

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/21 OA

Date of Public Redacted Version: 17 May 2022

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public Redacted Version of

“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”’, 29 June 2021, ICC-01/14-01/21-111-Conf-Red

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

The Office of the Prosecutor
Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for Mr Mahamat Said Abdel Kani
Ms Jennifer Naouri

REGISTRY

Registrar
Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Mahamet Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’ of 5 March 2021 (ICC-01/14-01/21-31-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The Decision on the “Prosecution’s Request for Extension of Contact Restrictions” is confirmed.

REASONS

I. KEY FINDINGS

1. A decision authorising restrictions on the contacts of a detained person pursuant to regulation 101(2) of the Regulations of the Court must sufficiently state the reasons upon which the Chamber based its decision. The obligation to provide reasons is particularly heightened in respect of decisions which interfere with the human rights of detained persons.
2. Where reliance in a decision is placed on redacted or *ex parte* material, the detained person must be able to understand, to the extent possible, the basis for the decision from the reasons discerned from the materials in *toto* available to him or her.
3. That a Chamber may choose to refer to its previous decisions presupposes that those decisions are sufficiently reasoned.
4. Where there is a series of decisions restricting contacts further to an *ex parte* decision, the Chamber is under a continuing obligation to review the necessity of such classification and the possibility of issuing a lesser redacted version.

II. INTRODUCTION

5. In the present appeal, the Appeals Chamber is called upon to determine whether Pre-Trial Chamber II (the ‘Pre-Trial Chamber’), its functions having been carried out by the Single Judge,¹ in the ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions”’ of 5 March 2021 (the ‘Impugned Decision’),² rendered a sufficiently reasoned decision when it extended the contact restrictions in relation to Mr Said.

6. The Defence raises one ground of appeal, arguing that the Pre-Trial Chamber erred in law by failing to issue sufficient reasons for its decision. In the view of the Defence, this error materially affected the Impugned Decision. The Defence requests the Appeals Chamber to reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber.

7. For the reasons elaborated in this judgment, the Appeals Chamber rejects the appeal lodged by the Defence and confirms the Impugned Decision.

8. This judgment sets out the procedural history of the appeal, followed by the relevant parts of the decisions of the Pre-Trial Chamber, the parties’ submissions, the determination of the Appeals Chamber and the appropriate relief.

III. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

9. On 22 January 2021, following a request by the Prosecutor (the ‘Prosecutor’s First Request for Contact Restrictions’),³ the Pre-Trial Chamber ordered the Registry to provisionally apply a number of restrictions in relation to Mr Said’s contacts upon his arrival at the Court’s Detention Centre.⁴

¹ [Decision on the designation of a Single Judge](#), 25 January 2021, ICC-01/14-01/21-3.

² ICC-01/14-01/21-31-Conf. A public redacted version was notified on 26 April 2022 ([ICC-01/14-01/21-31-Red](#)).

³ Corrected Version of ‘Prosecution’s Request for Contact Restrictions concerning Mahamat Said Abdel Kani in Pre-trial Detention’, ICC-01/14-133-US-Exp, 22 January 2021, ICC-01/14-133-US-Exp-Corr. A second confidential redacted version was notified on 24 May 2021 (ICC-01/14-01/21-10-Conf-Red2-Corr).

⁴ ICC-01/14-01/21-28-Conf-AnxA (Annex A to the ‘Decision on the “Requête urgente de la Défense” (ICC-01/14-01/21-26-Conf)’), 2 March 2021, ICC-01/14-01/21-28-Conf.

10. On 24 January 2021, Mr Said was surrendered to the Court and, on 25 January 2021, arrived at the Court's Detention Centre.⁵

11. On 3 February 2021, the Pre-Trial Chamber 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 imposing on Mr Said a number of contact restrictions for a period of one month.⁷

12. On 22 February 2021, the Prosecutor requested an extension of the contact restrictions imposed on Mr Said (the 'Prosecutor's Request to Extend Contact Restrictions').⁸

13. On 24 February 2021, the Registrar filed the 'Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge' (the 'Registry Report').⁹

14. On 2 March 2021, the Pre-Trial Chamber issued a decision (the 'Disclosure Decision')¹⁰ on the Defence request, of 1 March 2021, for disclosure in order to respond to the Prosecutor's Request to Extend Contact Restrictions (the 'Request for Disclosure').¹¹

15. On 3 March 2021, the Defence filed the 'Réponse de la Défense à la «Prosecution's Request for Extension of Contact Restrictions» (ICC-01/14-01/21-22-conf), déposée le 22 février 2021' (the 'Defence Response').¹²

⁵ [Impugned Decision](#), para. 3, referring to 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, para. 27. A confidential redacted version was notified on 19 February 2021 (ICC-01/14-01/21-6-Conf-Exp-Red).

⁶ ICC-01/14-01/21-9-Conf. A redacted version was notified on the same date (ICC-01/14-01/21-9-Conf-Red).

⁷ First Contact Restrictions Decision, paras 20-26, 29.

⁸ Prosecution's Request for Extension of Contact Restrictions, ICC-01/14-01/21-22-Conf.

⁹ ICC-01/14-01/21-23-Conf-Exp. A confidential redacted version was notified on the same date (ICC-01/14-01/21-23-Conf-Red).

¹⁰ Decision on the "Requête urgente de la Défense" (ICC-01/14-01/21-26-Conf), ICC-01/14-01/21-28-Conf.

¹¹ Requête urgente de la Défense visant à ce qu'il soit donné accès aux éléments lui permettant de répondre de manière suffisamment informée à la «Prosecution's Request for Extension of Contact Restrictions», déposée le 22 février 2021, ICC-01/14-01/21-26-Conf.

¹² ICC-01/14-01/21-29-Conf.

16. On 5 March 2021, the Pre-Trial Chamber rendered the Impugned Decision, extending and varying the contact restrictions specified in the First Contact Restrictions Decision for a period of two months.¹³

17. 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 ‘Request for Leave to Appeal’).¹⁴

18. On 19 March 2021, the Prosecutor filed her response to the Request for Leave to Appeal.¹⁵

19. On 12 April 2021, the Pre-Trial Chamber partially granted the Request for Leave to Appeal¹⁶ in relation to one ground, namely: ‘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’ and the contention that the extent of the reasoning constitutes an error.¹⁷

20. On 14 April 2021, the Prosecutor disclosed to the Defence¹⁸ the evidence cited in the decision of the Pre-Trial Chamber issuing the warrant of arrest for Mr Said (the ‘Warrant of Arrest’).¹⁹

B. Proceedings before the Appeals Chamber

21. On 23 April 2021, the Defence filed its appeal (the ‘Appeal Brief’).²⁰

¹³ [Impugned Decision](#), p. 15.

¹⁴ ICC-01/14-01/21-39-Conf.

¹⁵ 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)’, ICC-01/14-01/21-44-Conf.

¹⁶ [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 (the ‘Decision on Leave to Appeal’).

¹⁷ [Decision on Leave to Appeal](#), para. 17, p. 9.

¹⁸ [Prosecution’s Communication of the Disclosure of Evidence on 14 April 2021](#), 15 April 2021, ICC-01/14-01/21-54 (see para. 3) and its annex, ICC-01/14-01/21-54-Conf-Anx.

¹⁹ Warrant of Arrest for Mahamat Said Abdel Kani, 7 January 2019, ICC-01/14-01/21-2-US-Exp. A second public redacted version (ICC-01/14-01/21-2-Red2) was notified on 17 January 2019: [Public Redacted Version of ‘Warrant of Arrest for Mahamat Said Abdel Kani’, 7 January 2019, ICC-01/14-01/21-2-US-Exp.](#)

²⁰ Defence Brief on Appeal against the “Decision on the ‘Prosecution’s Request for Extension of Contact Restrictions’” (ICC-01/14-01/21-31-Conf) issued by the Single Judge on 5 March 2021, 23 April 2021, ICC-01/14-01/21-59-Conf-tENG. A public redacted version was notified on 5 May 2022 ([ICC-01/14-01/21-59-Red](#)).

22. On 6 May 2021, the Prosecutor filed her response to the Appeal Brief (the ‘Response’).²¹

IV. MERITS

A. Summary of the First Contact Restrictions Decision and the Impugned Decision

1. First Contact Restrictions Decision

23. In the First Contact Restrictions Decision, the Pre-Trial Chamber considered that,

[REDACTED]

24. [REDACTED]

²¹ 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. A public redacted version was notified on 5 May 2022 ([ICC-01/14-01/21-72-Red](#)).

[REDACTED]

[REDACTED]

[REDACTED]

2. *Impugned Decision*

25. In the Impugned Decision, the Pre-Trial Chamber emphasised that ‘any requests to extend contact restrictions must be assessed on the basis of concrete, specific and up-to-date information’.²⁸

26. The Pre-Trial Chamber recalled the reasons that prompted it to impose restrictions on Mr Said’s contacts in the First Contact Restrictions Decision, noting:

The current contact restrictions in relation to Mr Said were imposed on the basis that, following the events for which the Warrant of Arrest was issued, Mr Said was reportedly involved in violent clashes as a member of the *Front Populaire pour la Renaissance de la Centrafrique*, and remained involved in or associated with this group.²⁹

27. Furthermore, the Pre-Trial Chamber stated that:

Another group that was recently involved in armed hostilities in the Central African Republic (the ‘CAR’), *la Coalition pour les Patriotes et le Changement*, spoke out against the transfer of Mr Said to the Court. More generally, victims and potential witnesses in the present case continue to face heightened risks due to the volatile security situation in the CAR, in combination with the Covid-19 pandemic.³⁰

28. It also noted that ‘while the Registry [had] not reported any incidents’ regarding Mr Said’s compliance with the restrictions, visits to the Detention Centre had been suspended due to Covid-19 measures and Mr Said had yet to submit a request to add contacts to his non-privileged telephone list.³¹

29. According to the Pre-Trial Chamber, the Prosecutor had demonstrated to the required threshold 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 101(2)(b) and (c) of the Regulations could materialise’.³² The

²⁸ [Impugned Decision](#), para. 30.

²⁹ [Impugned Decision](#), para. 31 (emphasis in original and footnotes omitted).

³⁰ [Impugned Decision](#), para. 31 (emphasis in original and footnotes omitted).

³¹ [Impugned Decision](#), para. 31.

³² [Impugned Decision](#), para. 32.

restrictions on telephone communications, visits and written correspondence, initially imposed for one month in the First Contact Restrictions Decision, were extended by the Pre-Trial Chamber in the Impugned Decision for another two months,³³ albeit with some variations.³⁴

B. Submissions before the Appeals Chamber

1. Submissions of the Defence

30. In the Appeal Brief, the Defence alleges that the Pre-Trial Chamber erred in law by failing to provide sufficient reasoning on the existence of any of the risks set out in regulation 101(2) of the Regulations.³⁵ The Defence submits that this error materially affected the Impugned Decision,³⁶ and requests the Appeals Chamber to reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber.³⁷

31. After setting out its understanding of the applicable law on the sufficiency of reasoning in judicial decisions,³⁸ the Defence avers that measures restricting individual liberties cannot be based on general and unreasoned decisions.³⁹ By reference to regulation 101(2) of the Regulations, it submits that there is a requirement to establish: (i) the facts; and (ii) a connection between those facts and the risks alleged.⁴⁰ According to the Defence, the reasoning in the Impugned Decision is ‘solely’ contained in paragraph 31, failing therefore to provide the ‘reasoning [...] expected of judicial decisions’.⁴¹

32. The Defence presents two sets of arguments. It first argues that there is a ‘lack of factual information to elucidate the Judge’s basis for identifying risks’.⁴² It secondly argues that there is a ‘lack of reasoning concerning the existence of any of the risks enumerated in regulation 101(2) of the Regulations’.⁴³

³³ [Impugned Decision](#), para. 40.

³⁴ [Impugned Decision](#), para. 33.

³⁵ [Appeal Brief](#), paras 31-67.

³⁶ [Appeal Brief](#), paras 68-73.

³⁷ [Appeal Brief](#), p. 24.

³⁸ [Appeal Brief](#), paras 20-27.

³⁹ [Appeal Brief](#), para. 29.

⁴⁰ [Appeal Brief](#), para. 32.

⁴¹ [Appeal Brief](#), paras 33-34.

⁴² [Appeal Brief](#), p. 11. *See also* paras 35-46.

⁴³ [Appeal Brief](#), p. 15. *See also* paras 47-67.

2. *Submissions of the Prosecutor*

33. In her response, the Prosecutor submits that by challenging ‘the sufficiency of the factors and evidence’ considered in the Impugned Decision, the Defence addresses an issue not certified for appeal, and requests that the Appeals Chamber dismiss the appeal on this basis alone.⁴⁴

34. In the alternative, the Prosecutor contends that, ‘[e]ven assuming that Mr Said’s appeal falls within the scope of the single issue certified’ for appeal, the Impugned Decision was sufficiently reasoned.⁴⁵ She submits that the Pre-Trial Chamber ‘sufficiently motivated the decision to extend the contact restrictions against Mr Said’ and ‘clearly explained why Mr Said’s involvement or association with [armed groups in the CAR] 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’.⁴⁶

C. **Determination of the Appeals Chamber**

1. *The Scope of the Appeal: the Prosecutor’s request to dismiss the appeal for exceeding the issue certified for appeal*

35. The Prosecutor submits that the appeal should be dismissed on the basis that the Appeal Brief goes beyond the issue certified for appeal by the Pre-Trial Chamber. She argues that ‘[a]lthough 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’.⁴⁷ The Prosecutor identifies the single issue certified for appeal as being ‘whether the Single Judge sufficiently motivated the decision’ extending the contact restrictions.⁴⁸

36. The Appeals Chamber notes that the issue the Pre-Trial Chamber granted leave to appeal was: ‘the sufficiency of the reasoning regarding the application of the

⁴⁴ [Response](#), para. 4.

⁴⁵ [Response](#), para. 14. *See also* paras 15-51.

⁴⁶ [Response](#), para. 2.

⁴⁷ [Response](#), para. 8.

⁴⁸ [Response](#), para. 10. *See also* paras 4, 8, 13.

threshold defined in regulation 101(2) of the Regulations to the factors identified by the Single Judge’ and the contention that the extent of the reasoning constitutes an error.⁴⁹

37. The Appeals Chamber recalls that it is for the relevant Chamber ‘to determine not only whether a decision may be appealed, but also to what extent’.⁵⁰ The Appeals Chamber notes that, in the past, it has declined to consider grounds of appeal that went beyond the scope of the issue in relation to which leave to appeal was granted.⁵¹ Nonetheless, the Appeals Chamber has also considered arguments that were outside the scope of the appeal if they were ‘intrinsically linked’ to the issue on appeal as certified by the relevant Chamber.⁵²

38. The Appeals Chamber is not persuaded by the Prosecutor’s argument that the present appeal should be dismissed in its entirety for exceeding the scope of the issue certified for appeal. Although certain arguments in the Appeal Brief may exceed such scope, the Defence submissions fall largely within the scope of the issue certified for appeal or are otherwise intrinsically linked to the issue (such as the Defence arguments concerning the propriety of the approach taken by the Pre-Trial Chamber in respect of

⁴⁹ [Decision on Leave to Appeal](#), para. 17; p. 9.

⁵⁰ Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute”](#), 16 December 2013, ICC-02/11-01/11-572 (OA5) (the ‘Gbagbo OA5 Judgment’), para. 63. *See also* 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. 20.

⁵¹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016](#), 8 March 2017, ICC-01/04-02/06-1817-Red (OA4) (confidential version filed on the same day) (the ‘Ntaganda Judgment on contact restrictions’), para. 85 referring to [Gbagbo OA5 Judgment](#), paras 63-66; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the VWU”](#), 8 October 2010, ICC-01/04-01/06-2582 (OA18), para. 45; Appeals Chamber, *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II](#), 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA2), para. 32.

⁵² [Ntaganda Judgment on contact restrictions](#), para. 85 referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#), 1 November 2016, ICC-02/11-01/15-744 (OA8), paras 13, 19. *See also* [Gbagbo OA5 Judgment](#), fn 142.

the disclosure of redacted confidential and *ex parte* information relating to the Prosecutor's applications for contact restrictions).

39. Submissions in the Appeal Brief which challenge the adequacy of the Prosecutor's arguments for contact restrictions, the sufficiency/relevance of the Prosecutor's evidence tendered in support of her request for contact restrictions or the reasonableness of the factual findings of the Pre-Trial Chamber in the Impugned Decision⁵³ exceed the scope of the issue certified for appeal and will not be considered by the Appeals Chamber.

40. The Appeals Chamber thus rejects the Prosecutor's request to dismiss the appeal outright and will address the merits of the appeal along the aforementioned parameters. This approach guarantees the fairness of the proceedings by ensuring that the Defence appeal is properly heard.

2. *The Requirement of Sufficient Reasoning*

41. A reasoned decision is paramount to the exercise of the right to a fair trial as enshrined in articles 55 and 67 of the Statute.⁵⁴ The Statute and the Rules of Procedure and Evidence (the 'Rules') in various places emphasise the importance of sufficient reasoning in decisions of Chambers.⁵⁵

42. Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted and applied in accordance with 'internationally recognized human rights'. As previously stated, '[h]uman rights underpin the Statute; every aspect of it [...]'.⁵⁶ Pursuant to article 21(3) of the Statute, and in light of the jurisprudence cited by the Defence in support of its appeal and the response of the Prosecutor thereto, it is appropriate to have due regard to international jurisprudence,⁵⁷ which has underlined

⁵³ [Appeal Brief](#), paras 42-43, 57-66.

⁵⁴ See also Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81](#), 14 December 2006, ICC-01/04-01/06-773 (OA5) (the '*Lubanga* OA5 Judgment'), para. 20.

⁵⁵ [Lubanga OA5 Judgment](#), para. 20.

⁵⁶ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 \(2\) \(a\) of the Statute of 3 October 2006](#), 14 December 2006, ICC-01/04-01/06-772 (OA4), para. 37.

⁵⁷ Article 38 of the [Statute of the International Court of Justice](#), which sets out the sources of international law, also refers to judicial decisions as subsidiary means for the determination of rules of law. In addition,

the importance of reasoning in allowing the accused person to usefully exercise available rights of appeal; it requires that courts ‘indicate with sufficient clarity the grounds on which they based their decision’.⁵⁸ The Appeals Chamber has consistently followed this jurisprudence when dealing with allegations of insufficient reasoning.⁵⁹

43. A Chamber’s provision of reasons in decisions also ‘enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision was taken and thereby properly exercise its appellate functions’.⁶⁰

44. It is of note that the ECtHR has held that whereas article 6(1) of the ECHR obliges courts to give reasons for their judgments, it ‘cannot be understood as requiring a detailed answer to every argument [...]. The extent to which this duty to give reasons applies may vary according to the nature of the decision’.⁶¹ Furthermore, the ICTY Appeals Chamber has considered that a Chamber is ‘not under the obligation to justify

the jurisprudence of international courts may be seen as indicative of subsequent agreement and subsequent practice in light of article 31(3) of the [1969 Vienna Convention on the Law of Treaties](#).

⁵⁸ ECtHR, [Hadjianastassiou v. Greece Judgment](#), 16 December 1992, Application no. 12945/87, para. 33. See also ECtHR, [Cerovšek and Božičnik v. Slovenia Judgment](#), 7 March 2017, Application nos. 68939/12 and 68949/12, para. 40.

⁵⁹ Appeals Chamber, [The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s Judgment pursuant to Article 74 of the Statute](#), 8 June 2018, ICC-01/05-01/08-3636-Red (A) (confidential version filed on the same day) (the ‘Bemba Appeal Judgment’), para. 50. The link between the requirement of sufficient reasoning in a decision and the right to appellate review is reflected in the Statute in relation to decisions for which such review is as of right, as well as with respect to issues for which a Chamber has granted leave to appeal under article 82(1)(d) of the Statute, such as in the case at hand. See Appeals Chamber, [The Prosecutor. Laurent Koudou Gbagbo, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled “Decision on the ‘Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo’”](#), 26 October 2012, ICC-02/11-01/11-278-Red (OA) (confidential version filed the same day) (the ‘Gbagbo OA Judgment’), para. 47 (wherein the Appeals Chamber applied its standard for sufficient reasoning first articulated in the context of redactions under rule 81 of the Rules to a decision on interim release pursuant to article 60(2) of the Statute, stating that ‘the same [standard] applies to decisions on applications for interim release under article 60 (2) of the Statute, in particular because there is an automatic right to appeal such decisions under article 82 (1) (b) of the Statute’). See [Lubanga OA5 Judgment](#), para. 20 (wherein the Appeals Chamber noted that both the ECtHR and the ICTY emphasised a linkage between a reasoned decision and the right of appeal and held that such analysis ‘applies with similar force to the case at hand’ and wherein the Appeals Chamber held that the linkage between the requirement of sufficient reasoning and the right of appeal also applies in the case where ‘the right of the appellant to appeal [...] was conditional on the granting of leave by the Pre-Trial Chamber pursuant to article 82 (1) (d) of the Statute’); See also articles 81, 82(1)(a)-(c), (2) and (4) of the Statute.

⁶⁰ [Bemba Appeal Judgment](#), para. 50.

⁶¹ ECtHR, [Ruiz Torija v. Spain Judgment](#), 9 December 1994, Application no. 18390/91, para. 29. See also ECtHR, [Van de Hurk v. The Netherlands Judgment](#), 19 April 1994, Application no. 16034/90, para. 61.

its findings in relation to every submission made'.⁶² However, 'parties to judicial proceedings can expect to receive a specific and explicit reply to those arguments that are decisive for the outcome of those proceedings. It must be clear from the decision that the essential issues of the case have been addressed'.⁶³

45. Similarly, in terms of the 'minimum threshold' required for a reasoned decision,⁶⁴ the Appeals Chamber has held that '[t]he extent of the reasoning will depend on the circumstances of the case'.⁶⁵ Such reasoning 'will not necessarily require reciting each and every factor that was before the [...] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion'.⁶⁶ 'Relatively sparse'⁶⁷ reasoning will not amount to an error if it is nonetheless 'sufficiently clear to discern the basis' for the finding challenged on appeal.⁶⁸

⁶² ICTY, Appeals Chamber, *The Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, [Appeals Judgment](#), 28 February 2005, IT-98-30/1-A, para. 23. In that case, the ICTY Appeals Chamber recalled that 'it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record', para. 23. *See also* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#), 8 March 2018, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5) (confidential version filed the same day), fn 150. *See also* IACtHR, [Escher v. Brazil, Judgment](#) of 6 July 2009, Series C No. 200, para. 139, stating '[t]he decisions should explain the grounds on which they were based, taking into consideration the arguments and the body of evidence provided to the proceedings. The obligation to state the reasons for the decision does not require a detailed response to every argument included in the application, but may vary according to the nature of the decision'; and, [Hernández v. Argentina, Judgment](#) of 22 November 2019, Series C No. 395, para. 122, stating '[t]he reasoning for a ruling should reveal the facts, grounds and legal provisions on which the organ that issued it based itself. In addition, it should show that the arguments of the parties have been duly taken in account and that all the evidence has been examined'.

⁶³ ECtHR, [Lobzhanidze and Peradze v. Georgia Judgment](#), 27 February 2020, Application nos. 21447/11 and 35839/11, para. 66 (*see also* para. 65). *See also* United Nations Human Rights Committee, [General Comment 32](#) (Article 14, Right to equality before courts and tribunals and to fair trial), providing at paragraph 29 that a judgment should include 'the essential findings, evidence and legal reasoning'.

⁶⁴ *See* [Gbagbo OA Judgment](#), para. 49, wherein the Appeals Chamber refers to the 'minimum threshold for a reasoned decision, as established in the [*Lubanga* OA5 Judgment]'

⁶⁵ [Lubanga OA5 Judgment](#), para. 20. *See also* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled "Decision on the 'Demande de mise en liberte provisoire de Maitre Aimé Kilolo Musamba'"](#), 11 July 2014, ICC-01/05-01/13-558 (OA2), para. 51

⁶⁶ [Lubanga OA5 Judgement](#), para. 20.

⁶⁷ *See* [Gbagbo OA Judgment](#), paras 48-49.

⁶⁸ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60\(3\) of the Statute'](#), 8 September 2015, ICC-02/11-01/15-208 (OA6) (the '*Gbagbo* OA6 Judgment'), para. 39.

46. The above principles will guide the Appeals Chamber in its review of the factual and legal analyses challenged in the Impugned Decision.⁶⁹

3. *The Sufficiency/Insufficiency of the Reasons for the Impugned Decision*

47. Regulation 101(2) of the Regulations provides:

The Prosecutor 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:

- (a) Is for the purposes of attempting to arrange the escape of a detained person from the detention centre;
- (b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;
- (c) Could be harmful to a detained person or any other person;
- (d) Could be used by a detained person to breach an order for non-disclosure made by a judge;
- (e) Is against the interests of public safety; or
- (f) Is a threat to the protection of the rights and freedom of any person.

48. Regulation 101(2) of the Regulations sets the threshold for a Chamber seized of a case to use its discretion, at the Prosecutor's request, to regulate contact between a detained person and any other person (bar counsel). The test for exercising this discretion is whether the Prosecutor has reasonable grounds to believe that such contact could lead to the occurrence of any of the six adverse consequences enumerated in that regulation.

49. A decision authorising restrictions on the contacts of a detained person pursuant to regulation 101(2) of the Regulations must sufficiently state the reasons upon which the Chamber based its decision. The obligation to provide reasons is particularly heightened in respect of decisions which interfere with the human rights of detained

⁶⁹ See [Gbagbo OA6 Judgment](#), para. 39, wherein in addressing the alleged legal error of the reversal of the burden of proof, the Appeals Chamber applied the *Lubanga* OA5 Judgment's standard for sufficient reasoning.

persons, such as in the present case.⁷⁰ Any interference with the rights of the detained person must be justified, the competing interests having been carefully balanced, and must be proportionately tailored to mitigate the risks or harms in regulation 101(2) of the Regulation.

50. The Defence argues that there is both a lack of reasoning as to the factual determinations and that there is a lack of reasoning as to the legal determinations made pursuant to regulation 101(2) of the Regulations in the Impugned Decision.

(a) Lack of reasoning as to the factual findings

(i) Assessing sufficiency of reasoning

51. In challenging the sufficiency of reasoning, the Defence questions the permissibility of the Pre-Trial Chamber relying in the Impugned Decision (at paragraph 31) on the reasoning given in other rulings and on imprecise references to the submissions of the parties made before it.⁷¹ The Defence refers in particular to the factual findings in the First Contact Restrictions Decision,⁷² and unspecified submissions in the Prosecutor's First Request for Contact Restrictions.⁷³ It argues that '[t]he practice of making reference in a decision to another filing or another ruling does not make the decision sufficiently reasoned';⁷⁴ and complains that one has to 'consult another filing to attempt to fathom the Single Judge's reasoning' in the Impugned Decision.⁷⁵

52. While in principle the essential reasoning of a decision must be stated in the body of the decision itself, the Appeals Chamber recalls that it has previously held that in determining how a Chamber has reached its conclusions, the reasoning of a decision

⁷⁰ The ECtHR has, for example, emphasised that 'where measures interfering with prisoners' correspondence are taken, it is essential that reasons be given for the interference, such that the applicant and/or his advisers can satisfy themselves that the law has been correctly applied to him and that decisions taken in his case are not unreasonable or arbitrary', see ECtHR, [Onoufriou v. Cyprus Judgment](#), 7 April 2010, Application no. 24407/04, para. 113. Correspondence has been deemed to include, for example, written correspondence and telephone contact. See e.g. ECtHR, [Petrov v. Bulgaria Judgment](#), 22 August 2008, Application no. 15197/02, paras 43, 51.

⁷¹ See e.g. [Appeal Brief](#), paras 36, 39, 41.

⁷² [Appeal Brief](#), paras 35-36 referring to [Impugned Decision](#), para. 31, referring to First Contact Restrictions Decision, para. 20.

⁷³ [Appeal Brief](#), para. 41 referring to [Impugned Decision](#), para. 31, referring to Prosecutor's First Request for Contact Restrictions.

⁷⁴ [Appeal Brief](#), para. 36.

⁷⁵ [Appeal Brief](#), para. 39.

may be read together with the references contained in the footnotes of the decision and the parties' submissions. For instance, in the *Gbagbo* OA Judgment, the Appeals Chamber stated:

In particular, if the reasoning provided in the Impugned Decision is read together with the evidence referred to in the footnotes and the submissions of Mr Gbagbo and the Prosecutor, it is clear not only what conclusions the Chamber reached in relation to the grounds of detention under article 58 (1) (b) (i) to (iii) of the Statute, but also on what basis. Thus, while the Pre-Trial Chamber should have provided fuller reasoning, the Impugned Decision still meets the minimum threshold for a reasoned decision [...].⁷⁶

53. Drawing those elements together in that case, the Appeals Chamber found that even though the reasoning in the decision impugned was 'relatively sparse', it was 'still comprehensible how the Pre-Trial Chamber reached the conclusions it did', enabling the appellant to exercise his right to appeal.⁷⁷

54. Returning to the present appeal, in considering the arguments made by the Defence, the Appeals Chamber will, in line with its previous jurisprudence, analyse the reasoning in the Impugned Decision together with material cited in its footnotes and the submissions of the Prosecutor made in furtherance of the request for contact restrictions upon which the Pre-Trial Chamber relied.

55. With this in mind, the Appeals Chamber turns to the Defence's argument that the Impugned Decision does not explain how the Pre-Trial Chamber arrived at 'the main factual substratum of the decision'.⁷⁸ Namely, the assertion made by the Pre-Trial Chamber at paragraph 31 of the Impugned Decision that:

The current contact restrictions in relation to Mr Said were imposed on the basis that following the events for which the Warrant of Arrest was issued, Mr Said was reportedly involved in violent clashes as a member of the *Front Populaire pour la Renaissance de la Centrafrique*, and remained involved in or associated with this group.

56. It is argued by the Defence that there is 'no explanation in the decision itself to allow the Parties and observers to understand on what the assertion aforesaid rests'.⁷⁹

⁷⁶ [Gbagbo OA Judgment](#), para. 49. See also [Gbagbo OA6 Judgment](#), para. 61.

⁷⁷ [Gbagbo OA Judgment](#), para. 49.

⁷⁸ [Appeal Brief](#), para. 35.

⁷⁹ [Appeal Brief](#), para. 36. See also para. 35.

57. Reading the contested factual finding in paragraph 31 of the Impugned Decision together with its footnotes and the material referred to therein (including the First Contact Restrictions Decision, the Prosecutor’s First Request for Contact Restrictions and the Warrant of Arrest), the Appeals Chamber rejects the Defence’s argument that it is unclear how the Pre-Trial Chamber came to such finding as to Mr Said’s reported involvement/association with the FPRC and his reported involvement in violent clashes as a result. Whilst the Defence argues that one cannot understand the basis for the factual assertion in paragraph 31 from the Impugned Decision when read as a stand-alone decision,⁸⁰ the Appeals Chamber notes that the Pre-Trial Chamber did cross-refer to other sources or previous decisions in explaining its, albeit concise, reasoning. While it would have been preferable for the Pre-Trial Chamber to have explained in a fuller manner its sources and line of reasoning, the minimum threshold for a sufficiently reasoned factual finding is met.

58. In making the statement in paragraph 31 of the Impugned Decision, the Pre-Trial Chamber refers, in a footnote,⁸¹ to paragraph 20 of the First Contact Restrictions Decision. In turn, at paragraph 20 of the First Contact Restrictions Decision, the Pre-Trial Chamber refers, on the one hand, to the Warrant of Arrest and, on the other hand, to the Prosecutor’s submissions in the Prosecutor’s First Request for Contact Restrictions. These will be considered consecutively.

**(a) Reference in First Contact Restrictions
Decision to the Warrant of Arrest**

59. [REDACTED]

⁸⁰ [Appeal Brief](#), para. 36.

⁸¹ [Impugned Decision](#), para. 31, fn 50.

■ [REDACTED]

[REDACTED]

60. [REDACTED]

[REDACTED]

████████████████████ From all of the above, one is thus able to understand the Pre-Trial Chamber's referral to its earlier finding in the Warrant of Arrest as the basis for its finding recalled in paragraph 31 of the Impugned Decision, namely, that Mr Said was reportedly involved in the violent disruption of an electoral campaign and armed clashes in the CAR as a member of the FPRC following the events for which the Warrant of Arrest was issued.

(b) Reference in First Contact Restrictions Decision to the Prosecutor's First Request for Contact Restrictions

61. As to the finding of Mr Said's continued involvement in or association with the FPRC, made at paragraph 20 of the First Contact Restrictions Decision, the Appeals Chamber notes that the Pre-Trial Chamber relies on the Prosecutor's submissions in support thereof. It states that 'the Prosecutor's submissions in support of the [Prosecutor's First Request for Contact Restrictions] demonstrate Mr Said's continued involvement in or association with the FPRC'.⁹¹

62. Regrettably, and as argued by the Defence, the reference in the Impugned Decision to the Prosecutor's First Request for Contact Restrictions is 'devoid of specific reference to the Prosecutor's submissions' and is '[un]accompanied by any footnote or any explanation of how, in arriving at that conclusion, the Single Judge analysed the Prosecutor's arguments'.⁹² In making the factual finding, the Pre-Trial Chamber does not refer to any particular elements of, or evidence in, the Prosecutor's submissions in the Prosecutor's First Request for Contact Restrictions that it found persuasive and of assistance in finding that Mr Said was continuously involved in, or associated with, the FPRC.

63. This notwithstanding, the Appeals Chamber has examined the Prosecutor's submissions and notes that the Prosecutor did bring forward evidence in the Prosecutor's First Request for Contact Restrictions that goes to support the Pre-Trial

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⁹¹ The Pre-Trial Chamber referred to the 'Prosecutor's submissions in support of the present Request', which it had termed the First Request for Contact Restrictions.

⁹² [Appeal Brief](#), para. 41.

66. The Appeals Chamber finds that while it would have been preferable for the Pre-Trial Chamber to have provided some additional information, such as specific paragraph numbers in the Prosecutor’s filings or specific items of evidence relevant to distinct determinations, the overall factual basis for the decision applying restrictions to Mr Said’s contacts is discernible from the reasoning in the Impugned Decision and consequently the Appeals Chamber finds no error. However, the Appeals Chamber strongly emphasises the need for the Pre-Trial Chamber to provide fuller reasoning in any future decisions restricting contacts, which by their very nature interfere with the human rights of detained persons, including referencing specific paragraphs and footnotes of the parties’ submissions and the evidence relied upon, and explaining their import to the findings made.

67. The question of disclosure of this material to the Defence is discussed immediately below.

(ii) Disclosure

68. The Appeals Chamber turns to the challenge brought by the Defence as to the permissibility of the Pre-Trial Chamber referring in its factual findings and reasons to information that had not been disclosed to the Defence.⁹⁸ Specifically, the Defence maintains that it was not in a position to understand the basis of the Impugned Decision. First, since it was based on evidence that was disclosed only after the Impugned Decision was issued (i.e., the evidence underlying the Warrant of Arrest),⁹⁹ and the prior disclosure of that particular evidence was deemed unnecessary by the Pre-Trial Chamber for the Defence to respond to the Prosecutor’s Request to Extend Contact Restrictions.¹⁰⁰ Second, since certain factual assertions made by the Prosecutor as to Mr Said’s role in the FPRC were ‘unsupported by any footnote’ in the Prosecutor’s First Request for Contact Restrictions, this prevented the Defence from verifying the factual bases for the First Contact Restrictions Decision.¹⁰¹

69. The Appeals Chamber has previously found that the fact that information may be withheld from a detained person in proceedings under regulation 101 of the Regulations

⁹⁸ See e.g. [Appeal Brief](#), paras 40, 44-45.

⁹⁹ This information was disclosed to the Defence on 14 April 2021 (*see above*, para. 20).

¹⁰⁰ [Appeal Brief](#), paras 39-40.

¹⁰¹ [Appeal Brief](#), para. 44.

‘is not *per se* unfair’.¹⁰² Thus, any such non-disclosure is not in and of itself impermissible, but must be determined on a case-by-case basis. The relevant Chamber ‘must ensure the fairness of the proceedings in compliance with articles 64 (2) and 67 of the Statute, and regulation 101 (3) of the Regulations of the Court, which stipulates that, generally, the “detained person shall be informed of the Prosecutor’s request [to restrict contact] and shall be given the opportunity to be heard or to submit his or her views”’.¹⁰³ The Chamber must ‘continuously balance’ the right of the detained person, pursuant to regulation 101(3) of the Regulations, to be informed of the Prosecutor’s request for contact restrictions, against the possible need to withhold information.¹⁰⁴ The result of the foregoing is that ‘the [relevant] Chamber may sometimes review evidence which the detained person has not seen’, but ‘[i]n doing so, the [relevant] Chamber must be cognisant that the detained person, in proceedings under regulation 101 of the Regulations of the Court, has not had an opportunity to challenge the evidence and it should, therefore, consider such evidence with that in mind’.¹⁰⁵ Where reliance in a decision is placed on redacted or *ex parte* material, the detained person must be able to understand, to extent possible, the basis for the decision from the reasons discerned from the materials in *toto* available to him or her.

(a) **Material underlying the Warrant of Arrest**

70. The Appeals Chamber first turns to the Defence complaints that it did not have sight of the documents underlying the Warrant of Arrest prior to the issuance of the Impugned Decision by the Pre-Trial Chamber.¹⁰⁶ The given reasons for the *ex parte*, Prosecutor only classification of those documents were, [REDACTED]

¹⁰² [Ntaganda Judgment on contact restrictions](#), para. 89, referring to Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’](#), 13 May 2008, ICC-01/04-01/07-475 (OA), para. 62.

¹⁰³ [Ntaganda Judgment on contact restrictions](#), para. 89.

¹⁰⁴ [Ntaganda Judgment on contact restrictions](#), para. 89. See also ECtHR, *Rowe and Davis v. the United Kingdom Judgment*, 16 February 2000, Application no. 28901/95, paras 60-61.

¹⁰⁵ [Ntaganda Judgment on contact restrictions](#), para. 89.

¹⁰⁶ [Appeal Brief](#), para. 40, referring to the Defence request for the disclosure of the following documents:

[REDACTED]

[REDACTED] Those reasons for the *ex parte* classification of the concerned documents were accepted by the Pre-Trial Chamber.¹⁰⁸

71. Moreover, prior to responding to the Prosecutor’s Request to Extend Contact Restrictions and prior to the issuance of the Impugned Decision, the Defence filed its Request for Disclosure of numerous documents to enable it to respond to the Prosecutor’s request. In its Disclosure Decision rendered on the issue, the Pre-Trial Chamber, *inter alia*, considered and expressly rejected the Defence’s request [REDACTED]

[REDACTED]

72. [REDACTED] The Appeals Chamber is satisfied that the question of the disclosure of the concerned documents was not overlooked in the process leading to the Impugned Decision, and that the Pre-Trial Chamber gave reasons as to why the documents would not be disclosed to the Defence.

73. [REDACTED]

[REDACTED]
¹⁰⁸ [Warrant of Arrest](#), para. 27.
[REDACTED]

[REDACTED]

[REDACTED] the Appeals Chamber, considers that other material brought before the Pre-Trial Chamber by the Prosecutor purportedly supporting the factual statement made in the Impugned Decision at paragraph 31 as to Mr Said's involvement in the FPRC was disclosed to the Defence prior to the issuance of the Impugned Decision.¹¹²

(b) Material underlying the First Contact Restrictions Decision

74. As to the Defence complaint that it did not have access to the factual bases for the First Contact Restrictions Decision because the Prosecutor did not, in the Prosecutor's First Request for Contact Restrictions, provide supporting evidence for certain factual assertions,¹¹³ the Appeals Chamber notes [REDACTED]

[REDACTED]

75. Although this assertion is unsupported, the Appeals Chamber notes that the Prosecutor does cite other material in the Prosecutor's First Request for Contact Restrictions¹¹⁵ which was made accessible to the Defence, following the Disclosure

[REDACTED]

¹¹² See e.g. [REDACTED]

¹¹³ [Appeal Brief](#), para. 44.

¹¹⁵ Prosecutor's First Request for Contact Restrictions, para. 6, fn 2.

Decision and prior to the rendering of the Impugned Decision, suggesting that Mr Said was an FPRC member [REDACTED]

(c) Conclusion

76. Whilst emphasising the importance of disclosure in order to allow a detained person to respond to an application for contact restrictions, in accordance with regulation 101(3) of the Regulations, the Appeals Chamber finds that there is no material effect in the Defence not having had access to, either the material underlying the Warrant of Arrest upon which the Pre-Trial Chamber ultimately relied prior to responding to the Prosecutor's Request to Extend Contact Restrictions, or the material underlying the First Contact Restrictions Decision, as it was able to challenge the Impugned Decision on appeal through other material. [REDACTED]

[REDACTED] in cases where there is a series of decisions restricting contacts further to an *ex parte* decision,¹¹⁸ the Chamber is under a continuing obligation to review the necessity of such classification and the possibility of issuing a lesser redacted version.

(b) Lack of reasoning as to the existence of the risks in regulation 101(2) of the Regulations of the Court

77. The Appeals Chamber turns now to the arguments of the Defence that the Pre-Trial Chamber did not provide sufficient reasoning to demonstrate its application of the law to the facts it had found established. The Defence maintains that '[i]t is not apparent from the Impugned Decision how the facts alleged substantiate any of the risks

¹¹⁷ Decision on Disclosure, para. 22.

¹¹⁸ The Appeals Chamber notes that a third decision restricting contacts for a subsequent two month period has since been issued by the Pre-Trial Chamber (Decision on the 'Prosecution's Second Request for the Extension of Contact Restrictions', 5 May 2021, ICC-01/14-01/21-69-Conf, para. 30; p. 10). A public redacted version was notified on 26 April 2022 ([ICC-01/14-01/21-69-Red](#))

enumerated in regulation 101(2) so as to warrant measures restricting a detained person's contact with the outside world'.¹¹⁹

78. As noted by the Defence,¹²⁰ regulation 101(2) of the Regulations exhaustively enumerates the risks, the existence of which permits restrictions on the contacts of a detained person. In the Impugned Decision, the Pre-Trial Chamber found that the Prosecutor had demonstrated to the required threshold 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 101(2)(b) and (c) of the Regulations could materialise'.¹²¹ That is to say, the Pre-Trial Chamber found that the Prosecutor had made out reasonable grounds to believe that Mr Said's unrestricted contact, 'could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation', or 'could be harmful to a detained person or any other person', pursuant to regulation 101(2)(b) and (c) of the Regulations, respectively.¹²²

79. The question before the Appeals Chamber is whether the Pre-Trial Chamber provided sufficient reasons for determining that the Prosecutor had reasonable grounds to believe that unrestricted contacts by Mr Said could cause such harm. The Appeals Chamber has previously outlined that the extent of reasoning depends on the circumstances of the case.¹²³ A Chamber thus has a degree of discretion as to what to address in its reasoning.¹²⁴

80. In considering the present matter, the Appeals Chamber cannot ignore the fact that the Impugned Decision was a sequential decision maintaining and varying the pre-existing regime of contact restrictions that had been established by the Pre-Trial Chamber in the First Contact Restrictions Decision. Indeed, the Pre-Trial Chamber noted that the basis for the Prosecutor's request to *extend* contact restrictions was the same as that in the Prosecutor's First Request for Contact Restrictions for their initial

¹¹⁹ [Appeal Brief](#), para. 47.

¹²⁰ [Appeal Brief](#), para. 32.

¹²¹ [Impugned Decision](#), para. 32.

¹²² [Impugned Decision](#), para. 32.

¹²³ *See above*, paras 41-46.

¹²⁴ [Bemba Appeal Judgment](#), para. 54.

imposition. In the Impugned Decision, the Pre-Trial Chamber restated the Prosecutor's submission in the Prosecutor's Request to Extend Contact Restrictions that '[t]he circumstances justifying the imposition of contact restrictions as identified in the Prosecutor's First Request [for Contact Restrictions] and the [First Contact Restrictions Decision] *have not changed*'.¹²⁵ In these particular circumstances, the Pre-Trial Chamber would naturally have had regard to the reasoning in its First Contact Restrictions Decision when deciding whether such restrictions should be extended.

81. It based its conclusion that the harms in regulation 101(2)(b) and (c) of the Regulations could materialise, 'as a result of Mr Said's continuous involvement in or association with armed groups in the volatile context of the CAR',¹²⁶ in part on the factual findings it made in the First Contact Restrictions Decision (as to Mr Said's alleged involvement in violent clashes in the CAR as a member of the FPRC prior to, and after, the issuance of the Warrant of Arrest).¹²⁷ It also based its conclusion on its considerations: (1) that an armed group in the CAR had spoken out against the transfer of Mr Said to the Court; (2) that victims and potential witnesses face heightened risks due to the volatile security situation in the CAR, in combination with the Covid-19 pandemic; and (3) that whereas there had been no reports of breaches of the contact restrictions, visits to the detention centre had been suspended due to Covid-19 measures and no contacts had yet been added to Mr Said's non-privileged telephone list.¹²⁸

82. Given that the Pre-Trial Chamber, in its First Contact Restrictions Decision, reached its conclusion under regulation 101(2) of the Regulations '*in the light of the Prosecutor's submissions*',¹²⁹ it is also necessary to recall the submissions in the Prosecutor's First Request for Contact Restrictions, [REDACTED]

¹²⁵ [Impugned Decision](#), para. 13, quoting the Prosecutor's Request to Extend Contact Restrictions, para. 5 (emphasis added).

¹²⁶ [Impugned Decision](#), para. 32.

¹²⁷ [Impugned Decision](#), para. 31.

¹²⁸ [Impugned Decision](#), para. 31, on the basis of the Registry Report.

¹²⁹ First Contact Restrictions Decision, para. 20 (emphasis added).

[REDACTED]

83. On the basis of the aforecited paragraphs of the Impugned Decision, the First Contact Restrictions Decision and the Prosecutor's First Request for Contact Restrictions, the Appeals Chamber understands that the extension of the contact restrictions on Mr Said was based on the Pre-Trial Chamber's consideration that there were reasonable grounds to believe that [REDACTED]

[REDACTED]

That there had so far been no breach of the contact restrictions imposed was regarded as inconsequential, given that there had been no practical opportunity for such breach in any case.

84. The Appeals Chamber has not, as stated above,¹³¹ analysed whether the findings made by the Pre-Trial Chamber pursuant to regulation 101(2)(b) and (c) of the Regulations were correct or reasonable, as these arguments fall outside the remit of this appeal.

85. Whilst the Appeals Chamber finds that the Pre-Trial Chamber provided sufficient reasoning, this is towards the minimum that could have been provided. That a Chamber may choose to refer to its previous decisions presupposes that those decisions are sufficiently reasoned. This is particularly so in cases where the decision concerns restrictions on the fundamental human rights of detained persons. It is therefore also incumbent on the Prosecutor to fully substantiate, factually and legally, and to add

¹³¹ See above, paras 35-40.

references to, any request made to a Chamber to restrict the contacts of a detained person, pursuant to regulation 101(2) of the Regulations. Accordingly, while emphasising the need for sufficient reasoning in decisions restricting fundamental human rights, the Appeals Chamber has not in this instance identified insufficient reasoning in the Impugned Decision and rejects the arguments of the Defence in this regard.

V. APPROPRIATE RELIEF

86. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case it is appropriate to confirm the decision.

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

გ. ლორდკიპანიძე

Judge Gocha Lordkipanidze
Presiding



Judge Piotr Hofmański



Judge Luz del Carmen Ibáñez
Carranza



Judge Marc Perrin de Brichambaut



Judge Solomy Balungi Bossa

Dated this 17th day of May 2022

At The Hague, The Netherlands