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**International
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Court**

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Date: 7 November 2023

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of ""Defence Observations on the 'Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaißsona Ordered by Trial Chamber V''", (ICC-01/14-01/18-2024-Conf-Red), filed on 14 August 2023

Source: Defence of Patrice-Edouard Ngaißsona

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

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I. INTRODUCTION

1. The Defence of Mr Ngaïssona (“the Defence”) hereby provides its observations on the “Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V”, filed on 1 August 2023 (“Registry Report”).¹ The Defence submits that the concerns raised in the Registry Report are unfounded, as the material discussed by Mr Ngaïssona in the reported conversations consists of case-related local news, [REDACTED].
2. The Defence also responds to the “Prosecution’s Observations on the ‘Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V’”, filed on 7 August 2023 (“Prosecution Observations”).² The Defence requests Trial Chamber V (“the Chamber”) to reject all requests made in the Prosecution Observations.

II. CONFIDENTIALITY

3. The present response is filed on a confidential, *ex parte* basis pursuant to Regulation 23(1)*bis* of the Regulations of the Court (“RoC”) since it concerns information relating to Mr Ngaïssona’s private and family life. The Defence files a confidential redacted version simultaneously, and will file a public redacted version as soon as practicable.

III. PROCEDURAL HISTORY

4. Since his transfer to the Court on 23 January 2019, and at the Prosecution's demand,³ Mr Ngaïssona has been subject to measures severely restricting his contacts with the outside world. Mr Ngaïssona is only permitted to have contact with close family members. Contacts with other individuals have been suspended

¹ ICC-01/14-01/18-2012-Conf-Exp.

² ICC-01/14-01/18-2018-Conf.

³ ICC-01/14-01/18-98-Conf-Exp, para. 1, referring to ICC-01/14-01/18-2-US-Exp.

for almost four years, whereas his family communications have been subject to active monitoring, which includes active monitoring of Mr Ngaïssona's closest of kin.⁴ The Registry has been instructed to provide a report every six months concerning the implementation of the restrictions on Mr Ngaïssona's contacts.⁵

5. On 20 July 2022, with the filing of its sixth report on the implementation of restrictions on Mr Ngaïssona's contacts, the Registry flagged that Mr Ngaïssona had made reference to [REDACTED] during his [REDACTED], suggesting that Mr Ngaïssona may have had access to unregulated internet content, transmitted to his computer [REDACTED].⁶ In its observations filed on 9 August 2022, the Defence clarified that the above-referenced [REDACTED] consist of local press, which [REDACTED], given that it contains case-related material which has a direct relevance to the proceedings against Mr Ngaïssona.⁷ On 19 September 2022, the Chamber ruled that while no general categorisation could be made, it concurred with the Defence that local press can constitute case-related material, and [REDACTED] may be considered part of the local press.⁸
6. On 10 May 2023, the Chamber granted a Defence request to lift the active monitoring order for Mr Ngaïssona's [REDACTED] visits only and to reinstate two family members of Mr Ngaïssona onto his list of contacts. It decided however that all non-privileged communications with family members, save for Mr Ngaïssona's [REDACTED] visits, should remain subject to active monitoring.⁹

⁴ Restrictions were imposed by the following decisions of Pre-Trial Chamber II: ICC-01/14-01/18-98-Conf-Exp; ICC-01/14-01/18-106-Conf-Exp-Red; ICC-01/14-01/18-114-Conf-Exp-Red; ICC-01/14-01/18-137-Conf-Exp; ICC-01/14-01/18-176-Conf-Red; ICC-01/14-01/18-240-Conf-Exp; ICC-01/14-01/18-357-Conf-Exp; ICC-01/14-01/18-374-Conf-Exp; ICC-01/14-01/18-413-Conf-Exp and Trial Chamber V: ICC-01/14-01/18-484-Conf-Exp; ICC-01/14-01/18-582-Conf; ICC-01/14-01/18-672-Conf; ICC-01/14-01/18-965-Conf-Exp; ICC-01/14-01/18-1136-Conf; ICC-01/14-01/18-1575-Conf.

⁵ Ibid.

⁶ ICC-01/14-01/18-1536-Conf-Exp, paras 14-17.

⁷ ICC-01/14-01/18-1540-Conf-Exp, paras 2, 10-21.

⁸ ICC-01/14-01/18-1575-Conf, para 16.

⁹ ICC-01/14-01/18-1863-Conf-Exp, paras 8,10.

7. On 11 July 2023, the Registry sent an email to the Chamber, expressing a potential concern with the fact that during two non-privileged phone calls in June 2023, Mr Ngaiissona had once again made reference to having viewed [REDACTED] on his [REDACTED].¹⁰ On 14 July 2023, the Defence clarified that the [REDACTED] mentioned by Mr Ngaiissona during his non-privileged communications consist of local press, transmitted to Mr Ngaiissona by the Defence [REDACTED].¹¹

IV. APPLICABLE LAW

8. Pursuant to Article 67 of the Rome Statute (“Statute”), an accused person benefits from the right to “have adequate time and facilities for the preparation of the defence and to communicate freely with counsel [...] in confidence”. A detained person shall be able to enforce this right in accordance with regulation 151(1) of the Regulations of the Registry (“RoR”), and “communicate fully [...] with his or her defence counsel [...]”. Rule 73(1) of the Rules of Procedure and Evidence (“Rules”) further specifies that “[...] communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure [...]”.
9. Regulation 99 of the RoC provides for the general entitlements of detained persons, including their entitlement to keep themselves “regularly informed of the news by way of newspapers, periodicals and other publications, radio and television broadcasts”. The entitlement of keeping oneself informed of the news while being detained is further enshrined under Regulation 166(10) of the RoR.
10. In accordance with Regulations 167, 168 and 170 of the RoR, incoming items and mail received from outside the detention centre are subject to inspection by detention staff. Nevertheless, the Chief Custody Officer (“CCO”) may not review

¹⁰ Email by Jamila Zoubir-Afifi on behalf of the Registry to Trial Chamber V, 11 July 2023 at 17:03.

¹¹ Email by Michael Rowse on behalf of the Ngaiissona Defence to Trial Chamber V, 14 July 2023 at 14:43.

“items addressed to or sent by counsel for a detained person and assistants to counsel entitled to legal privilege” as per Regulation 169 of the RoR.

V. SUBMISSIONS

a) The concerns raised in the Registry Report are unfounded

11. The Registry Report notes that Mr Ngaïssona has received [REDACTED] that he “appears” to have viewed on his computer at the detention centre. In this regard, it raises concerns with the fact that “if it is non-privileged [c]ontent, (...) the [c]ontent has not been monitored to ensure compliance with the Chamber’s restrictions on contacts (...)”.¹² Given the extensive explanations provided exactly one year ago on the nature and scope of the transmission of local news to Mr Ngaïssona [REDACTED],¹³ the Defence is surprised by the Registry’s submissions. It further regrets the Registry’s suggestion that the material viewed by Mr Ngaïssona on [REDACTED]. This is especially so given that the Defence provided assurances in this regard well ahead of the filing of the Registry Report.¹⁴
12. The Defence incorporates by reference its previous submissions on the nature and scope of the material transmitted to Mr Ngaïssona [REDACTED], as well as on the underlying reasons that render this material privileged.¹⁵ Given however that the Registry appears to continue to take issue with the same matters, the Defence considers it necessary to reiterate some limited remarks. As already pointed out, the [REDACTED] in order to transmit the local news to Mr Ngaïssona. This consists of [REDACTED]. This material comments on the social, political and security situation in the Central African Republic (“CAR”). It further amounts to case-related material, as it provides important information and context allowing the Defence, as well as Mr Ngaïssona himself, to remain apprised of the social,

¹² ICC-01/14-01/18-2012-Conf-Exp, paras 10-11.

¹³ ICC-01/14-01/18-1540-Conf-Exp; ICC-01/14-01/18-1554-Conf.

¹⁴ Email by Michael Rowse on behalf of the Ngaïssona Defence to Trial Chamber V, 14 July 2023 at 14:43.

¹⁵ ICC-01/14-01/18-1540-Conf-Exp, paras 10-16.

political and security situation in CAR. The situation in CAR has an obvious bearing on Defence strategy and investigations, all the more so at a stage where the Defence is finalising its strategy and list of witnesses.

13. Non-case related material is transmitted to Mr Ngaïssona via the normal import procedure in place at the detention centre. This includes personal material such as [REDACTED] transmitted to the Defence by Mr Ngaïssona's [REDACTED]. Following the noticing of limited oversights in this regard in September 2022, which the Chamber was made aware of, the Defence has increased scrutiny over the material transmitted [REDACTED], and allocated additional team members to this task.¹⁶ All material is reviewed carefully and assessed as of public interest and relating to the social, political and security situation in CAR, and as case-related, before transmission [REDACTED]. This is to ensure that no material which is destined to Mr Ngaïssona personally, such [REDACTED], be transmitted [REDACTED]. The Defence also pays utmost caution to ensure that the [REDACTED] "communications from non-privileged individuals which are, on the face of it, addressed to a broader audience, but in substance clearly directed at the accused", as directed by the Chamber.¹⁷

14. Unlike argued in the Prosecution Observations, there exists no "loophole" that is being exploited to circumvent the security regulations in place at the detention centre.¹⁸ Rather, the Defence is making [REDACTED] that is put at its disposal in order to communicate case-related material to Mr Ngaïssona in full compliance with Article 67 of the Statute, as well as Rule 73(1) of the Rules and Regulation 169 of the RoR. The Defence finds the Prosecution's suggestion that it could facilitate transmission of a message by a third party to Mr Ngaïssona [REDACTED]

¹⁶ Email from Lauriane Vandeler on behalf of the Ngaïssona Defence to Trial Chamber V and the Registry, 12 September 2022, at 07:51.

¹⁷ ICC-01/14-01/18-1575-Conf, para 17.

¹⁸ ICC-01/14-01/18-2018-Conf.

inappropriate.¹⁹ It underscores, once more, that each item is reviewed and listened to in its entirety before transmission, in order to avoid any potential circumvention of the restrictions in place.

15. Turning to the two non-privileged conversations that were flagged in the Registry Report, the Defence notes that the content being discussed undoubtedly amounts to public content and local news. Notably [REDACTED].²⁰ As to the second conversation, [REDACTED].²¹ [REDACTED].
16. The Defence submits that the content of the transcripts annexed to the Registry Report dispels all doubts on the nature of the material that the Defence makes available to Mr Ngaïssona [REDACTED]. This consists of public interest material concerning the present situation in the CAR, which is of direct relevance to Mr Ngaïssona's case and Defence preparations. Even when its relevance may not be immediately obvious, as would instead be the case for a press article or video mentioning a person of relevance to the case, local press remains important to assess the political and security context in the country, which may influence the behaviour and testimonies of upcoming witnesses. What is more, material which may not have an obvious relevance for an outside observer may instead have a relevance for Mr Ngaïssona, in light of his in-depth knowledge of the political context in CAR. It may also be relevant to assess the political position of certain witnesses. As such, Mr Ngaïssona's entitlement to keep himself apprised of the local news stems directly from his right to a fair trial pursuant to Article 67, and not only from Regulation 99 of the RoC.
17. Lastly, the Registry appears to suggest that there exists an alternative avenue for the transmission of audio-video material, through the "import procedure" in place at the detention centre. Merely as a point of clarification, and for the Chamber's

¹⁹ Ibid, para 13.

²⁰ ICC-01/14-01/18-2012-Conf-Exp-AnxI, page 1.

²¹ ICC-01/14-01/18-2012-Conf-Exp-AnxII, page 1. [REDACTED]

edification, the Defence wishes to clarify that while the import procedure is suited to the import of printed documents, it does not allow the import of non-privileged audio-video materials into the detention centre. The only audio-video documents that may be imported are those that are placed on a non-writable CD or DVD (in practice, commercial CDs or DVDs). The Defence has enquired specifically with the detention centre about the possibility of importing non-privileged audio-video materials, either via a writable CD, or via a USB stick, or via email or a shared folder or cloud. The detention centre's response was that none of these options are possible in light of security reasons and resource constraints. The Acting CCO unequivocally informed the Defence that "the ICC-DC does not accept non-privileged audios or videos as imports *in any way*" (emphasis added).²² The Defence is aware that this is not the appropriate forum to discuss detention-related matters. However, it takes this opportunity to point out that should the Registry continue to advance that videos that consist of local press are not case-related materials that can be transmitted [REDACTED], it should put in place an import system that is at pace with current technological and information developments, in order to ensure Mr Ngaïssona's meaningful ability to enjoy his rights under Regulations 99 of the RoC and 166(10) of the RoR.

b) The requests made in the Prosecution Observations should be rejected

18. The Defence now turns to the Prosecution Observations. All of the Prosecution's requests contained therein should be rejected. With respect to the restrictions in place, the Prosecution requests the reinstating of Mr Ngaïssona's contact restrictions as imposed on 17 April 2020,²³ whilst at the same time requesting the reinstating of random active monitoring (jointly 'Prosecution request to increase restrictions').²⁴ The Defence is puzzled by this request, which reveals a complete

²² Email from Mr Harry Tjonk to the Ngaïssona Defence, 17 November 2022, at 11:00. Should the Chamber deem it necessary, the Defence stands ready to provide this email exchange.

²³ ICC-01/14-01/18-2018-Conf, para. 1.

²⁴ *Ibid*, section B.

unawareness of the restrictions currently in place. Notably, the Prosecution appears to ignore that the restrictions put in place in 2020 remain in place to this day, *at its own continued request*, with only limited exceptions relating to the live visits of Mr Ngaïssona's [REDACTED] and the reinstating of [REDACTED] of Mr Ngaïssona's [REDACTED] onto his list of contacts, which the Prosecution did not oppose.²⁵ The Prosecution's request to "reinstate" the April 2020 contact restrictions is therefore confusing. Insofar as it should be interpreted as calling for the renewed monitoring of Mr Ngaïssona's [REDACTED] visits and for the removal, once again, of [REDACTED], the Defence submits that these requests should be rejected, as the Prosecution has failed to show how they would assist in limiting the alleged risks ventilated in the Prosecution Observations. The Registry Report has not flagged any incidents concerning Mr Ngaïssona's non-privileged conversations. Rather, it has raised potential concerns with respect to Mr Ngaïssona's privileged communications. Therefore, the imposition of further restrictions onto Ngaïssona's non-privileged communications would be pointless in the case at hand, as it would in no way limit potential risks stemming from the transmission of [REDACTED]. The two issues are entirely separate, and should not be conflated at the expense of Mr Ngaïssona's right to private and family life.

19. The Prosecution also requests to reinstate random active monitoring.²⁶ The Defence is again puzzled by this request, given that *all* of Mr Ngaïssona's contacts with the outside world (with the sole exception, as of three months ago, of Mr Ngaïssona's [REDACTED] visits²⁷) are actively and *constantly* monitored.²⁸ This is not the first time the Prosecution inappropriately requests the reinstating or increasing of random active monitoring.²⁹ The Prosecution's apparent

²⁵ ICC-01/14-01/18-1863-Conf-Exp, paras 8-10.

²⁶ ICC-01/14-01/18-2018-Conf, section B.

²⁷ ICC-01/14-01/18-1863-Conf-Exp, para. 8.

²⁸ *Ibid.*

²⁹ ICC-01/14-01/18-1542-Conf, where the OTP similarly argued that it was necessary to "increase[e] the frequency of random active monitoring, at a minimum".

unawareness of the restrictions that were put in place *at its own request* is, with respect, disturbing. The Defence notes that for the past four years, contact restrictions have exacted and continue to exact a very serious toll on Mr Ngaïssona's well-being and ability to meaningfully exercise his right to private and family life, by limiting or *tout court* denying his ability to maintain contact with his family and friends. The Prosecution's superficial requests to "reinstate" or "increase" monitoring, while clearly being unaware of the exact restrictions in place, reveal a total disregard of the consequences similar requests have on Mr Ngaïssona's right to private and family life.

20. As to the Prosecution's request to obtain transcripts of the conversations annexed to the Registry report ('Prosecution request for transcripts'), the Defence notes that the transcribed conversations consist of Mr Ngaïssona discussing [REDACTED]. The conversations do not concern the case against Mr Ngaïssona, nor could they ever be interpreted as to pose a threat whatsoever to the integrity of the current proceedings. In accordance with the Chamber's prior practice in this regard, the Prosecution request for transcripts should be rejected, as granting it would amount to a disproportionate infringement of Mr Ngaïssona's right to private and family life.³⁰

21. Lastly, the Prosecution request to be provided with the identities of the purveyors of the content discussed in Mr Ngaïssona's conversations, as well as with the content itself (jointly 'Prosecution request for content') should be rejected. As pointed out in paragraphs 12-16 above, this content was transmitted [REDACTED] in the context of the professional relationship between counsel and Mr Ngaïssona. It consists of privileged material, which is not subject to disclosure.³¹ The Defence

³⁰ ICC-01/14-01/18-1575-Conf, para. 31.

³¹ Article 67(1)(b) of the Rome Statute; Rule 73 of the Rules; Article 8 of the European Convention on Human Rights.

incorporates by reference its previous extensive submissions in this regard,³² and recalls that the privileged nature of client-attorney communications may only be overcome in the event where there exists sufficient evidence to establish that said communications are being used to further a criminal scheme or fraud.³³ The Prosecution has not presented any evidence nor made submissions in this sense. Notwithstanding the qualification of the content as privileged, and as such non-disclosable, the Defence also notes that with its request, the Prosecution wishes to “fully and independently assess any potential security implications concerning witnesses”.³⁴ In this regard, the Defence submits that the Chamber has enough information before it to assess that the material poses absolutely no threat whatsoever to the proceedings or the safety and security of witnesses.

VI. RELIEF SOUGHT

In light of the above, the Defence respectfully requests the Chamber to:

- REJECT the Prosecution request to increase restrictions;
- REJECT the Prosecution request for transcripts;
- REJECT the Prosecution request for content.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

³² ICC-01/14-01/18-1554-Conf, paras 24-26.

³³ ICC-01/05-01/13-947, para. 15. See ECtHR, Case of André and another v. France, 18603/03, Judgement dated 24 July 2008, para. 42.

³⁴ ICC-01/14-01/18-2018-Conf, para 4.

Dated this 7 November 2023

At The Hague, the Netherlands.