

**Original: English****No. ICC-01/14-01/21 OA4****Date: 23 August 2022****THE APPEALS CHAMBER**

Before: Judge Gocha Lordkipanidze, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI****Public document****Judgment**

on the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “First review of the detention of Mr Mahamat Said Abdel Kani”

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

The Office of Public Counsel for Victims

Ms Sarah Pellet
Mr Tars Van Litsenborgh

REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Mahamat Said Abdel Kani against the decision entitled “First review of detention of Mr Mahamat Said Abdel Kani” of 29 June 2022 (ICC-01/14-01/21-382),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Trial Chamber VI entitled “First review of the detention of Mr Mahamat Said Abdel Kani” of 29 June 2022 (ICC-01/14-01/21-382) is confirmed.

REASONS

I. KEY FINDINGS

1. The passage of time alone does not *per se* lead to the conclusion that circumstances have changed in favour of interim release in the context of a review under article 60(3) of the Statute. Rather, this must be decided in the context of the specific circumstances in each case.
2. Article 60(3) of the Statute requires the relevant chamber to determine whether it “is satisfied” that there are changed circumstances. It does not give either party an exclusive right to procure information demonstrating whether such circumstances exist.
3. In a review of detention under article 60(3) of the Statute, the onus is on the Prosecution to demonstrate that there has been no change in the circumstances justifying detention. Nevertheless, where there exists a decision in favour of detention under article 60(2) of the Statute, and where the Prosecution submits that there has been no change in circumstances in a review pursuant to article 60(3) of the Statute, it is apparent that the Defence will have a particular interest in providing information to the

chamber so that the chamber will have all necessary information to arrive at a fully informed decision.

II. INTRODUCTION

4. This appeal concerns the decision of Trial Chamber VI (hereinafter: “Trial Chamber”) on the review of the detention of Mr Mahamat Said Abdel Kani (hereinafter: “Mr Said”) under article 60(3) of the Statute. In its decision, the Trial Chamber found that the risk that Mr Said may abscond or interfere with the proceedings if he were released to the territory of the Central African Republic (hereinafter: “CAR”) remains high. Thus, it determined that there were no changed circumstances within the meaning of article 60(3) of the Statute that required amending the initial decision of the Trial Chamber on detention under article 60(2) of the Statute.

5. The Defence alleges a number of errors of law and fact relating to the burden of proof in decisions reviewing detention and the manner in which the Trial Chamber made findings about the need for detention and the information provided by the Registry.

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial and Trial Chamber

6. On 7 January 2019, Pre-Trial Chamber II issued the warrant of arrest for Mr Said.¹

7. On 20 January 2021, Mr Said was arrested by the UN peacekeeping mission in the CAR. He was transferred to the Court on 24 January 2021.²

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

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

8. On 9 December 2021, Pre-Trial Chamber II confirmed seven counts of war crimes and crimes against humanity charged against Mr Said.³
9. On 14 December 2021, the Presidency transferred the case to the Trial Chamber.⁴
10. On 28 January 2022, following the Defence’s written request for the interim release of Mr Said,⁵ the Trial Chamber held a hearing on detention pursuant to rule 118(3) of the Rules of Procedure and Evidence (hereinafter: “Rules”).
11. On 3 March 2022, the Trial Chamber issued its decision on Mr Said’s request for interim release, in which it ordered the continued detention of Mr Said (hereinafter: “Initial Decision on Detention”).⁶ The Defence appealed the Initial Decision on Detention.⁷
12. On 19 May 2022, the Appeals Chamber confirmed the decision of the Trial Chamber (hereinafter: “*Said* OA3 Judgment”).⁸
13. On 17 June 2022, pursuant to an instruction from the Trial Chamber, the Registry submitted a report on the security situation in the CAR (hereinafter: “17 June 2022 Report”).⁹

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

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

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

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

⁷ [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](#), 2 May 2022, ICC-01/14-01/21-265-Red-tENG (a confidential version was notified on 21 March 2022, and a French public redacted version was notified on 23 March 2022).

⁸ [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions”](#), 19 May 2022, ICC-01/14-01/21-318 (OA3).

⁹ Annex to the Brief Report on the Security Situation in the Central African Republic, ICC-01/14-01/21-365-Conf-Anx; *see also* [First review of the detention of Mahamat Said Abdel Kani](#), 29 June 2022, ICC-01/14-01/21-382, para. 11.

14. On 29 June 2022, after receiving submissions from the Prosecution, Defence, Legal Representatives of Victims (hereinafter: “LRV”), and Registry, the Trial Chamber issued the “First review of the detention of Mahamat Said Abdel Kani” (hereinafter: “Impugned Decision”), determining that Mr Said would remain in detention.¹⁰

B. Proceedings before the Appeals Chamber

15. On 5 July 2022, the Defence filed a notice of appeal against the Impugned Decision, pursuant to article 82(1)(b) of the Statute.¹¹

16. On 14 July 2022, pursuant to the order of the Appeals Chamber,¹² the Defence submitted its appeal brief (hereinafter: “Appeal Brief”), raising four grounds of appeal against the Impugned Decision.¹³

17. On 18 July 2022, the LRV informed the Appeals Chamber by way of email that they do not intend to file a response to the Appeal Brief.¹⁴

18. On 21 July 2022, the Prosecution filed its response opposing the appeal (hereinafter: “Prosecution’s Response”).¹⁵

IV. STANDARD OF REVIEW

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

will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed

¹⁰ [First review of the detention of Mahamat Said Abdel Kani](#), 29 June 2022, ICC-01/14-01/21-382.

¹¹ [Defence Notice of Appeal against the “First review of the detention of Mahamat Said Abdel Kani” \(ICC-01/14-01/21-382\) by Trial Chamber VI Deciding to Continue Mr Said’s Detention](#), 5 July 2022, ICC-01/14-01/21-388-tENG.

¹² [Order on the conduct of appeal proceedings](#), 7 July 2022, ICC-01/14-01/21-393.

¹³ [Defence Appeal Brief against the “First review of the detention of Mr Said Abdel Kani” ICC-01/14-01/21-382\) by Trial Chamber VI Deciding to Continue Mr Said’s Detention](#), 10 August 2022, ICC-01/14-01/21-409-Red-tENG (a confidential version was notified on 14 July 2022, and a French public redacted version was notified on 22 July 2022).

¹⁴ Email from the LRV to the Appeals Chamber, with the Prosecution and the Defence in copy, received on 18 July 2022 at 9:58.

¹⁵ [Response to Defence Appeal against the “First Review of the Detention of Mr Mahamat Said Abdel Kani” \(ICC-01/14-01/21-409-Conf\)](#), 4 August 2022, ICC-01/14-01/21-421-Red (a confidential version was notified on 21 July 2022).

such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.¹⁶

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

its review is corrective and not *de novo*. It has explained that “[i]t will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts”. As regards the “misappreciation of facts” the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber’s findings.¹⁷

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

V. RELEVANT PARTS OF THE IMPUGNED DECISION

22. In the Impugned Decision, the Trial Chamber found that there were no changed circumstances that required it to amend its Initial Decision on Detention.¹⁸

23. The Trial Chamber considered that (i) the risk of Mr Said absconding if he were released to the territory of the CAR remains high, (ii) the current security situation in the CAR continues to be tense and volatile, (iii) given the security situation and the limited capacity of the CAR authorities, there would be little to prevent Mr Said, or others on his behalf, from harming or intimidating witnesses, and (iv) there is nothing

¹⁶ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”](#), 19 July 2017, ICC-02/11-01/15-992-Red (OA10) (hereinafter: “*Gbagbo / Blé Goudé* OA10 Judgment”), para. 15 and references cited therein.

¹⁷ *Gbagbo / Blé Goudé* OA10 Judgment, para. 16 (footnotes omitted). The Appeals Chamber recalls what it stated in recent judgments in appeals under article 81 of the Statute, on the applicable standard of review for errors of fact. In particular, it noted that “[i]n assessing the reasonableness of factual findings, the Appeals Chamber will consider [among other things] whether the trial chamber [...] was mindful of the pertinent principles of law [...]”. See Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A), para. 68; Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled “Judgment”](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2), para. 39.

¹⁸ [Impugned Decision](#), para. 35.

to suggest that Mr Said's motives for attempting to influence the Prosecution's witnesses have waned.¹⁹

24. Regarding the Defence's specific arguments that it had not been established that (i) Mr Said could still count on supporters in the CAR, (ii) there is no link between Mr Said and the *Front Populaire pour la Renaissance de la Centrafrique* (hereinafter: "FPRC"), and (iii) the accused has demonstrated a willingness to appear, the Trial Chamber considered that the Defence was attempting to re-litigate issues that had already been decided upon by the Trial Chamber in the Initial Decision on Detention, and which were later confirmed on appeal.²⁰ As such, the Trial Chamber noted that it would not consider these issues further.²¹

25. The Trial Chamber found that the Prosecution "should have made a greater effort to provide substantiated submissions on the matter".²² At the same time, the Trial Chamber found that its task was limited to determining whether the circumstances identified in the Initial Decision on Detention still exist, and that there was no need to re-litigate all arguments anew.²³ Finding that the review of its prior ruling on detention was not entirely dependent on the parties' submissions, the Trial Chamber stated that it has "an independent responsibility to assess whether or not the circumstances justifying detention remain in place".²⁴ As such, the Trial Chamber instructed the Registry to provide an independent assessment of the security situation in the CAR.²⁵

26. The Trial Chamber considered the Defence's concerns regarding the 17 June 2022 Report, and noted that it is permissible for the Registry to rely on public sources, such as UN or NGO reports.²⁶ While observing that the Defence does not bear any probative burden, the Trial Chamber noted that the Defence "does not claim that any of the information provided in the Registry Report is false or inaccurate."²⁷ The Trial Chamber further observed that the Defence had not claimed that the security situation

¹⁹ [Impugned Decision](#), paras 33-34.

²⁰ [Impugned Decision](#), para. 28, referring to [Said OA 3 Judgment](#).

²¹ [Impugned Decision](#), para. 28.

²² [Impugned Decision](#), para. 30.

²³ [Impugned Decision](#), para. 29.

²⁴ [Impugned Decision](#), para. 31.

²⁵ [Impugned Decision](#), para. 31.

²⁶ [Impugned Decision](#), para. 32.

²⁷ [Impugned Decision](#), para. 32.

in the CAR had evolved significantly since the Initial Decision on Detention, and that the Defence had acknowledged the ongoing political instability and armed violence in the region.²⁸

27. Following the above analysis, the Trial Chamber determined that there were no changed circumstances that required it to amend its Initial Decision on Detention, and therefore that Mr Said shall remain in detention.²⁹

VI. MERITS

28. The Defence raises four grounds of appeal: the Trial Chamber committed (i) errors of law and fact in refusing to examine or respond to the Defence submissions; (ii) an error of law by failing to act on its finding that the Prosecution did not discharge its obligation to demonstrate the need for continued detention; (iii) an error of law and fact by relying on a report of the Registry containing methodological shortcomings; and (iv) an error of law by ruling on Mr Said's continued detention on the basis of the overall security situation in the CAR, without identifying specific risks linked to Mr Said.

A. First ground of appeal

1. *Submissions of the Defence*

29. The Defence addresses the first ground of appeal under four limbs. Under the first limb, the Defence argues that while the Trial Chamber found that the Defence was attempting to re-litigate issues that had already been addressed, the fact that the Trial Chamber made particular factual findings in an earlier decision cannot bar the Defence from submitting that those findings are no longer valid.³⁰ The Defence refers to its submissions before the Trial Chamber where it stated that (i) it still did not have the Registry's *ex parte* report on which the Trial Chamber had heavily relied in issuing its Initial Decision on Detention, (ii) the Registry did not appear to have supplied any new information relating to the contents of that report or regarding whether it was standing by the report's conclusions, (iii) the Trial Chamber could no longer endorse past factual

²⁸ [Impugned Decision](#), para. 32.

²⁹ [Impugned Decision](#), paras 33-34, p. 16.

³⁰ [Appeal Brief](#), para. 45.

findings founded on a now obsolete report, and (iv) the fact that the Trial Chamber once found Mr Said's assurances to appear at trial to be insufficient to offset the risks under article 58(1)(b) of the Statute cannot bar the Defence from continuing to rely on that fact.³¹

30. Under the second limb, the Defence submits that the Trial Chamber's refusal to consider these arguments further constitutes an error of law as the Trial Chamber refused to perform its task of ascertaining whether those factual findings still hold true now.³² This would, according to the Defence, mean that the Defence would have no right to later question the basis for a factual finding, and have the effect that a Chamber would only need to determine once that a circumstance existed for it to then be regarded as holding true forever.³³ The Defence argues that by refusing to revisit the assurances given by Mr Said, the Trial Chamber is indicating that it will "never go back on its first assessment", contravening the rationale of article 60(3) of the Statute.³⁴

31. Turning to the third limb, the Defence submits that the Trial Chamber committed an error of fact by finding that the factual circumstances were unchanged. In the view of the Defence, it was all the more incumbent on the Trial Chamber to revisit the factual findings since the Appeals Chamber found, in relation to the link between Mr Said and the FPRC, that "the Trial Chamber could have referred to more than two items of evidence in support" of its determination.³⁵ Further, the Defence states that the Prosecution provided no concrete evidence in its observations in relation to the Initial Decision on Detention to support a claim that any link exists now between Mr Said and the FPRC, nor between the FPRC and the proceedings before the Court.³⁶

32. Under the fourth limb, the Defence submits that the failure to provide reasons constitutes an error of law which invalidates the Impugned Decision. In this regard, the

³¹ [Appeal Brief](#), paras 46-47, referring to [Réponse de la Défense aux «Prosecution's observations on the review of detention of Mr Mahamat Said Abdel Kani» \(ICC-01/14-01/21-335\) et aux «Victims' observations on the review of Mr Saïd's Detention» \(ICC-01/14-01/21-336\)](#), 20 June 2022, ICC-01/14-01/21-353-Red2 (a confidential version and a confidential redacted version were both notified on 10 June 2022).

³² [Appeal Brief](#), para. 49.

³³ [Appeal Brief](#), para. 49.

³⁴ [Appeal Brief](#), para. 51.

³⁵ [Appeal Brief](#), para. 52, referring to [Said OA3 Judgment](#), para. 35.

³⁶ [Appeal Brief](#), para. 53.

Defence argues that the Trial Chamber has made assumptions about risks that are unsupported by any evidence.³⁷ In addition, the Defence submits that when the Trial Chamber's determination regarding the risk of obstruction or absconding is based on abstract premises and theoretical assumptions, it may prove difficult for the Defence to demonstrate a change in circumstances.³⁸

2. *Response of the Prosecution*

33. As to the first ground of appeal, the Prosecution submits that the Defence has mistaken the Trial Chamber's ruling on re-litigation as meaning that it was prevented from raising an issue, when in reality, it was "merely barred from repeating its prior arguments based on the same evidence".³⁹ For example, the Prosecution submits that in relation to Mr Said's assurances to appear, while the Defence was permitted to address this issue, it was not entitled to simply reiterate Mr Said's undertakings in the hope that the Trial Chamber would take a different view on the matter the second time around.⁴⁰

34. In regard to the Defence's claim that the Trial Chamber failed to discharge its duties under article 60(3) of the Statute by rejecting Defence arguments as re-litigation, the Prosecution submits that this argument is based on an unfounded assumption that the Trial Chamber's approach prevented it from considering the accuracy of the past factual findings upon which the Initial Decision on Detention was based. In the view of the Prosecution, this was not the case, as the Trial Chamber proceeded to carry out this assessment.⁴¹ The Prosecution states, however, that the Trial Chamber was not required to re-examine the original evidence to reach its prior determination anew, nor is the mere passage of time sufficient to establish a change of circumstances pursuant to article 60(3) of the Statute.⁴²

35. The Prosecution states that the Trial Chamber made no determination about the existence of Mr Said's supporters in the CAR as this had already been adjudicated in

³⁷ [Appeal Brief](#), para. 64.

³⁸ [Appeal Brief](#), para. 66.

³⁹ [Prosecution Response](#), para. 16.

⁴⁰ [Prosecution Response](#), para. 16.

⁴¹ [Prosecution Response](#), para. 18.

⁴² [Prosecution Response](#), para. 19.

the Initial Decision on Detention, and the Trial Chamber was thus not obliged to make this determination *ab initio*.⁴³ As to the Defence arguments that the Trial Chamber erred by finding that there was no change in circumstances regarding the aforementioned links, the Prosecution submits that these arguments reflect a continued effort to re-litigate the original question concerning the support network potentially available to Mr Said if he were to be released.⁴⁴

3. *Determination by the Appeals Chamber*

36. The Defence submits that the Trial Chamber erred in law and fact by refusing to respond to a number of Defence submissions, and by failing to ascertain whether certain factual findings still hold true. In this regard, the Appeals Chamber recalls that in a review pursuant to article 60(3) of the Statute, a chamber is not required to entertain submissions by a detained person that “merely repeat arguments that the Trial Chamber has already addressed in previous decisions”,⁴⁵ nor is a chamber required to enter findings on circumstances already decided upon in the ruling on detention.⁴⁶

37. As for the first submission, the Defence argues that the Trial Chamber erred in failing to consider its arguments about the report of the Registry relied upon for the Initial Decision on Detention (hereinafter: “22 January 2022 Report”).⁴⁷ The Appeals Chamber observes that in the Initial Decision on Detention, available to the Defence, the Trial Chamber paraphrased the most pertinent section of the 22 January 2022 Report.⁴⁸ Prior to the Impugned Decision, the Trial Chamber sought a fresh report from the Registry in the form of the 17 June 2022 Report. Before making any findings, the

⁴³ [Prosecution Response](#), paras 20-21.

⁴⁴ [Prosecution Response](#), para. 22.

⁴⁵ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118\(2\) of the Rules of Procedure and Evidence”](#), 19 November 2010, ICC-01/05-01/08-1019 (OA4) (hereinafter: “*Bemba* OA4 Judgment”), para. 53.

⁴⁶ [Bemba OA4 Judgment](#), para. 53.

⁴⁷ [Appeal Brief](#), para. 46.

⁴⁸ [Initial Decision on Detention](#), para. 33.

Trial Chamber heard from the Defence about changed circumstances, generally,⁴⁹ and then again about the 17 June 2022 Report, specifically.⁵⁰

38. In the Impugned Decision, the Trial Chamber relied upon the new 17 June 2022 Report for its findings about the continuing risks present on the ground in the CAR. The Trial Chamber addressed the Defence's arguments regarding the 17 June 2022 Report, and observed that "it does not claim that any of the information provided in the [17 June 2022 Report] is false or inaccurate. Nor does it claim that the security situation inside the CAR has evolved significantly since the Initial Detention Decision".⁵¹ Thus, given the new information from the Registry and the submissions from the Defence thereon, the Appeals Chamber finds that the Trial Chamber was not required to address the relevance of the original 22 January 2022 Report.⁵² To the contrary, that latter report did not form the basis of the Trial Chamber's findings about changed circumstances, which is the objective of a review decision under article 60(3) of the Statute such as this one. Thus, the Defence's arguments are misguided.

39. Second, the Defence argues that the Trial Chamber failed to take into account the assurances given by Mr Said about his willingness to cooperate with the Court and appear for his trial.⁵³ The Appeals Chamber observes that the Trial Chamber incorrectly determined that this particular issue was already ruled upon in the *Said* OA3 Judgment.⁵⁴ Nevertheless, the Appeals Chamber recalls that the Trial Chamber did determine in the Initial Decision on Detention that Mr Said had a motive to abscond or to influence the Prosecution's witnesses in spite of his "proclamations to the contrary".⁵⁵ On appeal, the Defence argues only that the Trial Chamber erred in not

⁴⁹ [Réponse de la Défense aux «Prosecution's observations on the review of detention of Mr Mahamat Said Abdel Kani» \(ICC-01/14-01/21-335\) et aux «Victims' observations on the review of Mr Saïd's Detention» \(ICC-01/14-01/21-336\)](#), 20 June 2022, ICC-01/14-01/21-353-Red2 (a confidential version and a confidential redacted version were both notified on 10 June 2022).

⁵⁰ [Observations de la Défense portant sur le rapport « on the Security Situation in the Central African Republic » \(ICC-01/14-01/21-365-Conf\) déposé par le Greffe le 17 juin 2022](#), 18 July 2022, ICC-01/14-01/21-373-Red (a confidential version was notified on 24 June 2022).

⁵¹ [Impugned Decision](#), para. 32.

⁵² See [Appeal Brief](#), para. 46.

⁵³ [Appeal Brief](#), paras 47, 51.

⁵⁴ See [Impugned Decision](#), para. 28, stating that "as regards the Defence's specific arguments that [...] [Mr Said] has demonstrated a willingness to appear, the Chamber considers that the Defence is relitigating issues that were already decided by the Chamber in the Initial Decision on Detention and confirmed on appeal" (emphasis added).

⁵⁵ [Initial Decision on Detention](#), paras 26, 35.

considering this factor in its review under article 60(3) of the Statute, without indicating a concrete change in circumstances. That is, the Defence argues in the abstract that “[t]he personal circumstances of the person charged and that person’s relationship with the Court and with the case by definition change over time and the passage of time shows as a matter of course that Mr Said is cooperating with the Court”.⁵⁶

40. The Appeals Chamber does not accept the general premise that the passage of time – whether it be weeks, months or potentially even years – *per se* leads to the conclusion that circumstances have changed in favour of interim release. Rather, the Appeals Chamber finds that whether the passage of time has an impact on a chamber’s analysis under article 60(3) of the Statute must be decided in the context of the specific circumstances in each case. Here, the Defence has not indicated with specificity why the passage of time leads to the conclusion that Mr Said is cooperating with the Court, nor that the Trial Chamber erred in failing to reconsider this factor. Thus, the Appeals Chamber is unpersuaded by this argument.

41. Third, the Defence argues that the Trial Chamber erred in failing to consider the Defence’s arguments about the alleged links between Mr Said and the FPRC or between the FPRC and the proceedings at this Court.⁵⁷ In this regard, the Appeals Chamber recalls that, in the Initial Decision on Detention, the Trial Chamber noted that the FPRC was “a potential threat actor to ICC witnesses in this case and that Mr Said may have relatives who are still active in this organisation”.⁵⁸ In the Impugned Decision, the Trial Chamber explained that it would not consider the Defence’s arguments about Mr Said’s support network and his link to the FPRC because those issues were already decided in the Initial Decision on Detention and confirmed on appeal.⁵⁹

42. The Appeals Chamber observes that the Trial Chamber failed to recall its original findings about Mr Said’s support network and his link to the FPRC from the Initial Decision on Detention. This is not ideal, as an important part of a chamber’s assessment in a review decision under article 60(3) of the Statute is to revert to its initial findings

⁵⁶ [Appeal Brief](#), para. 51.

⁵⁷ [Appeal Brief](#), paras 50, 53-62.

⁵⁸ [Initial Decision on Detention](#), para. 33.

⁵⁹ [Impugned Decision](#), para. 28.

on detention under article 60(2) of the Statute.⁶⁰ However, the Appeals Chamber observes that the Trial Chamber ultimately determined that there was no new information before the it suggesting that its findings from the Initial Decision on Detention were no longer valid.⁶¹ To make this determination, the Appeals Chamber finds that the Trial Chamber must have assessed the Defence’s arguments about Mr Said’s links to the FPRC and the potential threat to the proceedings in the context of its original findings. Moreover, the Appeals Chamber finds that, contrary to the Defence’s submissions on appeal, the Trial Chamber correctly considered the Defence’s arguments only to the extent that they relate to the issue as to whether changed circumstances exist. This is consistent with the assessment in review decisions such as this one and does not itself give rise to an error.

43. The Defence also makes several specific arguments about Mr Said’s alleged network of support. First, it points out that the Trial Chamber failed to consider that Mr Said has no link with the FPRC because he “has been in custody since January 2021, thousands of kilometres from Bangui and with no contact with anyone except his close family”.⁶² The Appeals Chamber notes that this is not new information constituting “changed circumstances” in the context of article 60(3) of the Statute and it is was not incumbent upon the Trial Chamber to consider it.

44. Second, the Defence takes issue with the Prosecution’s reliance on two media reports concerning recent attacks allegedly supported by the FPRC. The Appeals Chamber notes that neither of these reports is discussed in the Impugned Decision. Rather, the Trial Chamber relied primarily on the 17 June 2022 Report from the Registry for its conclusion that the risk that Mr Said may abscond or interfere with the proceedings remains high. Therefore, the Appeals Chamber finds that the Defence’s

⁶⁰ [Bemba OA4 Judgment](#), para. 52. *See, for example*, Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, [Decision on the review of detention](#), 1 November 2021, ICC-02/05-01/20-502, paras 12-16; Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, [Decision on the review of detention](#), 5 July 2021, ICC-02/05-01/20-430, paras 23-26; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on Mr Gbagbo’s detention](#), 10 March 2017, ICC-02/11-01/15-846, para. 13.

⁶¹ [Impugned Decision](#), para. 34.

⁶² [Appeal Brief](#), para. 62.

arguments about the Prosecution's media reports do not relate to the Impugned Decision. These arguments are therefore dismissed.

45. Finally, the Defence contends that the Trial Chamber's refusal to consider several of the Defence's arguments constitutes a failure to give reasons for its conclusions in the Impugned Decision.⁶³ The Appeals Chamber has determined above that the Trial Chamber properly assessed whether the circumstances have changed in light of its earlier findings about Mr Said's potential support in the CAR under article 60(2) of the Statute. Therefore, the argument that the Trial Chamber erred in failing to give reasons is dismissed.

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

B. Second ground of appeal

1. Submissions of the Defence

47. Under the second ground of appeal, the Defence submits that once the Trial Chamber determined that the Prosecution had not supplied the necessary evidence to demonstrate the need for continued detention, it should have determined that the Prosecution had failed to discharge its burden of proof and ordered Mr Said's release. In the view of the Defence, in carrying out an independent assessment, the Trial Chamber stood in the place of the Prosecution, while the Prosecution should bear the burden of demonstrating the need for continued detention.⁶⁴

2. Response of the Prosecution

48. In response to the second ground of appeal, the Prosecution submits that this could be dismissed *in limine*, as the Defence has not presented an argument to challenge the Trial Chamber's conclusion that article 60(3) of the Statute imposes an "independent responsibility" upon the Trial Chamber "to assess whether or not the circumstances justifying detention remain in place".⁶⁵ In the view of the Prosecution, the Trial Chamber's interpretation is consistent with the express terms of article 60(3)

⁶³ [Impugned Decision](#), paras 63-66.

⁶⁴ [Appeal Brief](#), paras 68-69.

⁶⁵ [Prosecution Response](#), paras 25-26.

of the Statute and the purpose of the detention review procedure – namely, to determine whether detention continues to be objectively necessary.⁶⁶ The Prosecution submits that the Defence fails to show any reason why the Trial Chamber could not have been properly satisfied by the absence of a material change in circumstances based on the 17 June 2022 Report, even if it found that the Prosecution had provided less assistance on this occasion.⁶⁷

3. *Determination by the Appeals Chamber*

49. The Defence argues that the Trial Chamber erred in carrying out an independent assessment under article 60(3) of the Statute.

50. Article 60(3) provides that a chamber “may modify its ruling as to detention [...] if it is satisfied that changed circumstances so require”. The Appeals Chamber notes that in the present case, the Trial Chamber initiated the review of detention pursuant to article 60(3) of the Statute, in accordance with the time limit stipulated in rule 118(2) of the Rules. In this context, the Appeals Chamber recalls that a chamber is not limited to considering the submissions of the Prosecution and any submissions of the Defence. Rather, a chamber shall also consider “any other information which has a bearing on the subject”.⁶⁸

51. Indeed, after having determined that the Prosecution “should have made a greater effort to provide substantiated submissions”,⁶⁹ the Trial Chamber subsequently found that it had “an independent responsibility to assess whether or not the circumstances justifying detention remain in place”,⁷⁰ and instructed the Registry to provide an assessment of the security situation in the CAR.⁷¹

52. The Appeals Chamber recalls that “the onus is on the Prosecution to demonstrate that there has been no change in the circumstances justifying detention”. Furthermore, the Prosecution “must bring to the attention of the Trial Chamber any other relevant

⁶⁶ [Prosecution Response](#), para. 27.

⁶⁷ [Prosecution Response](#), para. 28.

⁶⁸ [Bemba OA4 Judgment](#), para. 52. *See also* article 68(1) of the Statute, which sets out the duty of a chamber to protect victims and witnesses.

⁶⁹ [Impugned Decision](#), para. 30.

⁷⁰ [Impugned Decision](#), para. 31.

⁷¹ *See* [Impugned Decision](#), para. 31.

information of which he [or she] is aware that relates to the question of detention or release”.⁷² Nevertheless, the Appeals Chamber observes that article 60(3) of the Statute simply requires the relevant chamber to determine whether it “is satisfied” that there are changed circumstances. It does not give either party an exclusive right to procure information demonstrating whether such circumstances exist, and nothing in the language of article 60(3) of the Statute precludes a chamber from seeking information from the Registry *proprio motu*, as the Trial Chamber did in this case after noting that the Prosecution “should have made a greater effort to provide substantiated submissions on the matter”.⁷³

53. The Appeals Chamber recalls that the security situation in the CAR was considered by the Trial Chamber in the context of the Initial Decision on Detention, and notes that the Registry is well-placed to provide an update in this regard. The Appeals Chamber further recalls that the chamber may modify its ruling if it is satisfied that changed circumstances so require, and that in this instance, the Trial Chamber initiated a review *proprio motu*. In these circumstances, after finding that the Prosecution should have provided more substantiated submissions, the Appeals Chamber finds that it was appropriate for the Trial Chamber to carry out an independent assessment. The Appeals Chamber considers that by seeking further information from the Registry, the Trial Chamber ensured that it was sufficiently informed in rendering its determination pursuant to article 60(3) of the Statute.

54. The second ground of appeal is thus rejected.

C. Third ground of appeal

1. Submissions of the Defence

55. Under the third ground of appeal, the Defence submits that the Trial Chamber committed an error of law and reversed the burden of proof by finding that “even though the Defence bears no probative burden [...] it does not claim that any of the information in the [17 June 2022 Report] is false or inaccurate”.⁷⁴ The Defence states that it had

⁷² Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60\(3\) of the Statute”](#), 8 September 2015, ICC-02/11-01/15-208 (OA6) (hereinafter: “*Gbagbo* OA6 Judgment”), para. 36.

⁷³ [Impugned Decision](#), para. 30.

⁷⁴ [Appeal Brief](#), paras 70-73, referring to [Impugned Decision](#), para. 32.

clearly taken the view that the findings of the Registry were not substantiated by questioning the methodology used by the Registry to write the report. Further, the Defence argues that the references in the 17 June 2022 Report to the political situation in the CAR do not provide information relevant to Mr Said. The Defence contends that by relying on such unsubstantiated assertions, the Trial Chamber committed an error of fact that invalidates the Impugned Decision.⁷⁵

2. *Response of the Prosecution*

56. In response to the third ground of appeal, the Prosecution submits that the Defence has misinterpreted the Impugned Decision as requiring the Defence to demonstrate that claims in the 17 June 2022 Report were false. The Prosecution points out that the Trial Chamber was careful to recount the Defence criticisms of the Registry's methodology and that the Trial Chamber examined the report in light of the Defence submissions before finding it to be reliable.⁷⁶

57. The Prosecution further submits that while the Defence has criticised the Trial Chamber's reliance on one aspect of the 17 June 2022 Report, this in any case only formed one aspect of the Trial Chamber's overall analysis.⁷⁷

3. *Determination by the Appeals Chamber*

58. The Defence submits that the Trial Chamber placed a burden of proof on the Defence to demonstrate that assertions in the 17 June 2022 Report were false, which constitutes an error of law.⁷⁸

59. As recalled above, the Appeals Chamber has previously determined that the onus is on the Prosecution to demonstrate that there has been no change in the circumstances justifying detention.⁷⁹ Nevertheless, the Appeals Chamber considers that where there exists a decision in favour of detention under article 60(2) of the Statute and where the Prosecution submits that there has been no change in circumstances in a review pursuant to article 60(3) of the Statute, it is apparent that the Defence will have a

⁷⁵ [Appeal Brief](#), paras 74-78.

⁷⁶ [Prosecution Response](#), paras 31-32.

⁷⁷ [Prosecution Response](#), paras 34-36.

⁷⁸ [Appeal Brief](#), para. 72.

⁷⁹ [Gbagbo OA6 Judgment](#), para. 36.

particular interest in providing information to the chamber so that the chamber will have all necessary information to arrive at a fully informed decision.

60. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber addressed the concerns of the Defence before finding that there was no barrier to the Registry's reliance on public sources in the 17 June 2022 Report.⁸⁰ The Appeals Chamber is not persuaded by the Defence's argument that the Trial Chamber placed an undue burden on the Defence to disprove the information in the report. Rather, the Trial Chamber made the observation that the Defence brought a challenge to the methodology used for the report rather than to the accuracy of the information therein, and then concluded that it was not convinced by the Defence's argument on this point. The Appeals Chamber finds no error in this approach.

61. The Defence also submits that the Trial Chamber has relied on conclusions of the Registry for which no sources were provided.⁸¹ While it would have been preferable for the Registry to include citations in paragraph 15 of the 17 June 2022 Report, the Appeals Chamber notes that in the subsequent paragraph, the Registry provided the details of an incident with citations.⁸² Furthermore, the Appeals Chamber considers that this only formed one aspect of the report. There is no indication that, but for this paragraph, the Trial Chamber would have reached a different conclusion regarding the security situation in the CAR.

62. Accordingly, the third ground of appeal is rejected.

D. Fourth ground of appeal

1. Submissions of the Defence

63. Under the fourth ground of appeal, the Defence submits that the Trial Chamber based Mr Said's continued detention on the general security situation in the CAR, without establishing a link to Mr Said.⁸³ The Defence refers to the *Said* OA3 Judgment which stated that "the Trial Chamber could have referred to more than two items of evidence in support of this determination", and states the Trial Chamber relied on

⁸⁰ [Impugned Decision](#), para. 32.

⁸¹ [Appeal Brief](#), paras. 74-75.

⁸² 17 June 2022 Report, paras 15-16.

⁸³ [Appeal Brief](#), para. 79.

theoretical and abstract risks to continue Mr Said's detention.⁸⁴ The Defence further submits that this approach gives rise to a presumption of continued detention, and reverses the burden of proof and leaves the Defence with the impossible task of proving that no risk exists.⁸⁵

2. *Response of the Prosecution*

64. In response to the fourth ground, the Prosecution states that the Defence has merely repeated its claims that concerns regarding the potential motivation to abscond or interfere are theoretical. However, the Prosecution submits that these risks were identified in the Initial Decision on Detention, and nothing in the proceedings leading to the Impugned Decision put them in issue – as such, the finding regarding the existence of these risks is settled and beyond the scope of these appeal proceedings.⁸⁶

65. In the view of the Prosecution, the fact that the analysis in the Impugned Decision tended to focus on the general security situation in the CAR does not suggest that the Trial Chamber was not mindful of the need to consider Mr Said's personal circumstances, but merely reflects that this is the key variable which might potentially change and therefore requires monitoring.⁸⁷

3. *Determination by the Appeals Chamber*

66. The Appeals Chamber recalls that in the *Said* OA3 Judgment, the Appeals Chamber addressed similar arguments from the Defence and concluded that the Trial Chamber correctly determined that the risk that Mr Said himself may interfere with ongoing investigations or the proceedings was high.⁸⁸ The Appeals Chamber also addressed the Defence's arguments that the Initial Decision on Detention was based on theoretical or abstract risks, and that the decision amounted to a reversal of the burden of proof and a presumption of continued detention. The Appeals Chamber determined that the Trial Chamber did not err.⁸⁹

⁸⁴ [Appeal Brief](#), para. 80.

⁸⁵ [Appeal Brief](#), para. 83.

⁸⁶ [Prosecution Response](#), para. 38.

⁸⁷ [Prosecution Response](#), para. 39.

⁸⁸ [Said OA3 Judgment](#), para. 54.

⁸⁹ [Said OA3 Judgment](#), paras 35-36.

67. The Appeals Chamber observes that the Defence repeats these arguments in this appeal without explaining how they relate to the Trial Chamber's assessment of changed circumstances, which was the objective of the review in the Impugned Decision under article 60(3) of the Statute. In this regard, the Appeals Chamber expresses concern that the Defence has simply duplicated some of its arguments from the *Said* OA3 appeal. The Appeals Chamber finds that such a practice is not an appropriate use of judicial time and resources.⁹⁰

68. Thus, the Appeals Chamber rejects the fourth ground of appeal.

⁹⁰ See Appeals Chamber, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, [Judgment on the appeal of Ali Muhammad Ali Abd-Al-Rahman against Trial Chamber I's "Decision on the review of detention"](#), 17 December 2021, ICC-02/05-01/20-542-Red (OA10), para. 69.

VII. APPROPRIATE RELIEF

69. In an appeal pursuant to article 82(1)(b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.⁹¹ In the present case, it is appropriate to confirm the Impugned Decision and reject the appeal.

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



Judge Gocha Lordkipanidze
Presiding



Judge Piotr Hofmański



Judge Luz del Carmen Ibáñez
Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa

Dated this 23rd day of August 2022

At The Hague, The Netherlands

⁹¹ Rule 158(1) of the Rules.