

**Cour
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**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/18**

Date: **30 April 2020**

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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

**Confidential, *EX PARTE*, only available to the Prosecution, the Defence of Patrice-
Edouard Ngaïssona, the Registrar, and the Detention Section**

**Prosecution's Response to Confidential Redacted Version of 'Defence Request for
leave to appeal the 'Decision on Mr Ngaïssona's Restrictions on Contacts and
Communications in Detention'(ICC-01/14-01/18-484-Conf-Exp), ICC-01/14-01/18-
496-Conf-Exp-Red**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the NGAISSONA Defence's request for leave to appeal the "Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention" ("Request").¹ The Request fails to establish an appealable issue. All four purported 'issues' merely disagree with the Decision. Further, the Request does not meet either of the cumulative requirements of article 82(1)(d).

II. CONFIDENTIALITY

2. This response is filed "Confidential, *EX PARTE*, only available to the Prosecution, the NGAISSONA Defence, the Registrar, and the Detention Section, given that it responds to a filing and concerns a decision of the same designation.

III. SUBMISSIONS

A. The Request fails to identify appealable issues

3. None of the four purported issues advanced in the Request constitutes an 'appealable issue' under article 82(1)(d).² The First Issue disagrees procedurally with the manner in which the Chamber engaged in its review and determination of the contact restrictions. The Second Issue, Third Issue, and Fourth Issue, disagree or express contrary opinions on how the Chamber exercised its discretion.

4. The 'First Issue' — "[w]hether the Chamber erred in extending the pre-trial restrictions to the trial stage while failing to consider the matter *de novo* despite the clear wording of regulation 101(2) which requires that the Prosecution file a request

¹ ICC-01/14-01/18-496-Conf-Exp-Red; ICC-01/14-01/18-484-Conf-Exp-Red ("Decision").

² ICC-01/04-168, para. 9.

to the "Chamber seized of the case"³ — is not appealable. Nor, is the argument advanced by NGAISSONA legally tenable.

5. The First Issue merely disagrees with the Chamber's disposition of NGAISSONA's prior submission that "the [contact restrictions] should be carefully examined by the Chamber and be entirely re-litigated *de novo* based on a new Prosecution request."⁴ Neither the Request, nor the Defence's prior submissions, provides any authority for this position, whereas the plain text of regulation 101(2) of the Regulations of the Court ("RoC") makes no mention of any required '*de novo*' review by a Chamber.⁵

6. Separately, the Request fails to substantiate any ostensible error in the Chamber's exercise of discretion. Contrary to the Defence assertions, the Chamber noted its intention to issue its decision on the question of contact restrictions⁶ upon the Parties' and Participants' submissions. It goes without saying that the factual and procedural history of the case as well as an accused's detention record are matters that a Chamber may reasonably and justifiably take into consideration in properly assessing and determining any associated *risks* regarding their conditions.

7. Contrary to the Request⁷, in so far as regulation 101(2) may be triggered on application of the Prosecutor, the Prosecution's Observations on the Registry's Ninth Report⁸ clearly constitute exactly this. Specifically, the Observations requested that the contact restrictions imposed by Pre-Trial Chamber II ("Pre-Trial Chamber") be continued.⁹ NGAISSONA's contention that "the legal requirements of regulation 101(2) and 101(3), and the procedural guarantees provided therein were effectively

³ ICC-01/14-01/18-496-Conf-Exp-Red, p.5.

⁴ ICC-01/14-01/18-460-Conf-Exp, para. 17; see ICC-01/14-01/18-484-Conf-Exp, para. 10.

⁵ ICC-01/14-01/18-496-Conf-Exp-Red, para. 10 (citing only the Defence's own previous submissions, ICC-01/14-01/18-460-Conf-Exp, para. 17); cf regulation 101(2).

⁶ ICC-01/14-01/18-484-Conf-Exp-Red, para. 12.

⁷ ICC-01/14-01/18-496-Conf-Exp-Red, para. 11.

⁸ ICC-01/14-01/18-453-Conf-Exp.

⁹ ICC-01/14-01/18-453-Conf-Exp, paras. 2, 11.

bypassed"¹⁰ are unsubstantiated and unavailing. In any event, they express only NGAISSONA's contrary views on the manner in which the Chamber ought to have undertaken the relevant inquiry and are thus, not appealable.

8. The 'Second Issue' — "[w]hether the Chamber erred in finding that there were "reasonable grounds to believe" under regulation 101(2) that the lifting of restrictions could prejudice the outcome of the proceedings, namely by negatively impacting on the Prosecution's ongoing investigations and the protection of victims and witnesses, in a case where none of the alleged violations of the restrictions regime in place related to interference with the Prosecution's investigations or victims and witnesses"¹¹ — is not appealable.

9. Like the First Issue, the Second Issue merely disagrees with the Decision. Rather than contesting the procedure applied, here the Request seeks to counter the Chamber's exercise of discretion. That said, nothing in the Request identifies any colourable legal error in the Chamber's exercise of its discretion in assessing the risk that the Accused continues to pose to the integrity of the proceedings.

10. The Defence's position that NGAISSONA's prior violations of the Pre-Trial Chamber's contact restriction order "lack[s] a logical connection with the grounds provided under regulation 101(2)"¹², simply argues with the Chamber's assessment. Certainly, a Chamber taking into consideration an accused's prior intentional disregard of a Court order to refrain from certain conduct while in detention is an appropriate factor in determining the likelihood of their prospective violation of a subsequent order of the Court.¹³ That NGAISSONA considers that the factors identified by the Chamber "do not present an 'objectively justifiable risk' which may warrant the imposition of restrictions" is an opinion he may hold, however, this does not transform the subject into an appealable issue. Nor, is NGAISSONA's claim that

¹⁰ ICC-01/14-01/18-496-Conf-Exp-Red, para. 12.

¹¹ ICC-01/14-01/18-496-Conf-Exp-Red, p. 5.

¹² ICC-01/14-01/18-496-Conf-Exp-Red, para. 13.

¹³ ICC-01/14-01/18-484-Conf-Exp-Red, para. 22.

the Registry and Pre-Trial Chamber erroneously assessed his prior violations of the contact restrictions substantiated by his self-serving characterisation of his behaviour, or the assertion that his conduct was “entirely benign.”¹⁴

11. In any event, the above only underscores that the basis of the purported issue is NGAISSONA’s disagreement with the outcome of the Chamber’s assessment of factors relevant to determining risk.

12. The ‘Third Issue’ — “[w]hether the Chamber erred by failing to assess the cumulative effect of the passage of time and the absence of indications of interference with the proceedings in its assessment of whether there had been a change in circumstances warranting the lifting or the modification of the restrictions”¹⁵ – is not appealable.

13. NGAISSONA’s contentions merely disagree with the Chamber’s exercise of its discretion in assessing factors plainly relevant to determining whether and to what extent contact restrictions should be continued or imposed. The Request concedes that the Chamber took account of the effect of the passage of time in assessing the relevant risks¹⁶, as well that that Chamber was not persuaded that this factor warranted the lifting of the contact restrictions.¹⁷ The Chamber, like the Pre-Trial Chamber before, it noted expressly that “refraining from prohibited conduct should be the norm.”¹⁸

14. That NGAISSONA predicates this Third Issue on the Chamber’s alleged failure to “substantively engage with [this factor] in its evaluation of whether restrictions on Mr Ngaïssona’s communications remain warranted,” or that the Chamber should have been “led to conduct a more concrete – and *de novo* – assessment of whether

¹⁴ ICC-01/14-01/18-496-Conf-Exp-Red, para. 14.

¹⁵ ICC-01/14-01/18-496-Conf-Exp-Red, p. 5.

¹⁶ ICC-01/14-01/18-496-Conf-Exp-Red, para. 18. (*citing* ICC-01/14-01/18-484-Conf-Exp, para. 22).

¹⁷ ICC-01/14-01/18-484-Conf-Exp-Red, para. 24.

¹⁸ ICC-01/14-01/18-484-Conf-Exp-Red, para. 24. ICC-01/14-01/18-424-Conf-Exp-Corr-Red, para. 28.

circumstances continued to warrant contact restrictions"¹⁹, is unavailing. Rather, it simply underscores his mere disagreement regarding this issue.

15. The 'Fourth Issue' — "[w]hether the Chamber erred in determining that the current measures constitute the least restrictive measures available in light of the aim pursued"²⁰ — is not appealable.

16. Again, NGAISSONA's arguments merely disagree with the Chamber's assessment of the risks concerning the circumstances of his detention. The thrust of NGAISSONA's claim here is that the Decision does not strike a proportionate balance between his right to private and family life and the protection of the integrity of the proceedings²¹ — clearly a balance well within the appropriate discretion of the Chamber.²²

17. NGAISSONA's position concerning the claimed disproportionality of the restrictions imposed²³ by the Decision, does not transform this issue into one that is properly appealable pursuant to article 82. Moreover, NGAISSONA's refrain that the Chamber was obliged to conduct "a *de novo* assessment of whether restrictive measures pursuant to regulation 101(2) were necessary", simply rehashes the same untenable position advanced in the First Issue.

18. On the above, the Chamber should dismiss the Request for failure to identify an appealable issue.

B. The Request fails to meet the remaining article 82(1)(d) criteria

19. At best, only the First Issue *might* amount to an "appealable issue" to the extent that it alleges the Chamber's disregard of an ostensible regulatory procedural norm (i.e., a *de novo* assessment). Even assuming *arguendo* this is the case — which it is not,

¹⁹ ICC-01/14-01/18-496-Conf-Exp-Red, paras. 18, 19.

²⁰ ICC-01/14-01/18-496-Conf-Exp-Red, p. 5.

²¹ ICC-01/14-01/18-496-Conf-Exp-Red, para. 23.

²² ICC-01/14-01/18-484-Conf-Exp-Red, para. 17.

²³ ICC-01/14-01/18-496-Conf-Exp-Red, para. 24.

as noted — the Request nevertheless fails to meet the cumulative requirements of article 82(1)(d)²⁴ for this, and the other ostensible issues.

20. None of the four issues significantly affects the fair or expeditious conduct of the proceedings, or the outcome of the case. Nor, is the Appeals Chamber's immediate intervention required.

21. *First*, the Decision does not create an immutable system or condition concerning NGAISSONA's contact restrictions. On the contrary, the Chamber can vary the relevant measures if the prevailing conditions change, and has further ensured a regular reporting procedure to review the continued propriety of the restrictions every three months.²⁵ The Chamber has "acknowledge[d] its obligation to regularly review the restrictions in place and will do so where circumstances change and require reassessment of the Current Restrictions."²⁶ *Second*, the continued contact restrictions are in fact necessary and proportionate, particularly given that they are limited in nature and duration, and moreover subject to interim review.²⁷ *Third*, NGAISSONA's arguments concerning the effect of the Decision on the fairness of the proceedings or outcome of a trial are speculative, conclusory, or unsubstantiated. *Fourth*, the Defence's contention that immediate appellate intervention may materially advance the proceedings is effectively unexplained, given the nature of the arguments in the Request. Moreover, as noted above, the express terms of the Decision undermine this claim.

22. The Request fails to set out a cogent basis for interlocutory appeal because it either misreads or ignores the import of the Decision. This includes, not only the Chamber's commitment to review the circumstances of detention regularly and as necessary in the interim, but its express "determination to protect the evidence from undue influence and to ensure victims' and witnesses' safety", per its statutory

²⁴ ICC-01/14-01/18-243-Conf, paras. 24-25.

²⁵ ICC-01/14-01/18-484-Conf-Exp-Red, para. 29.

²⁶ ICC-01/14-01/18-484-Conf-Exp-Red, para. 26.

²⁷ ICC-01/14-01/18-484-Conf-Exp-Red, para. 29, and p. 17 (citing ICC-01/14-01/18-176-Conf-Red, para. 32).

obligations and its concern for preserving the integrity of the proceedings and the protection of witnesses, as necessary to the conduct of a fair trial.²⁸ Simply asserting in different ways the remaining criteria under article 82(1)(d) without substantiating how or why they are met as the Request does, cannot reasonably satisfy the requisite legal threshold.

23. Finally, nothing in the Request establishes that the Decision will inevitably, or even reasonably, affect the fairness or the outcome of trial. To the contrary, the Decision seeks to ensure it, within the appropriate exercise of the Chamber's discretion. Appellate intervention would not advance the proceedings or promote their expeditious conduct, but would instead delay them unnecessarily.

IV. CONCLUSION

24. Accordingly, the Prosecution requests the Chamber deny the Request in all respects.



Fatou Bensouda, Prosecutor

Dated this 30th day of April 2020
At The Hague, The Netherlands

²⁸ ICC-01/14-01/18-484-Conf-Exp-Red, para. 21.