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No. ICC-01/14-01/21

Date: 5 July 2021

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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Public Redacted Version of 'Decision on the Prosecution's third request for the extension of contact restrictions', 5 July 2021, ICC-01/14-01/21-116-Conf

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court (the ‘Chamber’ and the ‘Court’), issues this ‘Decision on the Prosecution’s third request for the extension of contact restrictions’.

I. PROCEDURAL HISTORY

1. On 7 January 2019, Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of the Chamber, issued the ‘Warrant of arrest for Mahamat Said Abdel Kani’ (‘Mr Said’).¹
2. On 22 January 2021, the Chamber, by way of email, ordered the Registry to provisionally apply a number of restrictions in relation to Mr Said’s contacts and to provisionally separate Mr Said from Messrs Yekatom and Ngaïssona upon Mr Said’s arrival to the Court’s Detention Centre.²
3. On 24 January 2021, Mr Said was surrendered to the Court and arrived at the Court’s Detention Centre on 25 January 2021.³
4. On 25 January 2021, Judge Rosario Salvatore Aitala was designated by the Chamber as Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.⁴
5. On 29 January 2021, in accordance with the Single Judge’s decision dated 26 January 2021⁵ and his further instructions dated 28 January 2021,⁶ Mr Said

¹ ICC-01/14-01/21-2-US-Exp (public redacted version filed on 17 February 2021 ([ICC-01/14-01/21-2-Red2](#))).

² Email from the Chamber, at 18:42 hours. *See also* ICC-01/14-01/21-28-Conf-AnxA.

³ Registry, Report of the Registry on the Arrest and Surrender of Mr Mahamat Said Abdel Kani and Request for Guidance, 27 January 2021, ICC-01/14-01/21-6-US-Exp, paras 13-27 (confidential redacted, *ex parte* (only available to the Registry, the Prosecution and the Defence) version filed on 19 February 2021 (ICC-01/14-01/21-6-Conf-Exp-Red); confidential, lesser redacted, *ex parte* (only available to the Registry, the Prosecution and the Defence) version filed on 18 March 2021 (ICC-01/14-01/21-6-Conf-Exp-Red2)).

⁴ [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-3.

⁵ [Decision on the convening of a hearing for the initial appearance of Mr Mahamat Said Abdel Kani](#), ICC-01/14-01/21-4.

⁶ [Transcript of 28 January 2021](#), ICC-01/14-01/21-T-001-ENG, p. 4, line 20 to p. 5, line 4.

appeared before the Single Judge pursuant to article 60(1) of the Rome Statute (the ‘Statute’) and rule 121(1) of the Rules of Procedure and Evidence.⁷

6. On 3 February 2021, the Single Judge issued the ‘Decision on the “Prosecution’s Request for Contact Restrictions concerning Mahamat Said Abdel Kani in Pre-trial Detention”’ (the ‘First Restrictions Decision’),⁸ imposing a number of contact restrictions on Mr Said for a period of one month as of the date of that decision,⁹ and rescinding the separation of Mr Said from Messrs Yekatom and Ngaïssona.¹⁰

7. On 5 March 2021, the Single Judge issued the ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’ (the ‘Second Restrictions Decision’),¹¹ by which the contact restrictions in relation to Mr Said as specified in the First Restrictions Decision were extended for a period of two months as of the date of that decision.¹² However, the Single Judge authorised Mr Said ‘[t]o communicate by letter or telephone with [...] other persons’ pursuant to regulation 99(1)(i) of the Regulations of the Court (the ‘Regulations’).¹³

8. On 15 March 2021, the Defence filed the ‘Demande d’autorisation d’interjeter appel de la «Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions’» (ICC-01/14-01/21-31-Conf)’, in which it requested leave to appeal the Second Restrictions Decision (the ‘Defence’s Request for Leave to Appeal’).¹⁴

9. On 17 March 2021, following the recomposition of the Chambers by the Presidency,¹⁵ Judge Rosario Salvatore Aitala was designated by the Chamber as

⁷ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG.

⁸ ICC-01/14-01/21-9-US-Exp (confidential redacted version filed on 3 February 2021 (ICC-01/14-01/21-9-Conf-Red)).

⁹ First Restrictions Decision, ICC-01/14-01/21-9-Conf-Red, paras 20-26.

¹⁰ First Restrictions Decision, ICC-01/14-01/21-9-Conf-Red, para. 29.

¹¹ ICC-01/14-01/21-31-Conf. On 3 March 2021, the Single Judge extended, by way of email, *proprio motu* the contact restrictions in relation to Mr Said, as set forth in the First Restrictions Decision, until 5 March 2021 (inclusive). *See* email from the Single Judge, at 09:34 hours.

¹² Second Restrictions Decision, ICC-01/14-01/21-31-Conf, paras 31-33, 40.

¹³ Second Restrictions Decision, ICC-01/14-01/21-31-Conf, para. 34.

¹⁴ ICC-01/14-01/21-39-Conf.

¹⁵ [Decision assigning judges to divisions and recomposing Chambers](#), 16 March 2021, ICC-01/14-01/21-40.

Single Judge responsible for carrying out the functions of the Chamber in the present case until otherwise decided.¹⁶

10. On 19 March 2021, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution response to “Demande d’autorisation d’interjeter appel de la “Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions”” (ICC-01/14-01/21-31-Conf)”’.¹⁷

11. On 12 April 2021, the Single Judge issued the ‘Decision on the Defence Request for Leave to Appeal the ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’, partially granting the Defence’s Request for Leave to Appeal.¹⁸

12. On 5 May 2021, the Single Judge issued the ‘Decision on the “Prosecution’s Second Request for the Extension of Contact Restrictions”’ (the ‘Third Restrictions Decision’), ordering the Registrar to put in place the contact restrictions in relation to Mr Said, as set forth in previous restrictions decisions and with modification, until 5 July 2021 (inclusive).¹⁹

13. On 23 June 2021, the Registry filed the ‘Third Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge’ (the ‘Registry’s Report’).²⁰

14. On 25 June 2021, the Prosecution filed the ‘Prosecution’s Third Request for the Extension of Contact Restrictions’ (the ‘Prosecution’s Request’).²¹

15. On 29 June 2021, the Appeal Chamber issued the ‘Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled

¹⁶ [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-42.

¹⁷ ICC-01/14-01/21-44-Conf.

¹⁸ ICC-01/14-01/21-53-Conf.

¹⁹ ICC-01/14-01/21-69-Conf. On 11 May 2021, the Defence requested leave to appeal the Third Restrictions Decision. *See* Demande d’autorisation d’interjeter appel de la « Decision on the Prosecution’s Second Request for the Extension of Contact Restrictions » (ICC-01/14-01/21-69), ICC-01/14-01/21-75-Conf. The Prosecution responded to the request on 17 May 2021. *See* Prosecution response to “Demande d’autorisation d’interjeter appel de la “Decision on the Prosecution’s Second Request for the Extension of Contact Restrictions” (ICC-01/14-01/21-69)”, ICC-01/14-01/21-76-Conf.

²⁰ ICC-01/14-01/21-107-Conf.

²¹ ICC-01/14-01/21-108-Conf-Exp (confidential, *ex parte*, only available to the Prosecution), together with confidential, *ex parte*, only available to the Prosecution Annex A, ICC-01/14-01/21-108-Conf-Exp-AnxA (confidential redacted version filed on same day (ICC-01/14-01/21-108-Conf-Red)).

‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’ (‘*Said* OA Judgment’), in which it confirmed the Second Restrictions Decision.²²

16. On 30 June 2021, the Defence filed the ‘Réponse de la Défense à la « Prosecution’s Third Request for the Extension of Contact Restrictions” dated 25 June 2021 » (ICC-01/14-01/21-108-Conf-Red)’ (the ‘Defence’s Response’).²³

17. On 30 June 2021, the Single Judge issued the ‘Second order on disclosure and postponement of the confirmation hearing’ in which the commencement of the confirmation hearing was postponed to 12 October 2021.²⁴

II. SUBMISSIONS

A. The Registry’s Report

18. The Registry submits that it has no incidents to report in relation to Mr Said’s non-privileged telephone calls and Mr Said’s non-privileged written correspondence.

19. The Registry further indicates that ‘in-person non-privileged visits at the ICC DC [Detention Centre] are expected to resume on 15 July 2021’ and that ‘[s]hould such in-persons visits take place, the Registry will actively monitor and record Mr Said’s non-privileged visits which the Registry understands to be with a limited number of family members, whose identity and contact details have been thoroughly verified’.

B. The Prosecution’s Request

20. The Prosecution requests that the contact restrictions imposed on Mr Said be extended for another two months. The Prosecution submits that the circumstances justifying the contact restrictions under regulation 101(2)(b) and (c) of the Regulations have not changed since the Third Restrictions Decision and that they are necessary ‘to protect witnesses, victims and the ongoing investigation in the Central African Republic’ (the ‘CAR’).

21. The Prosecution further submits that the *Coalition pour les Patriotes et le Changement* (the ‘CPC’) continues to be engaged in armed hostilities and allegedly

²² ICC-01/14-01/21-111-Conf-Red (OA).

²³ ICC-01/14-01/21-113-Conf.

²⁴ ICC-01/14-01/21-112, para. 15.

committed crimes in the CAR. In support of this, the Prosecution refers to seven recent online news articles, as well as one press release from the United Nations mission in the CAR, the MINUSCA. The Prosecution avers that, before his arrest, Mr Said was ‘engaged with the armed groups’ *Front Populaire pour la Renaissance de la Centrafrique* (the ‘FPRC’) and CPC.

22. With regard to the witness protection measures, the Prosecution submits that it is “[REDACTED]” of these measures, yet “[REDACTED]”.

23. Furthermore, the Prosecution reports [REDACTED]. In the view of the Prosecution, this [REDACTED], even though [REDACTED] took place before Mr Said’s arrest and transfer to the Court and there is no information linking it to him.

C. The Defence’s Response

24. The Defence submits that the Prosecution’s Request should be rejected on the basis that the Prosecution failed to additionally substantiate its request.

25. The Defence argues that the Prosecution has failed to demonstrate the existence of the risks listed in regulation 101(2) of the Regulations. It submits that the Prosecution refers to the current security situation in the CAR in a generic and mechanical manner, without demonstrating the existence of a concrete and real risk or any link with Mr Said. In particular, it contends that the online news articles referred to by the Prosecution have no apparent link with the Prosecution’s investigation or witnesses, with Mr Said, or with the charges in the present case.

26. Further, the Defence argues that the Prosecution fails to demonstrate the existence of a link between the FPRC and the CPC, on the one hand, and Mr Said, on the other hand. It submits that the only item of evidence upon which the Prosecution relies in this regard does not refer to Mr Said’s alleged role in the CPC and contradicts the Prosecution’s allegations since, according to this evidence, Mr Said’s function with the FPRC ceased and there is no mention of Mr Said’s role or association with the CPC. In addition, the Defence avers that the Prosecution fails to demonstrate how the [REDACTED] and the [REDACTED] justify the extension of the contact restrictions imposed on Mr Said.

27. In the alternative, should the contact restrictions be extended, the Defence requests that such restrictions be lessened as follows: (i) the restrictions be limited to one month (the ‘First Alternative Defence Request’); and (ii) the time allotted to Mr Said to make telephone calls be extended to three times a week (the ‘Second Alternative Defence Request’).

III. DETERMINATION BY THE SINGLE JUDGE

28. The Single Judge notes articles 21(1)(a) and (3), 57(3)(a) and 67 of the Statute, regulations 97, 98, 99(1)(i), 100 and 101 of the Regulations of the Court and regulations 174 and 175 of the Regulations of the Registry.

29. At the outset, the Single Judge recalls that restrictions on contacts and communication under the Court’s statutory regime framework must be assessed in light of concrete, specific and up-to-date information. Having carefully considered the parties’ submissions and the material provided in support, the Single Judge remains persuaded that there are reasonable grounds to believe that contacts between Mr Said and other persons ‘[c]ould prejudice or otherwise affect the outcome of the proceedings against a detained person or any other investigation’ and/or ‘[c]ould be harmful to a detained person or any other person’ within the meaning of regulation 101(2)(b) and (c) of the Regulations.

30. In particular, the Single Judge finds that the basis for the contact restrictions regarding Mr Said, namely his continued involvement, association or connection with armed groups in the ongoing volatile context of the CAR, remains unchanged since the issuance of the Third Restrictions Decision.²⁵ The Single Judge notes the additional materials provided in support of the Prosecution’s Request, namely the online news articles, which confirm the continued involvement of the CPC in recent armed hostilities in the CAR. Whilst these materials do not expressly link the reported incidents to Mr Said, the Single Judge recalls that a *porte-parole* of the CPC publicly criticised Mr Said’s transfer to the Court as ‘political’ and, as such, this explicit support

²⁵ Third Restrictions Decision, ICC-01/14-01/21-69-Conf, paras 25, 28.

led the Single Judge to conclude that this connection constituted a concrete risk for witness interference should the contact restrictions imposed be lifted.²⁶

31. The Single Judge further notes with concern that the Prosecution [REDACTED], which in the Prosecution's view, demonstrates that '[REDACTED]'. [REDACTED] does not appear to be linked to Mr Said, it shows that witnesses in these proceedings face genuine security risks in the volatile situation in the CAR.

32. Furthermore, the Single Judge observes that with regard to the implementation of witness protective measures and the disclosure of the identity of witnesses, the Prosecution indicates that '[REDACTED]'. In addition, following the Third Restrictions Decision, the Prosecution's disclosure process is well advanced with 3719 items of evidence having been disclosed thus far.²⁷ Hence, the Defence is therefore privy to even more sensitive information, in particular regarding the names of certain witnesses.

33. The Single Judge duly notes the Registry's submission that Mr Said has not breached the conditions imposed on his non-privileged telephone calls and written correspondence. Nonetheless, having carefully balanced Mr Said's fundamental rights, the well-being of witnesses and victims, the risks that could come with the lifting of the current contact restrictions imposed on Mr Said, and the need to review periodically these restrictions in the course of the proceeding leading up to the confirmation hearing on 12 October 2021, the Single Judge considers that the contact restrictions are required in relation to Mr Said. Therefore, the Single Judge decides to extend these restrictions, as specified in the First, Second and Third Restrictions Decisions, and subject to the findings in the present decision, for two months as of the date of the present decision, namely until 3 September 2021 (inclusive). The implementation of these restrictions is subject to any Covid-19 related measures imposed by the Registry. Accordingly, the First Alternative Defence Request is rejected.

²⁶ See Second Restrictions Decision, ICC-01/14-01/21-31-Conf, para. 31; Third Restrictions Decision, ICC-01/14-01/21-69-Conf, para. 28.

²⁷ Prosecution's Third Report on Disclosure and Related Matters, 1 July 2021, ICC-01/14-01/21-114-Conf-Exp (a confidential redacted version was filed on 1 July 2021 (ICC-01/14-01/21-114-Conf-Red) and a public redacted version was filed on 2 July 2021 (ICC-01/14-01/21-114-Red2), para. 4.

34. However, the Single Judge is mindful of the progression of the proceedings preceding the confirmation hearing, of Mr Said's fundamental rights and the impact that the contact restrictions may have on his psychological well-being. The Single Judge recalls that in the Third Restrictions Decision, the Prosecution was requested to '*additionally substantiate* its request in accordance with the stage of the proceedings, if it intends to have these restrictions extended'.²⁸ Noting the Appeals Chamber's holding that it is necessary for the Prosecution to 'fully substantiate, factually and legally' its request under regulation 101 of the Regulations,²⁹ the Single Judge expects this level of substantiation for any future request from the Prosecution made to the Chamber.

35. With respect to the duration of Mr Said's non-privileged calls, the Single Judge recalls that, in the Third Restrictions Decision, these calls were extended to three hours per week on a maximum of two days per week.³⁰ Taking into account the Registry's submissions on the feasibility of adding additional days of calling time,³¹ the Single Judge finds it appropriate to extend the duration of Mr Said's non-privileged telephone calls to four hours per week on a maximum of two days per week and recalls the instructions regarding the allocation of time for the calls as specified at paragraph 33 of the Third Restrictions Decisions. Accordingly, the Second Alternative Defence Request is rejected.

36. The Single Judge further notes the Registry's submission that in-person non-privileged visits at the Court's Detention Centre are expected to resume on 15 July 2021, and that this will be to the benefit of Mr Said in allowing him to enjoy meaningful contacts with members of his family.³² In this regard, the Single Judge recalls the findings made in the First Restrictions Decision, namely that Mr Said's visits shall be restricted to (i) the persons identified in regulations 97 and 98 of the Regulations; and (ii) a limited number of individuals, such as family members, provided that their identities and contact details have been thoroughly verified with the support of the

²⁸ Third Restrictions Decision, ICC-01/14-01/21-69-Conf, para. 31 (emphasis added).

²⁹ *Said* OA Judgment, ICC-01/14-01/21-111-Conf-Red, para. 85.

³⁰ Third Restrictions Decision, ICC-01/14-01/21-69-Conf, para. 33.

³¹ Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge, 24 February 2021, ICC-01/14-01/21-23-Conf-Exp (confidential redacted version filed on 24 February 2021, (ICC-01/14-01/21-23-Conf-Red)), para. 16.

³² Registry's Report, ICC-01/14-01/21-107-Conf, para. 7.

Victim and Witnesses Unit in liaison with the Prosecutor. Furthermore, the Single Judge recalls that any discussion related to the present case is prohibited during visits by individuals referred to under (ii). In order to ensure compliance with this directive, the Single Judge: (i) limits the language of communication of such visits to French and Sango; and (ii) orders the audio recording and active monitoring of such visits by a Court staff member fluent in French or Sango.³³

37. The Single Judge reiterates that the Registry shall immediately inform the Single Judge of any violation of the contact restrictions in relation to Mr Said. Furthermore, the Registry shall submit a report on the implementation of these restrictions by no later than 20 August 2021 (as well as a redacted version if necessary). Should the Prosecution wish to maintain the contact restrictions in relation to Mr Said, a reasoned and fully substantiated request to this effect shall be submitted by no later than 23 August 2021. The Defence shall submit a response to the request by the Prosecution, if any, by no later than 27 August 2021.

38. Lastly, the Single Judge notes the Chamber's duty to continuously review the confidentiality classification of its decisions and orders, including the issuance of lesser redacted versions thereof. Accordingly, the Single Judge instructs the parties and the Registry to file public redacted versions of their respective filings concerning contact restrictions, if feasible and as soon as practicable. This instruction also applies to previous filings in relation to the First, Second and Third Restrictions Decisions.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecution's Request;

REJECTS the First and Second Alternative Defence Requests;

INSTRUCTS the Registry to put in place the contact restrictions in relation to Mr Said, as set forth in the First, Second and Third Restrictions Decisions and as modified in the present decision, namely with the extension of the duration of Mr Said's non-privileged

³³ See First Restrictions Decision, ICC-01/14-01/21-9-Conf-Red, para. 25.

telephone calls to four hours per week on a maximum of two days per week, until 3 September 2021 (inclusive);

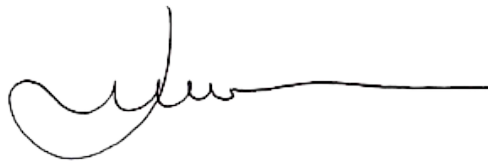
ORDERS the Registry to immediately inform the Single Judge of any violation of the contact restrictions in relation to Mr Said;

ORDERS the Registry to submit a report on the implementation of the contact restrictions in relation to Mr Said by no later than 20 August 2021 (as well as a redacted version if necessary);

ORDERS the Prosecution, if it wishes to maintain the contact restrictions in relation to Mr Said, to submit a reasoned and fully substantiated request to this effect by no later than 23 August 2021, and the Defence to submit a response to such a request by the Prosecution, if any, by no later than 27 August 2021; and

ORDERS the parties and the Registry to file public redacted versions of their respective filings in relation to the present decision and the First, Second and Third Restrictions Decisions, if feasible and as soon as practicable.

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



**Judge Rosario Salvatore Aitala,
Single Judge**

Dated this Tuesday, 26 April 2022

At The Hague, The Netherlands