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Date: 29 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 Defence's requests for leave to appeal the Third and Fourth Contact Restrictions Decisions', 29 July 2021, ICC-01/14-01/21-133-Conf

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

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Language Services Section

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 Defence’s requests for leave to appeal the Third and Fourth Restrictions Decisions’.

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.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, Mr Said 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 (the ‘Rules’).⁵

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

⁵ [Transcript of 29 January 2021](#), ICC-01/14-01/21-T-002-ENG.

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 Contact Restrictions Decision’).⁶
7. On 5 March 2021, the Single Judge issued the ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’ (the ‘Second Contact Restrictions Decision’),⁷ extending the contact restrictions as specified in the First Contact Restrictions Decision for a period of two months.⁸
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)’ (the ‘First Request’), in which it requested leave to appeal the Second Contact Restrictions Decision.⁹
9. On 12 April 2021, the Single Judge issued the decision on the First Request (the ‘Decision on the First Request’), partially granting it.¹⁰
10. On 5 May 2021, the Single Judge issued the ‘Decision on the “Prosecution’s Second Request for the Extension of Contact Restrictions”’ (the ‘Third Contact Restrictions Decision’), extending the contact restrictions as set forth in previous decisions and with modification, for a period of two months.¹¹
11. On 11 May 2021, the Defence filed a request for leave to appeal the Third Contact Restrictions Decision (the ‘Second Request’).¹²

⁶ ICC-01/14-01/21-9-US-Exp (confidential redacted version filed on 3 February 2021 (ICC-01/14-01/21-9-Conf-Red)).

⁷ 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 Contact Restrictions Decision, until 5 March 2021 (inclusive). See email from the Single Judge, at 09:34 hours.

⁸ Second Contact Restrictions Decision, ICC-01/14-01/21-31-Conf, paras 31-33, 40.

⁹ ICC-01/14-01/21-39-Conf. See also 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)”, 19 March 2021, ICC-01/14-01/21-44-Conf.

¹⁰ Decision on the Defence Request for Leave to Appeal the ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’, ICC-01/14-01/21-53-Conf.

¹¹ ICC-01/14-01/21-69-Conf.

¹² 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.

12. On 17 May 2021, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Second Request.¹³

13. 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 ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’, in which it confirmed the Second Contact Restrictions Decision (the ‘*Said* OA Judgment’).¹⁴

14. On 5 July 2021, the Single Judge issued the ‘Decision on the Prosecution’s third request for the extension of contact restrictions’, extending the contact restrictions as specified in previous decisions, subject to one further modification, for a period of two months (the ‘Fourth Contact Restrictions Decision’).¹⁵

15. On 12 July 2021, the Defence filed a request for leave to appeal the Fourth Contact Restrictions Decision (the ‘Third Request’).¹⁶

16. On 16 July 2021, the Prosecution filed its response to the Third Request.¹⁷

II. SUBMISSIONS

A. The Second Request

1. *The Defence’s submissions*

17. In the view of the Defence, the Third Contact Restrictions Decision raises four appealable issues. First, the Defence contends that the failure to provide reasons regarding the factual findings in the Third Contact Restrictions Decision on Mr Said’s continuous involvement in or association with armed groups constitutes an error of law (the ‘First Proposed Issue of the Second Request’). Second, the Defence avers that the Single Judge erred in law, on the one hand, by accepting the Prosecution’s assertions concerning protective measures for witnesses, and, on the other hand, by stating that Mr Said was privy to sensitive information, as this was not raised by the Prosecution

¹³ ICC-01/14-01/21-76-Conf.

¹⁴ ICC-01/14-01/21-111-Conf-Red (OA).

¹⁵ ICC-01/14-01/21-116-Conf.

¹⁶ Demande d’interjeter appel de la « Decision on the Prosecution’s third request for the extension of contact restrictions » (ICC-01/14-01/21-116-Conf), ICC-01/14-01/21-120-Conf.

¹⁷ Prosecution response to “Demande d’interjeter appel de la “Decision on the Prosecution’s third request for the extension of contact restrictions” (ICC-01/14-01/21-116)”, ICC-01/14-01/21-126-Conf.

and the Defence did not have an opportunity to respond to this issue (the ‘Second Proposed Issue of the Second Request’). Third, the Defence asserts that the Single Judge erred in law by taking into account [REDACTED], without having established a link to Mr Said (the ‘Third Proposed Issue of the Second Request’). Lastly, the Defence argues that the Third Contact Restrictions Decision erroneously applied the standard of proof set out in regulation 101(2) of the Regulations of the Court (the ‘Regulations’) (the ‘Fourth Proposed Issue of the Second Request’).

18. According to the Defence, the four above mentioned issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In this regard, the Defence submits that, when a decision touches upon the fundamental rights of a suspect, it needs to be considered as, by default, affecting the fairness of the proceedings. Furthermore, the Defence submits that an immediate resolution by the Appeals Chamber could materially advance the proceedings, as the above mentioned proposed issues will likely arise in each of the Prosecution’s requests for (extension of) contact restrictions throughout the confirmation of charges phase, and their non-resolution could lead to an irreparable violation of Mr Said’s rights.

2. *The Prosecution’s submissions*

19. The Prosecution requests that the Second Request be rejected. According to the Prosecution, none of the issues proposed by the Defence constitute appealable issues. In relation to the First Proposed Issue of the Second Request, the Prosecution submits that the Defence misreads or misinterprets the Third Contact Restrictions Decision, and that in any event, it is a mere disagreement with the Single Judge’s assessment of the totality of information in its proper context. The Prosecution submits that the Single Judge expressly explained how the relevant finding was reached and specifically identified and/or elucidated some of the factual elements in those submissions that were considered in reaching that finding. With regard to the Second Proposed Issue of the Second Request, the Prosecution argues, *inter alia*, that the Defence misreads the context in which the Single Judge considered the Prosecution’s implementation of protective measures for witnesses, and misunderstands or disagrees with the Single Judge’s ‘reasonable assessment’ concerning Mr Said’s access to sensitive information.

20. Furthermore, the Prosecution submits, with regard to the Third Proposed Issue of the Second Request, that the [REDACTED] was merely an ‘additional consideration’ in the assessment of the risks posed to witnesses. The Prosecution argues that, in any event, the Defence merely disagrees with the Third Contact Restrictions Decision’s consideration of factors that may impinge on or contribute to the general volatile security situation in the assessment under regulation 101(2) of the Regulations, regardless of whether they necessarily engage the suspect’s conduct. The Prosecution further submits, concerning the Fourth Proposed Issue of the Second Request, that the Defence’s contentions in relation to the standard of proof under regulation 101(2) of the Regulations merely disagree with the Third Contact Restrictions Decision’s assessment of matters normally falling within the discretion of the Pre-Trial Chamber.

21. In addition, the Prosecution submits that the issues identified by the Defence do not meet the remaining criteria pursuant to article 82(1)(d) of the Statute. In particular, the Prosecution argues that the Defence fails to substantiate how the above mentioned proposed issues meet these criteria, and that in any case, the Third Contact Restrictions Decision ‘cannot be shown to negatively impact the fairness and expeditiousness’ of the proceedings, or to require immediate appellate intervention.

B. The Third Request

1. The Defence’s submissions

22. The Defence submits that the Fourth Contact Restrictions Decision raises three appealable issues. First, the Defence argues that the Single Judge’s factual findings concerning the alleged current link between Mr Said and ‘armed groups’ are not explained and reasonable, thereby constituting an error of law. In the view of the Defence, the material provided by the Prosecution regarding new incidents does not demonstrate a link between Mr Said and the *Coalition pour les Patriotes et le Changement*, nor does it support the Single Judge’s finding that there exists ‘a concrete risk for witness interference should the contact restrictions be lifted’ (the ‘First Proposed Issue of the Third Request’).

23. Furthermore, the Defence submits that the Single Judge erred in law in taking into account [REDACTED]. In addition, the Defence argues that the Fourth Contact Restrictions Decision does not provide any information to enable the parties to

understand the basis for the decision (the ‘Second Proposed Issue of the Third Request’). Lastly, the Defence seeks to challenge the Single Judge’s reliance on the Prosecution’s statement about protective measures for its witnesses, and on Mr Said’s access to sensitive information (the ‘Third Proposed Issue of the Third Request’).

24. According to the Defence, the three above mentioned issues related to the Fourth Contact Restrictions Decision significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial, and their immediate resolution by the Appeals Chamber is warranted.

2. The Prosecution’s submissions

25. The Prosecution submits that the Single Judge should dismiss the Third Request, as it does not identify any appealable issue. The Prosecution argues that the First Proposed Issue of the Third Request is predicated on a misreading of the Fourth Contact Restrictions Decision and that the Defence merely disagrees with the findings made by the Single Judge. The Prosecution avers that the Single Judge explicitly explained how he had reached the conclusion about Mr Said’s continuous involvement, association or connection with armed groups in the CAR. The Prosecution argues that when alleging unreasonableness of the conclusions as to Mr Said’s connection with armed groups, the Defence merely disagrees with those conclusions.

26. The Prosecution contends that under the Second Proposed Issue of the Third Request the Defence wrongly assumes that the Single Judge did not have access to the submissions regarding the nature of [REDACTED]. The Prosecution argues that the Defence does not substantiate the alleged insufficiency or unreasonableness of the [REDACTED]. The Prosecution submits that the Third Proposed Issue of the Third Request is based on a misunderstanding of the Fourth Contact Restrictions Decision on the question of a ‘balancing’ of competing interests, which has been settled by the Appeals Chamber. The Prosecution argues that the Defence merely expresses factual disagreements with the conclusions reached by the Single Judge. Finally, the Prosecution submits that the Fourth Contact Restrictions Decision cannot be shown to negatively impact fairness or expeditiousness and that the Third Request fails to justify immediate appellate intervention.

III. DETERMINATION BY THE SINGLE JUDGE

27. The Single Judge notes article 82(1)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations.

28. At the outset, the Single Judge observes that the Second and Third Requests (jointly the ‘Defence’s Requests’) extensively discuss the merits of the Third and Fourth Contact Restrictions Decisions and set out a number of arguments challenging those decisions. The Single Judge notes that such arguments exceed the scope of a request for leave to appeal, which should focus on whether the requirements set forth in article 82(1)(d) of the Statute are met. The Single Judge recalls that these requirements are the only considerations relevant to the determination of whether leave to appeal should be granted or not.¹⁸

29. Having considered the parties’ submissions, the Single Judge rejects the Defence’s Requests in their entirety for the reasons set out hereinafter.

30. In relation to the First Proposed Issue of the Second Request and, in part, the First Proposed Issue of the Third Request, the Single Judge notes that the Decision on the First Request granted leave to appeal in respect of a similar issue raised by the Defence concerning the sufficiency of the reasoning of the Second Contact Restrictions Decision.¹⁹ Considering that the Appeals Chamber confirmed the Second Contact Restrictions Decision on this issue,²⁰ and that the First Proposed Issue of the Second Request and the First Proposed Issue of the Third Request, in part, are in substance the same as that issue, the Single Judge finds that these two issues are not ones for which ‘an immediate resolution by the Appeals Chamber may materially advance the proceedings’, as required by article 82(1)(d) of the Statute. In addition, the remainder of the First Proposed Issue of the Third Request concerns the reasonableness of the Single Judge’s reliance on material and information provided by the Prosecution to

¹⁸ See Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecutor’s Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006, 10 July 2006, ICC-02/04-01/15-64 (the ‘[Ongwen Decision](#)’), para. 16; Pre-Trial Chamber II, *Situation in Uganda*, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 9 August 2005, ICC-02/04-01/05-20 (the ‘[Uganda Decision](#)’), para. 22.

¹⁹ First Request, ICC-01/14-01/21-39-Conf, paras 31-35.

²⁰ *Said OA Judgment*, ICC-01/14-01/21-111-Conf-Red.

make findings about the link between Mr Said and the armed groups. However, other than arguing that these findings are not reasonable, the Defence has failed to explain how this constitutes an appealable issue within the meaning of article 82(1)(d) of the Statute. Without this explanation, the Defence's arguments amount to a mere disagreement with the Single Judge's findings.

31. As to the Second Proposed Issue of the Second Request and the Third Proposed Issue of the Third Request, the Single Judge notes that the Defence misreads the Third and the Fourth Contact Restrictions Decisions, which simply noted the Prosecution's statements that it was '[REDACTED]' and that '[REDACTED]', rather than drawing any conclusions therefrom as to Mr Said's involvement in or association with armed groups in the Central African Republic. The Defence has also failed to demonstrate that the Single Judge's acceptance of the Prosecution's statement 'sans prendre en compte les observations de la Défense'²¹ is an appealable issue within the meaning of article 82(1)(d) of the Statute.²² In any case, the Single Judge considers that the Defence's submissions constitute a mere disagreement with the Third Contact Restrictions Decision's reliance on the information provided by the Prosecution, and with the Single Judge's determination that Mr Said had access to sensitive information.

32. In a similar vein, the Third Proposed Issue of the Second Request and the Second Proposed Issue of the Third Request merely question the Single Judge's approach to take [REDACTED] into account in the overall assessment of the criteria under regulation 101(2) of the Regulations. The Defence does not explain why this should be considered to be an appealable issue within the meaning of article 82(1)(d) of the Statute.

33. Lastly, in relation to the Fourth Proposed Issue of the Second Request, the Single Judge recalls that the Decision on the First Request addressed and rejected similar arguments by the Defence on the ground that the Second Contact Restrictions Decision

²¹ Defence's Request, ICC-01/14-01/21-75-Conf, para. 48; Third Request, ICC-01/14-01/21-120-Conf, para. 69.

²² See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168 (OA3), para. 9.

had ‘referred *verbatim* to the relevant standard arising from regulation 101(2) of the Regulations’ and that the Defence’s arguments constituted a mere disagreement with the decision.²³ The same holds true for the Fourth Proposed Issue of the Second Request, which merely amounts to a disagreement with the Third Contact Restrictions Decision’s finding that the requirements of regulation 101(2)(b) and (c) of the Regulations were met.

34. Furthermore, the Single Judge observes that the Defence’s Requests fail to *specifically* substantiate, for each of the above mentioned issues, how the requirements of article 82(1)(d) of the Statute are met, and only advance broad arguments in this regard. The Defence’s assertion that ‘[à] partir du moment où une décision touche aux droits fondamentaux d’une personne poursuivie, elle doit être considérée comme affectant nécessairement le déroulement équitable de la procédure’²⁴ further ignores the exceptional and restrictive nature of interlocutory appeals under article 82(1)(d).²⁵ In addition, the Single Judge considers that the mere fact that an issue could be raised in future pre-trial or trial proceedings²⁶ is, without more, not sufficient to warrant the granting of leave to appeal.²⁷ While not irrelevant, such issues must first ‘significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial’. The Defence’s Requests fail to satisfy this prerequisite for each of the proposed issues of the Second and Third Requests.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY
REJECTS the Defence’s Requests.**

²³ Decision on the First Request, ICC-01/14-01/21-53-Conf, para. 18.

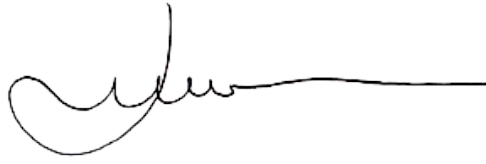
²⁴ Second Request, ICC-01/14-01/21-75-Conf, para. 58; Third Request, ICC-01/14-01/21-120-Conf, para. 70.

²⁵ See [Uganda Decision](#), ICC-02/04-01/05-20, paras 15, 19; [Ongwen Decision](#), ICC-02/04-01/15-64, paras 17-19, 22; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 23 April 2009, ICC-01/04-01/07-946-tENG (the ‘[Katanga and Ngudjolo Decision](#)’), para. 11.

²⁶ Second Request, ICC-01/14-01/21-75-Conf, para. 60; Third Request, ICC-01/14-01/21-120-Conf, para. 72.

²⁷ See Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008](#), 26 February 2008, ICC-01/04-01/06-1191, para. 11; [Katanga and Ngudjolo Decision](#), ICC-01/04-01/07-946-tENG, para. 11.

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

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a series of loops and a long horizontal stroke.

**Judge Rosario Salvatore Aitala,
Single Judge**

Dated this Tuesday, 26 April 2022

At The Hague, The Netherlands