

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/21

Date: 12 April 2021

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

Confidential

Decision on the Defence Request for Leave to Appeal the ‘Decision on the
“Prosecution’s Request for Extension of Contact Restrictions”’

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
for Participation/Reparations**

**The Office of Public Counsel
for Victims**

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

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 Request for Leave to Appeal the ‘Decision on the “Prosecution’s Request for 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 on the basis of regulation 101 of the Regulations of the Court (the ‘Regulations’).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 2021⁶, 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’).

¹ ICC-01/14-01/21-2-US-Exp; a public redacted version is also available, see [ICC-01/14-01/21-2-Red2](#).

² Email from the Chamber to the Registry, at 18:42 hours; see 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; a confidential redacted, *ex parte* (only available to the Registry, the Prosecutor and the Defence) version is also available, see ICC-01/14-01/21-6-Conf-Exp-Red; a confidential, lesser redacted, *ex parte* (only available to the Registry, the Prosecutor and the Defence) version is also available, see 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 [ICC-01/14-01/21-T-001-ENG](#), pp 4-5.

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’).⁷ The Single Judge imposed a number of restrictions in relation to Mr Said’s contacts for a period of one month as of the date of the First Restrictions Decision.⁸ However, the Single Judge rescinded the separation of Mr Said from Messrs Yekatom and Ngaïssona.⁹

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’).¹⁰ The Single Judge, *inter alia*, extended the contact restrictions in relation to Mr Said as specified in the First Restrictions Decision for a period of two months as of the date of the Second Restrictions Decision.¹¹ However, the Single Judge restored Mr Said’s right to communicate with ‘other persons’.¹²

8. On 15 March 2021, the Single Judge received 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 ‘Defence’s Request for Leave to Appeal’).¹³

9. On 17 March 2021, following the recomposition of the Chambers by the Presidency,¹⁴ 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.¹⁵

10. On 19 March 2021, the Single Judge received the ‘Prosecution response to “Demande d’autorisation d’interjeter appel de la ‘Decision on the “Prosecution’s

⁷ ICC-01/14-01/21-9-US-Exp; a confidential redacted version is also available, see ICC-01/14-01/21-9-Conf-Red.

⁸ ICC-01/14-01/21-9-US-Exp, paras 20-26.

⁹ ICC-01/14-01/21-9-US-Exp, para. 29.

¹⁰ ICC-01/14-01/21-31-Conf.

¹¹ ICC-01/14-01/21-31-Conf, paras 31-33, 40.

¹² ICC-01/14-01/21-31-Conf, para. 34.

¹³ ICC-01/14-01/21-39-Conf.

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

¹⁵ [Decision on the designation of a Single Judge](#), ICC-01/14-01/21-42.

Request for Extension of Contact Restrictions” (ICC-01/14-01/21-31-Conf)” (the ‘Prosecutor’s Response’).¹⁶

II. SUBMISSIONS RECEIVED BY THE SINGLE JUDGE

A. The Defence’s Request for Leave to Appeal

11. In the view of the Defence, the Second Restrictions Decision ‘soulève quatre questions susceptibles d’appel’.¹⁷ First, 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’).¹⁸ Second, the Defence avers that ‘[l]’emphase mise sur les termes de « could » [...] semble raisonnablement suggérer que le Procureur serait soumis à un standard de preuve bas’ (the ‘Second Proposed Issue’).¹⁹ Third, the Defence asserts that ‘il n’est pas démontré comment échanger sur des éléments publics du dossier peut constituer un risque pour les enquêtes du Procureur ou pour ses témoins’ (the ‘Third Proposed Issue’).²⁰ Lastly, as to the duration and frequency of Mr Said’s telephone calls, the Defence ‘estime que constitue une erreur de droit le fait de balancer les droits fondamentaux de Monsieur Said avec des « practical considerations »’ (the ‘Fourth Proposed Issue’).²¹

12. According to the Defence, ‘[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’.²² Furthermore, the Defence takes the view that, ‘dans la mesure où la question de l’extension et de la teneur des mesures de restrictions va probablement se poser de manière continue pendant toute la phase de confirmation des charges [...], permettre à la Chambre d’appel de trancher les questions fondamentales que soulève la Défense ici aurait pour conséquence de contribuer à la célérité de la procédure’.²³

¹⁶ ICC-01/14-01/21-44-Conf.

¹⁷ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 30.

¹⁸ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 32.

¹⁹ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 37.

²⁰ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 42.

²¹ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 44.

²² Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 45.

²³ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 47.

13. In addition, in the submission of the Defence, ‘l’intervention immédiate de la Chambre d’appel permettra de trancher une fois pour toute les questions cruciales soulevées dans la présente demande d’autorisation d’interjeter appel, contribuant par la même à faire progresser la procédure’.²⁴ It also argues that, ‘si la question de la légalité des mesures de restrictions prononcées contre Monsieur Said n’était pas tranchée immédiatement, cela pourrait conduire à une violation irrémédiable de ses droits’.²⁵

B. The Prosecutor’s Response

14. In relation to the First Proposed Issue, the Prosecutor submits that ‘not only did the Impugned Decision evaluate three facts in a holistic manner [...] but the Decision also expressly explained why the Single Judge was satisfied that such involvement or association posed a risk to two interests underlying regulation 101’.²⁶ The Prosecutor adds that, in any event, ‘[t]he Defence [...] merely expresses factual disagreements with the conclusions reached by the Chamber’.²⁷ Furthermore, the Prosecutor asserts that, ‘since the Impugned Decision considered all factors together, the Defence Request’s claim that the Decision “rest[ed] almost exclusively on the allegations of the arrest warrant”, misreads the Impugned Decision’.²⁸ As to the Second Proposed Issue, the Prosecutor argues that ‘the Decision was referring, verbatim, to the plain text of regulation 101’.²⁹ The Prosecutor adds that, in any event, the Defence ‘simply advances alternative interpretations of the facts, or a [sic] merely disagrees with the Chamber’s assessment of matters that fall within its discretion’.³⁰ With regard to the Third Proposed Issue, the Prosecutor avers that ‘the Impugned Decision does not impose an endless or open-ended restriction of every matter in the public domain’.³¹ In any event, according to the Prosecutor, the Defence ‘simply advances alternative interpretations of the facts, or a [sic] merely disagrees with the Chamber’s reasonable assessment of matters that fall within its discretion’.³² Lastly, the Prosecutor submits that, ‘[i]n alluding to the need for proportionality vis-à-vis the mitigation of risks, the [Fourth

²⁴ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 48.

²⁵ Defence’s Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 51.

²⁶ Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 8.

²⁷ Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 10.

²⁸ Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 11.

²⁹ Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 14.

³⁰ Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 16.

³¹ Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 18.

³² Prosecutor’s Response, ICC-01/14-01/21-44-Conf, para. 19.

Proposed Issue] advances alternative interpretations of the facts, or merely disagrees with the Chamber's assessment of matters falling within its discretion'.³³

15. Moreover, the Prosecutor recalls that, 'leave to appeal can be granted only if the issue on which appeal is sought would *significantly* affect the proceedings both in terms of fairness and in terms of expeditiousness' and asserts that '[t]he Defence Request's unsubstantiated claims [...] cannot meet this standard'.³⁴ In any event, in the Prosecutor's submission, the Second Restrictions Decision 'does not impose open-ended restrictions on communication both in terms of scope and duration'.³⁵ Lastly, in the view of the Prosecutor, 'immediate appellate intervention will delay (rather than materially advance) the proceedings'.³⁶

III. DETERMINATION BY THE SINGLE JUDGE

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

17. 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'.³⁷ 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.³⁸ 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. Second, the First Proposed Issue is 'apt to "significantly affect" [...] "the fair and expeditious conduct of the proceedings"'.³⁹ The restrictions in relation to Mr Said's contacts have an impact on different rights enjoyed by Mr Said throughout the proceedings leading up to the confirmation of charges

³³ Prosecutor's Response, ICC-01/14-01/21-44-Conf, para. 22.

³⁴ Prosecutor's Response, ICC-01/14-01/21-44-Conf, para. 27 (emphasis in original).

³⁵ Prosecutor's Response, ICC-01/14-01/21-44-Conf, para. 28.

³⁶ Prosecutor's Response, ICC-01/14-01/21-44-Conf, para. 29.

³⁷ 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) (the '13 July 2006 Appeal Judgment'), para. 9.

³⁸ Prosecutor's Response, ICC-01/14-01/21-44-Conf, paras 7-11.

³⁹ [13 July 2006 Appeal Judgment](#), ICC-01/04-168, para. 10.

hearing. In addition, the prospect of continued litigation regarding this question will significantly affect the expeditious conduct of these proceedings. In view of these considerations, the Single Judge is not persuaded by the Prosecutor's arguments to the contrary.⁴⁰ Lastly, 'an immediate resolution [of the First Proposed Issue] by the Appeals Chamber may materially advance the proceedings'.⁴¹ As this question will recur, the Appeals Chamber may ensure 'that the proceedings follow the right course',⁴² as opposed to delaying them.⁴³ Accordingly, the Single Judge grants the Defence's Request for Leave to Appeal in so far as the First Proposed Issue is concerned.

18. The Single Judge rejects the remainder of the Defence's Request for Leave to Appeal. As to the Second Proposed Issue, since the Single Judge referred verbatim to the relevant standard arising from regulation 101(2) of the Regulations,⁴⁴ the Defence's speculative assertion, namely that '[l]'emphase mise sur les termes de « could » [...] *semble raisonnablement suggérer* que le Procureur serait soumis à un standard de preuve bas',⁴⁵ amounts to a disagreement. The Third Proposed Issue is also a disagreement, considering that the relevant measure was imposed as a result of the analysis contained in the First Restrictions Decision⁴⁶ and the Single Judge merely clarified its extent in the Second Restrictions Decision⁴⁷. In any event, the Third Proposed Issue is not 'apt to "significantly affect" [...] "the fair and expeditious conduct of the proceedings"',⁴⁸ in view of the fact that the Single Judge further clarified that, 'contrary to the Defence's submission, this limitation does not prevent Mr Said from expressing his general feelings about the present proceedings or discussing other aspects of his life at the Detention Centre, provided that such matters do not involve substantive aspects of the present case or that he is otherwise barred from discussing such matters'.⁴⁹ Lastly, the Fourth Proposed Issue is a disagreement as well. Besides finding that the Defence had not substantiated its claim that Mr Said is treated differently from other persons in the Detention Centre and that such assessments must

⁴⁰ Prosecutor's Response, ICC-01/14-01/21-44-Conf, paras 27-28.

⁴¹ [13 July 2006 Appeal Judgment](#), ICC-01/04-168, para. 14.

⁴² [13 July 2006 Appeal Judgment](#), ICC-01/04-168, para. 15.

⁴³ Prosecutor's Response, ICC-01/14-01/21-44-Conf, para. 29.

⁴⁴ Second Restrictions Decision, ICC-01/14-01/21-31-Conf, para. 32.

⁴⁵ Defence's Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 37 (emphasis added).

⁴⁶ First Restrictions Decision, ICC-01/14-01/21-9-Conf-Red, paras 20-21.

⁴⁷ Second Restrictions Decision, ICC-01/14-01/21-31-Conf, para. 38.

⁴⁸ [13 July 2006 Appeal Judgment](#), ICC-01/04-168, para. 10.

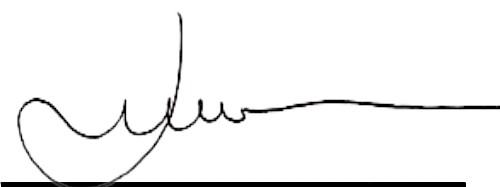
⁴⁹ Second Restrictions Decision, ICC-01/14-01/21-31-Conf, para. 38.

be made in the circumstances of each case, the Single Judge, contrary to the Defence's assertion,⁵⁰ expressly held that 'this measure *does not exclusively depend on the resources of the Registry*, but constitutes a *balance* between the need to restrict Mr Said's contacts, his fundamental rights, and practical considerations'.⁵¹

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **GRANTS** the Defence's Request for Leave to Appeal in so far as the First Proposed Issue is concerned; and
- b) **REJECTS** the remainder of the Defence's Request for Leave to Appeal.

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



**Judge Rosario Salvatore Aitala,
Single Judge**

Dated this Monday, 12 April 2021

At The Hague, The Netherlands

⁵⁰ Defence's Request for Leave to Appeal, ICC-01/14-01/21-39-Conf, para. 44.

⁵¹ Second Restrictions Decision, ICC-01/14-01/21-31-Conf, para. 39 (emphasis added).