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APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

Public Redacted Version of “Prosecution response to “Mémoire d’appel de la Défense au soutien de son appel contre la “Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions” (ICC-01/14- 01/21-31-Conf) du Juge Unique rendue le 5 mars 2021”, 6 May 2021, ICC-01/14-01/21-72-Conf

Source: **Office of the Prosecutor**

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

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I. Introduction

1. The Appeals Chamber should dismiss Mr Said's appeal¹ challenging the sufficiency of reasoning of the "Decision on the 'Prosecution's Request for Extension of Contact Restrictions.'" ²

2. The Single Judge sufficiently motivated the decision to extend the contact restrictions against Mr Said under regulation 101(2) of the Regulations of the Court ("Regulations") for two months³ by identifying and considering together three relevant factors. These factors together pointed to Mr Said's continuous involvement in or association with armed groups in the Central African Republic ("CAR").⁴ The Single Judge, referring to the Prosecution's submissions which identified supporting information and evidence, clearly explained why Mr Said's involvement or association with these groups posed a risk to two of the interests protected by regulation 101(2), justifying restricting Mr Said's contacts—namely, harm to persons (such as witnesses and victims) and prejudice to the outcome of the proceedings.⁵

3. Mr Said's appeal challenging the sufficiency of the Impugned Decision's reasoning should be dismissed for the following reasons, in summary.

4. *First*, although the single issue certified for appeal concerns whether the Single Judge provided a reasoned opinion in extending the contact restrictions, Mr Said's appeal instead challenges the sufficiency of the factors and evidence that the Single

¹ ICC-01/14-01/21-59-Conf, 23 April 2021 ("Appeal").

² ICC-01/14-01/21-31-Conf ("Impugned Decision").

³ The Impugned Decision extended contact restriction imposed against Mr Said in a decision dated 3 February 2021 (ICC-01/14-01/21-9-Conf-Red, herein "First Restrictions Decision"). The Impugned Decision did not impose open-ended restrictions on Mr Said's communication, both in terms of scope and duration. Mr Said may communicate with his family and 'other persons' under the same conditions identified in the First Restrictions Decision. *See* Impugned Decision, para. 34. If the Prosecution wished to maintain them beyond two months, "a reasoned request shall be submitted [...]": Impugned Decision, para. 41.

⁴ Impugned Decision, paras. 31-33. These factors are: Mr Said's alleged involvement in violent clashes as a member of an armed group before and after the issuance of a warrant for his arrest; the fact that another armed group in the CAR spoke out against Mr Said's transfer to the Court; and more generally that victims and witnesses continued to face heightened risks due to the volatile security situation in the CAR, in combination with the Covid-19 pandemic.

⁵ Impugned Decision, para. 32 (referring to sub-paragraphs (b) and (c) of regulation 101(2)).

Judge considered in reaching the decision. Mr Said's appeal thus addresses a matter not certified for appeal and/or exceeds it. It should be dismissed on this basis alone.

5. *Second*, and in any event, the Single Judge sufficiently reasoned the Impugned Decision under regulation 101(2) by basing the decision on the three factors described above. Given the nature of the decision and the totality of the circumstances in this case, the Single Judge was not required to elaborate every step by which these factors posed a risk to the interests in regulation 101(2). It was sufficient for the Single Judge to consider the three factors together, and to refer to the Prosecution's submissions detailing those factors and supporting evidence in reaching its conclusion.

6. *Third*, even if, *arguendo*, the Single Judge should have been more detailed in his reasoning, Mr Said does not show that any such error had a material impact on the decision. The three factors that the Single Judge took into account are clearly relevant to an assessment on whether contact restrictions should be imposed under regulation 101(2). Any failure by the Single Judge to provide more detailed reasoning does not detract from the correctness and adequacy of his conclusion in this regard.

II. Confidentiality

7. Under regulation 23*bis*(2) of the Regulations, the Prosecution files this response as confidential since it responds to an appeal of the same classification. A public redacted version will be filed as soon as practicable.

III. Submissions

A. The appeal exceeds the matter certified for appeal.

8. Although the single issue certified for appeal concerns whether the Single Judge provided a reasoned opinion in extending the contact restrictions, Mr Said's appeal instead challenges the sufficiency of the factors or evidence considered by the Single

Judge in reaching that decision. Mr Said's appeal thus addresses a matter not certified for appeal and/or exceeds it. It should be dismissed on this basis alone.

9. In granting leave to appeal the Impugned Decision, the Single Judge certified a single issue for appeal in relevant part, as follows:

With regard to the First Proposed Issue, the Single Judge considers, first, that it amounts to 'an identifiable subject or topic requiring a decision for its resolution'. It concerns the sufficiency of the reasoning regarding the application of the threshold defined in regulation 101(2) of the Regulations to the factors identified by the Single Judge. Contrary to the Prosecutor's assertion, the Defence does not misrepresent, misread or disagree the Second Restrictions Decision. The Defence rather acknowledges the different factors underpinning the Single Judge's decision to extend the contact restrictions in relation to Mr Said and contends that the extent of the *reasoning* constitutes an error law (...).⁶

10. It is thus clear that the issue certified for appeal is whether the Single Judge sufficiently motivated the decision, which is an error of law.⁷ It is not an error of fact, which is concerned with whether the three factors considered by the Single Judge in the Impugned Decision reasonably supported his conclusion that there existed a risk to the interests in regulation 101(2) justifying imposing contact restrictions against Mr Said.

11. Rather than substantiating the alleged absence of reasoning in the Impugned Decision, Mr Said instead impugns the nature or sufficiency of the factors or evidence considered by the Single Judge in reaching the Impugned Decision. He asserts, with reference to the Judgment of the European Court of Human Rights in *Grishin v Russia*,⁸ that "it did not suffice merely to refer to an abstract risk *unsupported by any evidence*."⁹

⁶ ICC-01/14-01/21-53-Conf, para. 17 (emphasis in the original text). *See also* para. 11 ("the Defence submits that '[i]l ne ressort pas de la décision attaquée en quoi les faits allégués constitueraient la preuve de l'existence de l'un des risques listés dans la Norme 101(2)' and that '[c]ette absence de motivation constitue [...] une erreur de droit' (the 'First Proposed Issue')").

⁷ See e.g., [Perišić Appeal Judgment](#), para. 92; [Ndindiliyimana et al Appeal Judgement](#), para. 316.

⁸ Application no. 14807/08, 24 July 2012.

⁹ Appeal, para. 24 (emphasis added).

Furthermore, while emphasising the value of a reasoned opinion, Mr Said impugns the sufficiency of the evidence, rather than the sufficiency of the reasoning, by claiming that restrictions on freedoms cannot be based on what he describes as generic and unsubstantiated claims.¹⁰

12. Moreover, referring to the information and evidence identified in the Prosecution's submissions—which the Single Judge recalled in concluding that he was satisfied of the risk to regulation 101(2) interests to justify extending contact restrictions—Mr Said challenges the sufficiency of such information and evidence, rather than focusing on the adequacy of the Impugned Decision's reasoning.¹¹ In particular, he impugns the [REDACTED] (which he considers to constitute no information at all)¹² and the report of a [REDACTED] as mere hearsay.¹³ Mr Said also contends that the [REDACTED] referred to in the Prosecution's submissions were valueless because they were, in his view, unverifiable.¹⁴

13. In sum, rather than challenging the sufficiency of the Impugned Decision's reasoning—in line with the single issue certified for appeal—Mr Said impugns the adequacy of the factors or the information and evidence underlying the Decision. This exceeds the issue certified for appeal. Mr Said's appeal should be dismissed on this basis alone.

B. The Impugned Decision was sufficiently reasoned.

14. Even assuming that Mr Said's appeal falls within the scope of the single issue certified by the Single Judge (whether the Impugned Decision was sufficiently reasoned), it should still be dismissed.

¹⁰ Appeal, para. 30.

¹¹ Appeal, paras. 41-46.

¹² Appeal, para. 43.

¹³ Appeal, para. 43.

¹⁴ Appeal, para. 44.

15. Mr Said seems to claim, on the one hand, that the Impugned Decision is not sufficiently motivated because it does not identify the factual elements underpinning it.¹⁵ In this regard, he seems to consider—wrongly—that the reasoning of the Impugned Decision is contained in a single paragraph.¹⁶ On the other hand, Mr Said also challenges the relevance or sufficiency of the materials relied upon in establishing the risk to the interests in regulation 101(2) to justify extending contact restrictions against him.¹⁷

16. To assist the Appeals Chamber most fully, the Prosecution will not necessarily follow the order of Mr Said’s arguments in every respect. Instead, the Prosecution will address his contentions as follows.

17. *First*, the Prosecution will show that the Impugned Decision, which must be read as a whole and in its proper context,¹⁸ was sufficiently motivated because it identified all factors (or factual elements) and circumstances that it considered relevant in reaching the Impugned Decision—including those identified in the Prosecution’s submissions to which the Impugned Decision refers.

18. *Second*, the Prosecution will demonstrate that, given the nature of the decision and the totality of the circumstances in this case—including that the decision was an extension of restrictions rather than being the first such decision—it was not required for the Impugned Decision to articulate every step as to how each of the three factors independently posed a risk to the interests in regulation 101(2). It was sufficient to assess them together, and to cross-refer to the Prosecution’s submissions—because

¹⁵ Appeal, paras. 30-67. *See e.g.* paras. 30 (contending that the Impugned Decision’s reasoning rests on a single inadequate paragraph), 35 (concerning the Impugned Decision’s finding that Mr Said was involved in violent clashes in the CAR following the issuance of the warrant of arrest, Mr Said contends that it is not clear from the contested decision how the Single Judge arrived at that conclusion, further claiming that the Single Judge did not base the contested decision on any concrete factual element and offered no explanation).

¹⁶ Appeal, para. 34.

¹⁷ Appeal, paras. 30-67.

¹⁸ *See* [Renzaho Appeal Judgment](#), para. 405 (The “obligation to provide a reasoned opinion relates to the Trial Judgement rather than to each and every submission made at trial”). *See also* [Kvočka Appeal judgement](#), para. 23. Thus a (Trial) Chamber is not obliged in its judgement to recount and justify its finding in relation to every submission made at trial. *See e.g.* [Kalimanzira Appeal Judgement](#), paras 96, 121; [Ntabakuze Appeal Judgment](#), para. 161.

those submissions clearly identified the relevant factual elements underpinning the Decision and why they met the standard in regulation 101(2).

19. *Third*, the Prosecution will show that each of the three factors that the Impugned Decision considered was relevant—and the Single Judge properly assessed them together to find that they sufficiently demonstrated a risk to the interests in regulation 101(2).

i. The Impugned Decision clearly identified which facts it found relevant in reaching its conclusion.

20. The Single Judge sufficiently motivated the Impugned Decision by clearly indicating the basis for his conclusions. This was accomplished not only in a single paragraph,¹⁹ but also in several other paragraphs (notably paragraphs 31-33) in which the Single Judge identified all the relevant facts and circumstances underpinning the decision. In particular, these factors showed that there existed a risk to the interests in regulation 101(2), which justified extending the contact restrictions against Mr Said. This was sufficient for the Single Judge to fulfil his duty to provide a reasoned opinion.²⁰ And, as shown below,²¹ the Single Judge was not required to elaborate every step by which each of these factors individually posed a risk to the interests in regulation 101(2). It was sufficient for the Single Judge to consider the three factors together, and to refer to the Prosecutor's submissions and the information and evidence identified in those submissions, in deciding to extend the contact restrictions.

21. *First*, the Single Judge specifically identified three factors—notably pointing to Mr Said's continued involvement in or association with the CAR armed groups—as

¹⁹ *Contra Appeal*, para. 34 (contending that the Impugned Decision's motivation is contained in a single paragraph, namely paragraph 31, which mentions the three factors, and that this single paragraph does not meet the requirements for motivating judicial decisions).

²⁰ [ICC-01/04-01/06-773 OA5](#), para. 20 ("The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion"). See also [ICC-01/04-01/06-774 OA6](#), para. 30; [ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#), para. 247; [ICC-02/05-01/20-236](#), paras. 14, 42.

²¹ Under section (ii), *infra*.

posing a risk to two interests in regulation 101(2)²² which justified extending the contact restrictions.²³ In summary, the three factors were: Mr Said's alleged involvement in violent clashes as a member of an armed group before and after the issuance of the warrant for his arrest; the fact that another armed group in the CAR spoke out against Mr Said's transfer to the Court; and more generally that victims and witnesses continued to face heightened risks due to the volatile security situation in the CAR, in combination with the Covid-19 pandemic.²⁴ As shown below, the Impugned Decision identified the information and evidence supporting these factors, including by reference to the Prosecution's submissions.

22. *Second*, the Single Judge did not merely identify those three factors,²⁵ but he also explained why those factors, considered together, were sufficient to show a risk to the above named interests in regulation 101(2). He did this by referring to the Prosecution's submissions (which, as shown below, cited much of the Decision's underlying information and evidence), and also by underlining the nature of the decision—which in his view the Defence had misappreciated when challenging the sufficiency of those three factors in showing such risk.²⁶

23. Noting that, to impose contact restrictions, regulation 101(2) required that “the Prosecutor has *reasonable grounds to believe* that such contact: (b) *Could* prejudice or otherwise affect the outcome of the proceedings against the detained person, or any other investigation; [or] (c) *Could* be harmful to a detained person or any other person,”²⁷ the Single Judge then correctly concluded that:

[t]he Prosecutor has demonstrated to the aforementioned threshold that, as a result of Mr Said's continuous involvement in or association with

²² These are: harm to witnesses, victims and prejudice to the outcome of the proceedings: Impugned Decision, para. 32 (referring to sub-paragraphs (b) and (c) of regulation 101(2)).

²³ *Contra* Appeal, paras. 35-67.

²⁴ Impugned Decision, paras. 31-32.

²⁵ *Contra* Appeal, para. 34 (claiming, as noted above, that the Single Judge's reasons are contained in a single inadequate paragraph 31, which mentions the three factors).

²⁶ Impugned Decision, para. 32.

²⁷ Impugned Decision, para. 32.

armed groups in the volatile context of the CAR, the consequences enumerated in regulation 101(2)(b) and (c) could materialise.²⁸

24. The Prosecution's submissions had not only cited the underlying supporting information and evidence,²⁹ but had also clearly articulated the existence of the requisite link between those three facts and the identified risks.³⁰ In particular, they noted Mr Said's prior violent behaviour and his continued involvement with armed groups perpetrating violence in the CAR, and underscored the danger to victims and witnesses residing in the country posed by the volatile situation.³¹ In the Prosecution's view, contact restrictions on Mr Said remained necessary to protect witnesses, victims, and the ongoing investigation in the CAR.³²

25. As discussed in the next section, given the nature of the decision and the totality of the circumstances of the case, Mr Said does not show why the Single Judge was required to elaborate every step on how each of these factors individually posed a risk to the interests in regulation 101(2).

ii. The nature of the decision and the totality of the circumstances justified limited elaboration of each step and reference to the Prosecution's submissions.

26. Mr Said does not show that the Impugned Decision was insufficiently reasoned merely because it did not articulate in detail how each factor individually presented a risk to the interests in regulation 101(2), and instead referred to the Prosecution's submissions.³³ Given the nature of the decision and the totality of the circumstances in this case, it was sufficient for the Impugned Decision to assess the relevant factors together, and to refer to the Prosecution's submissions—because those submissions

²⁸ Impugned Decision, para. 32.

²⁹ For further analysis, see section (ii) below.

³⁰ ICC-01/14-01/21-22-Conf, paras. 5-7.

³¹ ICC-01/14-01/21-22-Conf, paras. 6-7.

³² ICC-01/14-01/21-22-Conf, para. 5.

³³ *Contra* Appeal, paras. 31-67 (in particular, e.g., paras. 36, 41, 42, 56-67).

clearly identified the *relevant* factual information and evidence underpinning the Decision, and showed why these met the standard in regulation 101(2).

27. As underscored in the case law of the Court, “the extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.”³⁴

28. This decision was under regulation 101(2), which does not require proof of actual harm, but potential harm. Moreover, the circumstances of the case – including that the Impugned Decision involved a limited extension of contact restrictions, which had been the subject of prior Prosecution submissions and a prior decision, and was not the first such decision³⁵—necessarily meant that reference could be made to prior submissions, and the information and evidence underpinning them. Unless the circumstances had changed since the First Restrictions Decision was made—and here the Prosecution showed that this was not the case—the Single Judge did not err by not elaborating in detail every step by which these factors individually posed a risk to the interests in regulation 101(2).³⁶ It was sufficient for the Single Judge to consider the three factors together, and to refer to the Prosecution’s submissions and the

³⁴ [ICC-01/04-01/06-773 OA5](#), 14 December 2006, para. 20. *See also* [ICC-01/04-01/06-774 OA6](#), para. 30; [ICC-01/05-01/13-2276-Red A6 A7 A8 A9](#), para. 247; [ICC-02/05-01/20-236](#), paras. 14 (“[T]he Appeals Chamber recognises that chambers of the Court must indicate with sufficient clarity the grounds on which they base their decisions [...]. The Appeals Chamber recognises, however, that whether the reasons given are indeed ‘sufficient’ will depend invariably on the circumstances. There is no prescribed formula for what is or is not sufficient, and the extent to which the duty to provide reasons applies may vary according to the nature of the decision”), 42 (“[The Appeals Chamber] recalls that ‘the extent of the reasoning will depend on the circumstances of the case’, and that the obligation to provide reasons ‘will not necessarily require reciting each and every factor that was before the [relevant chamber] to be individually set out, but [requires the relevant chamber] to identify which facts it found to be relevant in coming to its conclusion’”).

³⁵ *See* Impugned Decision, para. 6 (referring to the First Restrictions Decision and the underlying submissions). *See also* para. 2 (concerning the Single Judge’s order to the Registry to impose some limited provisional contact restrictions).

³⁶ *See e.g.* [ICC-01/05-01/08-1626-Red OA7](#), para. 60 (“[T]he existence of Mr Bemba’s network of international contacts had already been considered in previous decisions. The Trial Chamber did not have to re-evaluate this factor in the absence of a suggestion that it had changed or no longer existed”).

information and evidence identified in those submissions, to extend the contact restrictions against Mr Said.

29. Under regulation 101(2), “the Prosecution may request the Chamber seized of the case to *prohibit, regulate or set conditions* for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has reasonable grounds to believe that such contact [...] (b) *[c]ould* prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation; (c) *[c]ould* be harmful to a detained person or any other person; [...] or (f) *[i]s* a threat to the protection of the rights and freedom of any person.”³⁷

30. It is clear, therefore, that regulation 101(2) not only deals with actual or on-going contacts between the detained person and other persons, but also *future* contacts that may occur between the detained person and others, which could pose a risk to or undermine the various interests in subparagraphs (a) to (f).³⁸ The standard to demonstrate this risk is generally low—and, consistent with the use of the word “could”, necessarily involves an element of prediction. This task is accomplished by assessing all the underlying evidence not in isolation but rather together.³⁹

31. In this regard, Mr Said wrongly impugns the underlying information and evidence for not identifying the “concrete risk” and the specific victims or persons “whom the Prosecutor did not want Mr Said to contact.”⁴⁰

32. Mr Said is also incorrect to assert that the information and evidence in the Prosecution’s submissions (to which the Impugned Decision cross-referred, and which

³⁷ ICC-01/14-01/18-98, para. 5 (emphasis added). *See also* Impugned Decision, para. 32.

³⁸ *See also* [ICC-01/14-01/18-98](#), paras. 6, 7, 12.

³⁹ The term “could” has been defined as indicating “possibility.” *See* on-line Cambridge Dictionary. In this regard, the case-law on provisional release or continued detention—which engages similar concepts, and which Mr Said concedes may guide the construction of regulation 101(2) decisions (*see* Appeal, para. 24)—may be pertinent. *See e.g.* ICC-01/04-01/06-824 OA7, 13 February 2007, para. 137 (“[A]ny determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction”); [ICC-01/05-01/08-323 OA](#), para. 55 (“[T]he apparent necessity of continued detention in order to ensure the detainee’s appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together”).

⁴⁰ Appeal, paras. 60, 64.

showed that he was prone to violence and was connected with violence in the CAR) was irrelevant in demonstrating a risk to witnesses and victims in the CAR and prejudice to the outcome of these proceedings.⁴¹

33. Contrary to Mr Said's contentions, the Impugned Decision's reference to the Prosecution's submissions in concluding that relevant risks had been shown to the necessary standard,⁴² is not incompatible with the requirement that "the reasons for [the] decision must be comprehensible from the decision itself."⁴³ This is because the Prosecution's submissions, and the underlying information and evidence to which the Impugned Decision referred, were not only *relevant*, but also *clear* and *accessible* to Mr Said.

(a) Clarity and accessibility

34. Mr Said incorrectly contends that the Prosecution's submissions and materials relied on (to which the Impugned Decision referred) did not identify the bases or information and evidence substantiating the risk, and/or that they were unclear or inaccessible to him.⁴⁴

35. *First*, the Impugned Decision did not only refer to an *ex parte* decision or material, or fail to rely on any concrete element, in concluding that Mr Said was reportedly involved in violent clashes as a member of a rebel group and remained so involved, even after the issuance of the warrant of arrest.⁴⁵ Nor is Mr Said correct to claim that the Impugned Decision's conclusion that the "Prosecutor has demonstrated (...) that as a result of Mr Said's continuous involvement in or association with armed groups in the volatile context of the CAR, the consequences enumerated in regulation

⁴¹ See e.g. Appeal, paras. 58-67. See also more detailed submissions in section (iii) below.

⁴² Impugned Decision, para. 32.

⁴³ [ICC-01/04-01/06-774 OA6](#), para. 33. *Contra* Appeal, paras. 36, 39.

⁴⁴ Appeal, paras. 41-45.

⁴⁵ *Contra* Appeal, paras. 35-36; 46.

101(2)(b) and (c) of the Regulations could materialise” was neither accompanied by any explanation, nor any reference.⁴⁶

36. To the contrary, in a decision dated 2 March 2021, which predates the Impugned Decision, the Single Judge granted Mr Said access to many documents which supported the Impugned Decision’s finding concerning Mr Said’s involvement in violent clashes in the CAR.⁴⁷ Mr Said refers to many of these documents in his appeal.⁴⁸ The Single Judge found that, since the Prosecution had agreed to release all documents referred to in footnote 2 of ICC-01/14-01/21-10-Conf-Red, and footnotes 3 and 5 of ICC-01/14-01/21-22-Conf [REDACTED], this aspect of the Defence request for access had become moot.⁴⁹

37. Additionally, the Prosecution’s submissions highlighted the content of the documents it cited. For example, footnote 3 of the Prosecutor’s request to extend contact restrictions specifically identified and summarised these documents, and thus demonstrated their relevance. For instance, concerning CAR-OTP-2100-1774, the Prosecution stated that it was a [REDACTED].⁵⁰ Moreover, it noted that CAR-OTP-2130-2031 was [REDACTED]⁵¹ and that CAR-OTP-2127-774 was [REDACTED].⁵²

38. In addition, other relevant submissions made by the Prosecution and referred to in the Impugned Decision,⁵³ such as those underlying the First Restrictions Decision, also specifically cited relevant information and evidence. This included an [REDACTED].⁵⁴ The Prosecution’s submissions also referred to their content and Mr

⁴⁶ Appeal, para. 56.

⁴⁷ ICC-01/14-01/21-28-Conf, para. 23.

⁴⁸ See e.g. Appeal, paras. 58-62.

⁴⁹ ICC-01/14-01/21-28-Conf, para. 23 (material in bracket added for clarity).

⁵⁰ ICC-01/14-01/21-22-Conf, fn. 3.

⁵¹ ICC-01/14-01/21-22-Conf, fn. 3.

⁵² ICC-01/14-01/21-22-Conf, fn. 3.

⁵³ Impugned Decision, e.g., para.13 (referring to the Prosecution’s submissions relating to the First Restrictions Decision. In making a case for the extension of those restrictions, the Prosecution argued that the circumstances justifying the imposition of contact restrictions as identified in the First Contact Restrictions Decision had not changed).

⁵⁴ See Appeal, paras. 41-44.

Said also specifically cites those materials in his appeal.⁵⁵ These documents showed Mr Said's continuous connection with armed rebels in the CAR. Mr Said now merely disagrees with their sufficiency by offering his own interpretation of their content. This is not a sufficient basis to impugn the clarity and accessibility of the evidence referred to in the Prosecution's submissions, to which the Impugned Decision referred.

(b) Relevance

39. Mr Said also raises several discrete challenges against the information and evidence referred to in the Prosecution's submissions, to which the Impugned Decisions referred.⁵⁶ But his challenges are misconceived. Many of them appear to be directed at the relevance and sufficiency of these materials, or the Prosecution's arguments that persuaded the Single Judge to find that the Prosecution had sufficiently demonstrated the risks to the interests in regulation 101(2).⁵⁷

40. For instance, Mr Said impugns the [REDACTED] as constituting no information,⁵⁸ and criticises the report of a [REDACTED] as being mere hearsay.⁵⁹ He also contends that the [REDACTED] referred to in the Prosecution's submissions were valueless, allegedly because they were unverifiable.⁶⁰ Furthermore, concerning exhibit CAR-OTP-2100-1774, he claims that the information therein is unverifiable (again, because it is alleged to be hearsay), and thus "not relevant"⁶¹ in the debate regarding the need to restrict Mr Said's communications.

41. Mr Said fails to show that the Single Judge was unreasonable to consider, based on all the information and evidence, that Mr Said continues to be involved in or

⁵⁵ See e.g. Appeal, paras. 41-44.

⁵⁶ See e.g. Appeal, paras. 41-44, 56-67.

⁵⁷ See e.g. Appeal, paras. 41-44, 56- 67.

⁵⁸ Appeal, para. 43.

⁵⁹ Appeal, para. 43.

⁶⁰ Appeal, para. 44.

⁶¹ Appeal, para. 61.

associated with armed groups in the volatile context of the CAR—and that this could lead to the risks identified in regulation 101(2).⁶²

42. Mr Said merely disagrees with the Single Judge’s reasonable assessment of the evidence and information, which is otherwise relevant. It is immaterial that some of it may be hearsay, since such evidence is admissible and may be probative.⁶³ Mr Said also ignores that regulation 101(2) engages a low threshold of proof and concerns potential for risk, rather than concrete risk directed against specific or named individuals as Mr Said suggests.⁶⁴ The Single Judge was entitled to freely evaluate the relevant information and evidence as a whole, and on this basis to find that the three factors posed such a risk.

43. Mr Said wrongly claims that the Prosecution did not identify evidence to support key allegations, including that the [REDACTED] with a view to harming the interests in regulation 101(2).⁶⁵ Again, however, he overlooks that both matters can be reasonably inferred from the totality of the information and evidence summarised above, concerning Mr Said’s continuous involvement in or association with armed groups in the CAR.

44. Nor is Mr Said correct to suggest that the Impugned Decision ignored his own submissions.⁶⁶ In a somewhat analogous situation, even if a Chamber “did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber’s findings, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.”⁶⁷ This presumption can only be rebutted by a showing that a matter which was clearly relevant to the question in issue was completely disregarded.⁶⁸ Here, the

⁶² Impugned Decision, para. 32.

⁶³ See e.g. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), para. 902.

⁶⁴ Appeal, paras. 63-64.

⁶⁵ Appeal, paras. 63-66.

⁶⁶ Appeal, para. 67.

⁶⁷ [Ndindabahizi, Appeal Judgement](#), para. 75. See also [Kvočka et al Appeal Judgement](#), para. 23.

⁶⁸ See e.g. [D. Milošević Appeal Judgment](#), para. 123; [Krajišnik Appeal Judgment](#), para. 353.

Impugned Decision not only recounted Mr Said's submissions,⁶⁹ but also expressly found that they had misappreciated the applicable standard of proof.⁷⁰ Mr Said cannot therefore show that his submissions were ignored, but rather they were rejected on a reasoned basis.

(c) All three factors underpinning the Impugned Decision were relevant and the Impugned Decision did not need to elucidate how each individually presented a risk under regulation 101(2)

45. In addition to impugning the supporting information and evidence, Mr Said also appears to challenge the relevance of the three factors, and claims that the Impugned Decision was not reasoned because it did not explain why each of those factors individually posed a risk.⁷¹ The Impugned Decision was correct in holistically considering that all three relevant factors posed a risk to witnesses and victims, and to the outcome of the proceedings under regulation 101(2). To be sufficiently reasoned, it was not required for the Impugned Decision to elucidate every step by which the Single Judge determined a particular factor to pose such a risk.⁷²

46. The Single Judge correctly considered that the three factors demonstrating Mr Said's continuous link to the CAR conflict were relevant to demonstrate risk to the interests under regulation 101(2). He did so applying the correct standard of proof in regulation 101(1) and in light of the fact that the decision was extending restrictions which had previously been imposed in a prior decision. In the Single Judge's view, "Mr Said's continuous involvement in or association with the armed groups in the volatile context of the CAR [mean that] the consequences enumerated in regulation 101(2)(b) and (c) of the Regulations *could* materialise."⁷³

⁶⁹ Impugned Decision, paras. 12, 21-28.

⁷⁰ Impugned Decision, para. 32.

⁷¹ See e.g. Appeal, paras. 47-55.

⁷² *Contra* Appeal, paras. 47-67.

⁷³ Impugned Decision, para. 31.

47. Mr Said does not show that his association or linkage with armed groups in the CAR was not a relevant factor in assessing the risk to the two protected interests, nor indeed why or what further elucidation of such relevance was required to satisfy the reasoned opinion requirement.⁷⁴

48. The mere fact that some of the factors considered by the Impugned Decision (such as Mr Said's association with the violence in the CAR) were similar to those considered for the issuance of the warrant of arrest and the First Restriction Decision does not render those factors irrelevant, or undermine the sufficiency of the reasoning in the Impugned Decision.⁷⁵ Nor does it mean that any suspect or accused person would automatically, on the sole basis of the factual allegations underlying the warrant of arrest, be subject to contact restrictions under regulation 101(2).⁷⁶ To the contrary, as the Impugned Decision clearly explained, the factors considered in issuing the warrant of arrest (in particular Mr Said's involvement with the conflict) *had not changed*,⁷⁷ and it was on this basis that it was justified to extend the restrictions under the Impugned Decision.

49. Nor does Mr Said show why the public opposition by a CAR rebel group to Mr Said's transfer to the Court was not a relevant factor in assessing the risk to witnesses and victims, and the outcome of the Court's proceedings under regulation 101(2)—or, indeed, why or what further elucidation of such relevance was required to satisfy the reasoned opinion requirement.⁷⁸ This factor clearly corroborated Mr Said's continued association with the CAR violence, and showed the danger that such rebel group could pose to any potential witnesses against Mr Said.

50. The above considerations also underline the relevance of the third factor relied on by the Impugned Decision, namely, the heightened risks faced by potential

⁷⁴ *Contra Appeal*, paras. 47-67.

⁷⁵ *Contra Appeal*, para. 49.

⁷⁶ *Contra Appeal*, paras. 49-50.

⁷⁷ Impugned Decision, para. 31.

⁷⁸ *Contra Appeal*, paras. 51-52.

witnesses due *inter alia* to the volatile security situation in the CAR.⁷⁹ Mr Said's continued involvement in the CAR's rebel groups, and the violent clashes discussed above, contribute to the volatility of the security situation. His own personal conduct is thus engaged.⁸⁰ In any case, the absence of an accused's personal involvement does not necessarily render irrelevant the general security situation facing witnesses, when considering whether to impose or maintain contact restrictions on suspects, or to restrict their other freedoms in a necessary and proportionate way. A Chamber does not necessarily err in assessing the existence of salient risks by taking the volatile security situation into account. Such factors constrain the Court's capacity to protect witnesses and victims in a situation country, just like the current Covid-19 pandemic, and are therefore relevant.

51. Significantly, the case law on provisional release – which Mr Said suggests may provide some inspiration to the proper construction of regulation 101(2)⁸¹ – accepts that evidence concerning the suspect's past and present roles in the conflict, his or her network of supporters, international contacts and financial resources, among others, may demonstrate a risk to such protected interests as the security of witnesses, victims and the integrity of investigations. Such evidence may militate against provisional release.⁸² The three factors considered by the Single Judge in the Impugned Decision reveal the existence of similar elements. The Single Judge thus correctly took them into account in finding that an extension of contact restrictions was justified.

C. Mr Said does not show impact of the alleged error.

⁷⁹ *Contra* Appeal, para. 53.

⁸⁰ *Contra* Appeal, para. 53.

⁸¹ Appeal, para. 24.

⁸² See e.g. [ICC-01/05-01/08-323 OA](#), para. 53; [ICC-01/05-01/08-1626-Red OA7](#), para. 60 (“[T]he existence of Mr Bemba's network of international contacts had already been considered in previous decisions. The Trial Chamber did not have to re-evaluate this factor in the absence of a suggestion that it had changed or no longer existed”); [ICC-02/11-01/11-278-Red OA](#), para. 63 (“[I]t is not unreasonable to assume that a support network that may assist in the absconding of the detained person may also assist in obstructing or endangering the investigation or the court proceedings”).

52. Finally, if *arguendo*, the Single Judge did not provide sufficient reasoning (or should have been more detailed), Mr Said does not show that any such alleged error had any material impact on the decision.⁸³ The three factors the Single Judge took into account are clearly relevant to an assessment of whether contact restrictions should be imposed under regulation 101(2). Any failure to provide more detailed reasoning did not detract from the correctness and adequacy of his ultimate finding/conclusion in this regard.

53. Key to assessing the absence of an impact justifying the Appeals Chamber to uphold an impugned decision, is the showing, as here, that the Chamber identified the relevant factors in reaching the decision. This was articulated in the *Bemba* case as follows:

The Pre-Trial Chamber based its finding on a number of factors put forward by the Prosecutor, namely, the Appellant's 'past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources', repeating findings already made in the Decision of 10 June 2008 and concluding that these findings were 'still valid' at the time it rendered the Impugned Decision. The Appeals Chamber considers that it would have been preferable for the Pre-Trial Chamber to state in more detail in the Impugned Decision the reasons for which it concluded that the conditions of article 58 (1) (b) (i) of the Statute continued to be fulfilled. The Appeals Chamber is nevertheless satisfied that the Pre-Trial Chamber's omission to provide more detailed reasoning did not detract from the correctness and adequacy of its finding on this point.⁸⁴

54. As shown above, all the factors that the Impugned Decision identified as supporting its finding of a risk to two of the interests protected under regulation 101(2), thus justifying extending contact restrictions against Mr Said, are clearly

⁸³ *Contra Appeal*, paras. 68-73.

⁸⁴ [ICC-01/05-01/08-323 OA](#), para. 53.

relevant. Consequently, even if the Single Judge erred by not providing greater detail in its reasoning, this would not undermine the validity of its ultimate conclusions.

D. Relief Requested

55. Based on the above, the Chamber should dismiss Mr Said's appeal.



Karim A.A. Khan QC
Prosecutor

Dated this 5th day of May 2022

At The Hague, The Netherlands.