set aside the Single Judge's decision to order Mr Bemba's interim release, on the ground that the Single Judge had misappreciated the weight to be accorded to the fact that the charges against Mr Bemba had been confirmed. The Appeals bench in *Bemba* therefore acted as Trial bench, whereas the applicable appellate law patently provides that the Appeals Chamber must allow the Trial bench some discretion in their assessment of the facts presented and of the weight to give to the factors relevant to a decision to continue detention.[40] However, the Appeals bench took the place of the Trial bench to disturb, without explanation or reasoning, its determination, taking the view that greater weight should be accorded to the fact that the charges had been confirmed. Of further note is that the one and only time the Appeals Chamber has intervened to substitute its own assessment of risk for that of a lower Chamber's was when interim release had been ordered by the court below.

45. In other words, the Court's jurisprudence, taken as a whole, creates a presumption of continued detention for an accused against whom charges have been confirmed: were a Trial bench to determine that the confirmation of the charges was insufficient to keep a person in detention, its decision would be set aside by the Appeals Chamber – as it was in *Bemba* – whereas a Trial bench's decision that relies generically on the confirmation of charges test to keep a person in detention would, on the contrary, never be set aside and, even then, the Court's jurisprudence does not provide an explanation or a reasoning to warrant such a determination.

46. Put differently still, the current situation before the Court, according to the

[39] ICC-01/05-01/08-631-Red, paras. 69-70.
[40] See, for example, ICC-02/05-01/20-279-Red, para. 13.

jurisprudence, is as follows: if the charges are confirmed, a person charged who is in detention will necessarily be kept there and has no other procedural avenue to interim release. Such a position, at a court that has a duty to set an example, is untenable vis-à-vis the fundamental rights of a person charged (presumption of innocence and "liberty is the rule and detention the exception") and violates the right to a fair trial.

47. That being so, by failing to define the concept of "seriousness", the Chamber committed an error of law which invalidates the impugned decision. Given that all the crimes within the Court's jurisdiction are, by definition, "serious", failure to define the concept of seriousness as it pertains specifically to an interim release context creates a presumption of continued detention for any person accused of crimes within the jurisdiction of the Court and would render article 60(2) of the Statute nugatory, since no accused could ever be granted interim release.

48. The same reasoning applies in essence to the matter of the sentence: as the ICTY has emphasized, "the expectation of a lengthy sentence cannot be held against an accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences";[41] accordingly, the possible sentence is not a factor for consideration in determining seriousness unless the view is taken that any person charged before the Court and in detention must remain in detention merely because he or she has been charged and therefore faces a sentence.

49. Moreover, the Statute of the Court does not provide for a sentencing tariff. At the Court, only a very broad range of sentences faced by persons charged is provided: 0 to 30 years, or even life imprisonment in cases of the "extreme gravity of the crime".[42] In such a procedural context, a bench cannot engage in estimating the length of the

[41] *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "Decision on Ramush Haradinaj's Motion for Provisional Release", 5 June 2005, para. 24.
[42] Article 77 of the Statute.

possible sentence, lest it violate the presumption of innocence because once it expresses a view on the sentence that might reasonably be received without having adjudged the guilt of the accused, it is as if it has already decided how it sees the case brought before the Trial bench. Where the applicable law does not foresee a sentencing tariff, to comment on what it might be would be tantamount to issuing an opinion on, hence pre-determining, the very nature of the case and thus would make the judicial proceedings a foregone conclusion.

1.2.2. The error of fact consisting of failure to analyse "seriousness" in the instant case

50. By failing to explain why the charges laid against Mr Said are serious, the Chamber committed an error of fact which invalidates the impugned decision. In this instance, it was all the more important to explain why the acts imputed to Mr Said meet the standard of seriousness in the context of a request for release, since the Defence had shown in its request for release that the limited charges laid against Mr Said did not meet the seriousness threshold.[43]

51. In the light of the confirmation of charges decision, it should be noted that, as the case now stands, the charges against Mr Said are limited both in time and place, especially in comparison to other cases before the Court. The Chamber's role here was to assess the charges explicitly laid against Mr Said: the confirmation of charges decision confirms only a limited number of incidents spanning a period of several months and does not confirm accusations against Mr Said of murder or sexual violence.

52. Moreover, the number of victims is a factor germane to the overall assessment of seriousness. On that point, the Registry says that, following the confirmation of charges decision which dismissed half of the Prosecution's allegations, there are now no participating victims in the proceedings. The Registry explains that it has

[43] ICC-01/14-01/21-233-Conf, paras. 47-49.

reviewed all the applications for participation in the light of the confirmation of charges decision[44] and concludes:

> Following its assessment, the Registry submits that the status of all participating victims to date is negatively impacted by the Confirmation Decision's findings since these victims all reported to have suffered harm as a result of crimes committed at the CEDAD, but not at the OCRB.[45]

53. Since the Registry's report of 21 January 2022, it has emerged from discussions in preparation for trial that both the Registry and OPCV foresee only a limited number of new applications for participation − 40 to 50 at the most [46] − and that, thus far, just 13 applications have been submitted to VPRS.[47] It can then reasonably be expected that there will be few participating victims in the proceedings.

1.3. Third ground of appeal: the consideration given to alleged incidents involving Prosecution witnesses in continuing Mr Said's detention without establishing the slightest connection with Mr Said constitutes an error of law.

54. In the impugned decision, it is asserted:

> The Chamber has also taken note of the Prosecution's argument that a number of witnesses have already faced security threats in the CAR, even though the Prosecution does not claim that these incidents can be attributed to Mr Said. […] Although these allegations are based on uncorroborated hearsay evidence and raise a lot of questions, the Chamber is aware of its duties and is deeply concerned by these incidents, which took place after Mr Said was surrendered to the Court. Indeed, 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.[48]

55. First, the Defence notes that the Chamber gave consideration to these alleged incidents, despite itself regarding them as "based on uncorroborated hearsay evidence and rais[ing] a lot of questions". That being so, it was necessary for the Chamber to draw conclusions from its own observation and not, therefore, rely on

[44] ICC-01/14-01/21-229-AnxII-Red, para. 5.
[45] ICC-01/14-01/21-229-AnxII-Red, para. 6.
[46] ICC-01/14-01/21-T-007-CONF-FRA ET, p. 48, lines 17-18 and p. 48, line 23.
[47] ICC-01/14-01/21-263, para. 12.
[48] ICC-01/14-01/21-247-Conf, para. 32.

these incidents in the impugned decision.

56. Above all, it appears from the impugned decision that the Chamber relied on alleged incidents that have no connection to Mr Said to continue Mr Said's detention. Otherwise put, Mr Said's continued detention is based on the Chamber's analysis of the general security situation confronted by the Prosecution witnesses, whereas no link whatsoever with Mr Said has been established.

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

> The Appeals Chamber would like to highlight that article 58 (1) (b) (ii) of the Statute stipulates that detention must be necessary "to ensure that *the person* does not obstruct or endanger the investigation or the court proceedings" (emphasis added). This indicates that there must be a link between the detained person and the risk of witness interference.[49]

58. The Chamber did not take into account that holding and in its view:

> However, the Chamber cannot simply disregard the existing dire security situation because Mr Said did not create it. Moreover, it is 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.[50]

The Defence points out that even if there is no footnote reference to the Defence's submissions, the Chamber seems, in this instance, to be attributing ("it is incorrect to suggest") an argument to the Defence that the Defence has never advanced: the

[49] ICC-01/05-01/08-1937-Red2, para. 67.
[50] ICC-01/14-01/21-247-Conf, para. 33.

Defence has never argued that it is necessary to show that the person charged must have attempted to influence witnesses in the past. It merely sought discharge, in conformity with article 58(1)(b)(ii) and the jurisprudence, of the duty to show a link between the alleged risks and the person charged for continued detention to be justified,[51] which was not done in this particular instance.

1.4. Fourth ground of appeal: the basing of the decision to continue detention on a Registry report which was never disclosed to the Defence constitutes an error of law for violating the principle that an opportunity to be heard and to reply be afforded.

59. In deciding to continue the detention, the Chamber relied on a Registry report which was never provided to the Defence.[52] Such an approach constitutes an error of law which invalidates the decision: the Defence was not placed in a position to discuss or challenge the content of that report, in violation of the principle that an opportunity to be heard and to reply be afforded. It was all the more important for the Defence to have this report, since not one piece of evidence in the case record was capable of serving as a basis for continuing Mr Said's detention (see above).

60. Moreover, this report seems to contradict other information disclosed by the Registry. According to the Chamber, the Registry's *ex parte* report states "[REDACTED]",[53] even though in the Registry's filing to which this report was annexed, it was plainly stated that:

[REDACTED].[54]

61. These contradictions, along with the apparently vague nature of the Registry's assertions, made it essential for the Defence to be put in a position to acquaint itself

[51] ICC-01/14-01/21-233-Conf, para. 51.
[52] ICC-01/14-01/21-247-Conf, para. 33.
[53] ICC-01/14-01/21-247-Conf, para. 33.
[54] ICC-01/14-01/21-232-Conf, paras. 16-17.

with the Registry's report to be able to challenge its conclusions on an equal footing.

1.5. Fifth ground of appeal: the basing of continued detention on the disclosure to the Defence for Mr Said of evidence relating to the Prosecution's case constitutes an error of law.

62. In deciding to continue the detention, the Chamber relied on the fact that "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".[55] Such an approach constitutes an error of law which invalidates the impugned decision, since it puts the Accused in the impossible predicament of having to choose between two of his fundamental rights: the right to be informed of the charges and the right to enjoy liberty.

63. The Chamber adverts in a footnote to certain previous decisions of the Court, namely, an appellate judgment in *Gbagbo* that states:

> Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute it may be a relevant factor. Accordingly, the Appeals Chamber considers that the Pre-Trial Chamber did not have to explain the specific circumstances relating to the disclosure of evidence and how they amplified the risk. The Appeals Chamber emphasises, however, that this does not mean that the fact that evidence is disclosed means that the detainee cannot be released. The disclosure of evidence is but one factor that the Pre-Trial Chamber may take into account when determining whether continued detention appears necessary under article 58 (1)(b)(ii) of the Statute.[56]

64. The Defence notes the Appeals Chamber has made plain that disclosure of evidence to the Accused does not necessarily mean that "the detainee cannot be released". However, in holding that "the Pre-Trial Chamber did not have to explain the specific circumstances relating to the disclosure of evidence and how they amplified the risk", the Appeals Chamber relieves the Trial bench of its duty to justify, case by case, the need for continued detention owing to the disclosure of

[55] ICC-01/14-01/21-247-Conf, para. 35.
[56] ICC-02/11-01/11-278-Red, para. 65.

evidence and allows it to rely on a generic criterion that will always result in continued detention. Put differently, even though the Appeals Chamber takes the trouble to specify that disclosure is but one factor to take into account, in no way does that alter the fact that permitting the bench to have regard to a generic factor, without having to tailor it to the case at hand, gives rise to a presumption of continued detention. In effect, the continued detention of an accused thus becomes automatic if the person opts to exercise all of his or her rights.

65. That being so, it falls to the Appeals Chamber to reaffirm the fundamental principles underpinning a decision to continue detention and to require the Trial bench to explain the existence of risk in the case *sub judice*, rather than relying on generic factors.

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

66. It is plain to see that the errors of law and fact identified by the Defence in this appeal brief have materially affected the impugned decision. This is because, absent these errors, the Chamber would have had no factual or legal footing to support the existence of the risks set out in article 58(1)(b) and therefore to warrant continuing Mr Said's detention.

67. In addition, insofar as the Chamber, in deciding to maintain the restrictions on Mr Said's communications, relied on the same conclusions as it did in continuing the detention,[57] the errors alleged consequently invalidate the decision rejecting the Defence's request for the lifting of the restrictions on Mr Said's communications.

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

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

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

Accordingly:

- **Reverse**, in its entirety, the decision of Trial Chamber VI rejecting the request for the release of Mr Said (ICC-01/14-01/21-247-Conf), for lack of legal basis and the factual and legal errors committed;
- **Reverse**, in its entirety, the decision of Trial Chamber VI rejecting the request for the lifting of the restrictions on Mr Said's communications (ICC-01/14-01/21-247-Conf), for lack of legal basis and the factual and legal errors committed;

and,

- **Remand** the matter to Trial Chamber VI and **order** it to rule anew, with reference to the applicable legal rules, on whether (1) the conditions at article 58(1) of the Rome Statute and (2) the conditions at regulation 101(2) of the Regulations of the Court are met.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 21 March 2022,

At The Hague, Netherlands