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**International
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Date: **26 September
2022**

TRIAL CHAMBER V

Before:

**Judge Bertrand 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Public Redacted Version of “Ngaïssona Defence Response to the “Prosecution’s
Observations on the “Sixth Registry Report on the Implementation of the Restrictions
on Contact of Mr Ngaïssona Ordered by Trial Chamber V” (ICC-01/14-01/18-1536-
Conf-Red), 1 August 2022”, (ICC-01/14-01/18-1542-Conf), 11 August 2022”, ICC-01/14-
01/18-1554-Conf, 25 August 2022**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence for Mr Ngaïssona (the “Defence”) hereby responds to the “Prosecution’s Observations on the “Sixth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V””¹ (the “Prosecution’s Observations”).
2. The Defence opposes all requests contained in the Prosecution’s Observations for the reasons elaborated below.

II. Relevant procedural history

3. On 1 June 2020, Trial Chamber V (the “Chamber”) issued its “Decision Recalling the Reporting Procedure for the Review of Restrictions” (“Chamber’s Decision”)² and ordered, *inter alia*, the Registry to file reports on the implementation of restrictive measures and to inform the Chamber of any violation of said-measures.³
4. On 1 August 2022, the Registry issued *ex parte* its “Sixth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V” (the “Report”) reporting on “[REDACTED]”,⁴ a confidential redacted version of which was made available to all parties to the case on the same day.⁵ The Report identifies Mr Ngaïssona allegedly making references to contents that was relayed by his Defence Team [REDACTED] (“Content”).⁶

¹ ICC-01/14-01/18-1542-Conf.

² ICC-01/14-01/18-540. Pursuant to the Chamber’s Decision ICC-01/14-01/18-856-Conf, dated 28 January 2021, this document was reclassified as “Public”.

³ ICC-01/14-01/18-540, para. 13 (i).

⁴ ICC-01/14-01/18-1536-Conf-Exp, para. 1.

⁵ ICC-01/14-01/18-1536-Conf-Red.

⁶ ICC-01/14-01/18-1536-Conf-Red, paras 8-15.

5. On 9 August 2022, the Defence submitted *ex parte* its Observations on the Report (the “Defence Observations”),⁷ a confidential redacted version of which was notified to all parties to the case on 12 August 2022.⁸
6. On 11 August 2022, the Prosecution filed its observations on the Report requesting the Chamber to, *inter alia*, direct the Registry to provide “the transcripts of the Calls, the identity of the interlocutors and of those persons providing the Content to the Accused as well as the Content itself”.⁹
7. In anticipation of the present response, the Defence filed a lesser redacted confidential version of the Defence Observations on 19 August 2022.¹⁰

III. 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”.¹¹ A detained person shall be able to enforce this right in accordance with regulation 151(1) of the Regulations of the Registry (“RoR”),¹² and “communicate fully [...] with his or her defence counsel [...]”.¹³
9. 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 [...]”.¹⁴

⁷ ICC-01/14-01/18-1540-Conf-Exp, notified on 10 August 2022.

⁸ ICC-01/14-01/18-1540-Conf-Red.

⁹ ICC-01/14-01/18-1542-Conf, para. 18.

¹⁰ ICC-01/14-01/18-1540-Conf-Red2.

¹¹ Article 67(1)(b) of the Statute.

¹² Regulation 151(1) of the RoR.

¹³ Regulation 97(1) of the Regulations of the Court (“RoC”).

¹⁴ Rule 73(1) of the Rules, further providing two specific exceptions.

10. In accordance with regulations 167, 168 and 170 of the RoR,¹⁵ 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 “items addressed to or sent by counsel for a detained person and assistants to counsel entitled to legal privilege,” as per regulation 169(1)(a) of the RoR.¹⁶

IV. Confidentiality

11. In accordance with regulation 23 bis(1) of the RoC, the present response is classified as confidential, as it responds to a document of the same level of classification.

V. Submissions

A. The Prosecution disregarded the reporting procedure and its Observations should hence not be considered

12. As a preliminary remark, the Defence notes that the Prosecution disregarded the reporting procedure set out in the Chamber’s Decision dated 1 June 2020. Pursuant to that procedure, the Prosecution should have filed any observations on the Report within five (5) days of its notification, which would have allowed the Defence to make its observations on both the Report and the Prosecution’s Observations five (5) days later maximum.¹⁷ Since the Prosecution waited until

¹⁵ Regulation 167 of the RoR (“Any item received from outside the detention centre, including any item brought by any visitor for a detained person, shall be subject to security controls and shall be transported through the detention centre by staff [...]”); Regulation 168 of the RoR (“On arrival at the detention centre, all correspondence and mail, including packages, shall be inspected.”); Regulation 170 of the RoR (“A detained person may receive packages, which shall be dealt with in accordance with regulations 167, 168, 169 and 192 sub-regulations 3 and 4.”).

¹⁶ Regulation 169(1)(a) of the RoR (“The Chief Custody Officer shall review all incoming and outgoing mail with the exception of items addressed to or sent by: (a) Counsel for a detained person and assistants to counsel entitled to legal privilege; [...]”).

¹⁷ Chamber’s Decision, para. 13. See also *ibid.*, para. 14, referring to “[REDACTED]”. The Defence submits that the decision of the Chamber on the suspension of deadlines during the recess did not apply to this specific case as the Registry’s Report cannot be considered as a “[REDACTED]”. See also email of Trial Chamber V dated 19 July 2022, at 10:45am clarifying that “[REDACTED]”.

11 August 2022 to file its observations, *i.e.* on a date that was posterior to the time limit imposed on the Defence to submit its own observations, the Defence was not in a position to make any observations on the Prosecution's Observations within the time limit fixed in the reporting procedure, *i.e.* within 10 days of notification of the Registry Report.¹⁸ Therefore, these circumstances force the Defence to make its observations on the Prosecution's Observations and underlying requests by way of separate filing. The disregarded reporting procedure does not provide for the present scenario. Since the Prosecution's Observations (i) also contain a "motion" as per the Chamber's email decision dated 19 July 2022 and (ii) were submitted after 22 July 2022, the Defence submits that the suspension of deadlines during recess now applies to the present response and that the time limit to respond is thus, by default, ten (10) days from Monday, 15 August 2022 (corresponding to the end of the summer recess), pursuant to that same email decision.

13. In light of the above, the Defence respectfully asks the Chamber to decline to consider the Prosecution's Observations.

14. In the alternative, should the Chamber decide to dismiss the above procedural arguments and consider the Prosecution's Observations, the Defence will now turn to the merits of the Prosecution's Observations and substantiate as to why all the Prosecution's requests should be rejected.

B. The Prosecution's request to increase the frequency of random active monitoring, while unsubstantiated, is misguided

15. In its Observations, the Prosecution requests "maintaining the current restrictions and increasing the frequency of *random* active monitoring"

¹⁸ Chamber's Decision, para. 13(iii).

(emphasis added).¹⁹ Yet, to the Defence's knowledge, Mr Ngaïssona is not subject to "random active monitoring" but rather to "active monitoring", which means that the Detention Centre systematically monitors *all* his non-privileged communications, including calls, visits and correspondence. The only communications of Mr Ngaïssona that are not monitored are the communications he exchanges with his counsels which, as developed below, is subject to client-attorney privilege. Therefore, the monitoring of Mr Ngaïssona's communications is already at its maximum and cannot be increased. The request of the Prosecution is thus misguided.²⁰

16. Regardless, there is no basis for an increase of the restrictions currently in place. The active monitoring of Mr Ngaïssona's non-privileged communications did not reveal any breach of the current restrictions. In other words, the Registry Report did not show that Mr Ngaïssona breached any detention conditions. The reported conversations were with verified contact persons. In addition, it was nowhere reported that during these conversations Mr Ngaïssona used obscure or coded language or discussed his case, which the active monitoring would not have failed to reveal had it been the case.²¹ The Defence respectfully submits that the content of the Report should dispel any concern for the integrity of the proceedings as the Registry does not report any concerns whatsoever on the safety and protection of witnesses arising from the reported monitored conversations.

¹⁹ Prosecution's Observations, para. 4. *See also ibid.*, para. 14, requesting "more frequent and systematic monitoring of the Accused's communications".

²⁰ *Compare* ICC-01/14-01/18-484-Conf-Exp, para. 15 with ICC-01/14-01/18-484-Conf-Exp, footnote 53. *See also* ICC-01/14-01/18-672-Conf, para. 21.

²¹ Discussions over public information need to be distinguished from the strategic / professional reasons why the Defence may have handed over the underlying material to Mr Ngaïssona in the context of the preparation of his defence.

17. In its Third Restrictions Decision, the Chamber noted the parties' right to [REDACTED].²²

18. Not only have there been no changes in the current circumstances which would warrant any increase of the restrictions in place – if possible at all - but to the contrary, certain circumstances relied as a ground to justify the current restrictions no longer exist, at least to their full extent. For instance, the fact that the vast majority of the witnesses allegedly relevant to the charges against Mr Ngaïssona have already testified before the Chamber greatly undermines the incentive - if any - and therefore the alleged risk of [REDACTED].²³ As a result, and contrary to the Prosecution's submissions, the alleged risk of witnesses becoming reluctant or unwilling to continue their cooperation with the Prosecution is not being "augmented" but considerably reduced.²⁴

19. [REDACTED].²⁵ [REDACTED][REDACTED].

20. Hence, the Prosecution's request to increase the current restrictions should be rejected.²⁶

C. The Prosecution's request to obtain copies of the transcripts of the Calls and the identities of Mr Ngaïssona's interlocutors should be rejected as disproportionately prejudicial to Mr Ngaïssona's right to privacy and family

21. For the same reasons as above, the Trial Chamber should reject the Prosecution's request to have access to the transcripts of the telephone calls together with the identities of Mr Ngaïssona's interlocutors.

²² ICC-01/14-01/18-672-Conf, para. 26.

²³ Second Restrictions Decision, ICC-01/14-01/18-582-Conf, para. 11, referring to First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 23.

²⁴ Prosecution's Observations, para. 10.

²⁵ Prosecution's Observations, para. 10.

²⁶ It also seems contradictory to argue on the one hand that the current restrictions are proportionate and on the other hand to request an increase of those restrictions. See Prosecution's Observations, para. 11.

22. The events reported do not involve disclosure to the public of confidential information concerning witnesses who have or are about to testify in this case, including their identities. As held in the past in the Fourth Restrictions Decision in relation to letters, the reported conversations the transcripts of which the Prosecution requires access do [REDACTED].²⁷

23. There is no breach of the restrictions on contacts in the present case and no reasons for these conversations, which have already been actively monitored, to be further reviewed by the Prosecution. Accordingly, this request should be rejected.

D. Requesting access to the providers of the Content and the Content itself is contrary to the fundamental principle of legal privilege

24. It is the Defence's understanding that the Prosecution requests access to the Content and the names of its providers ("Request for Access") only to the extent that it may be further identified or recovered by the Registry.²⁸ Even assuming that the Registry would recover this material, which is an issue that is at best premature as no requests or instructions in this sense have been made, the Defence submits that granting the Request for Access from the Prosecution would be unfounded, unprecedented and excessive as it is contrary to the fundamental principle of legal privilege as reflected in the text of Article 67(1)(b) and further elaborated in Rule 73(1).

25. As previously developed in the Defence Observations, the Content, to the extent that it could ever be identified with certainty, has been communicated to Mr Ngaïssona [REDACTED].²⁹ Furthermore, it consists of local press publications from different public media outlets, which have generally been assessed by the Defence, after careful review by counsels and assistants to

²⁷ ICC-01/14-01/18-965-Conf-Red, para. 18, referring to *ibid.*, paras 14-16.

²⁸ Prosecution's Observations, paras 5, 18.

²⁹ Defence Observations, para. 16.

counsels, as necessary for the preparation of Mr Ngaïssona's case. As mentioned in the Defence Observations, the Prosecution is trying to build its case on information from media outlets. Therefore, the information contained in the press publications are of relevance on the preparation of witness examinations. These communications qualify as being made in the context of the professional relationship between Mr Ngaïssona and his counsels. Therefore, contrary to the Prosecution's submissions,³⁰ the Content cannot be considered as written correspondence subject to inspection within the meaning of regulations 168 and 169 of the RoR, as it concerns information addressed by counsels and assistants to counsels entitled to legal privilege to Mr Ngaïssona as opposed to written mail addressed by third parties.³¹ This is also the Registry's own analysis of the situation.³² The communication of the Content by the Defence to Mr Ngaïssona can therefore not (i) be considered as non-privileged mail communications and (ii) fall within the limitations set out for them.

26. These communications being made in the context of the professional relationship set out in rule 73(1) of the Rules and being therefore presumed privileged, they are protected by professional secrecy and, save for highly exceptional circumstances, are not subject to disclosure.³³ As already noted before this Court, "the right to professional privilege is instrumental to the need to obtain legitimate legal advice on a confidential basis".³⁴ While not absolute, it forms the basis of the relationship of trust between lawyer and client and guarantees the freedom of exercise of the profession of lawyer without

³⁰ Prosecution's Observations, paras 8, 13.

³¹ See regulation 169(1)(a) of the RoR.

³² Registry Report, para. 18, stating that : "[REDACTED] ."

³³ Article 67(1)(b) of the Rome Statute; rule 73 of the Rules; article 8 of the European Convention on Human Rights.

³⁴ ICC-01/05-01/13-408, page 5.

improper interference, in particular in light of Article 8 of the European Convention on Human Right.³⁵

27. *First*, the Defence notes that the Prosecution seems to limit its Request for Access to the scenario where the communications in question are considered non-privileged. Indeed, the Prosecution seems to concede from the outset that should the Content be considered as part of privileged communications, its monitoring, and therefore its access, could not be required.³⁶

28. As a side note, the distinction between privileged and non-privileged material in the context of client-attorney communications is artificial and a mischaracterisation of the law. In practice, the measures having to be taken to isolate the non-privileged material, if any, from the privileged material would in themselves require already an unacceptable interference with the professional legal privilege, which should be presumed to exist in relation to *all* communications transmitted from the Defence to Mr Ngaïssona. This presumption can only be rebutted in exceptional situations which is not applicable here.³⁷ The Defence submits that the material in question is privileged because of the nature of the relationship between the client and his counsels as well as its form of transmission, not the substance of its contents. It is only in the exceptional scenario where a chamber is satisfied, based on sufficient evidence, that litigious material is used with the intent to further crimes that it may, only then, exercise its discretion to decide on the scope of materials covered by the crime/fraud exception, in application of a strict framework.³⁸ The Prosecution has not brought forward any arguments that would rebut that presumption and allow this distinction to be made. Therefore,

³⁵ See ECtHR, Case of André and another v. France, 18603/03, Judgement dated 24 July 2008.

³⁶ Prosecution's Observations, para. 8, suggesting that [REDACTED].

³⁷ See paragraph 31 below.

³⁸ 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.

the Content should undeniably be considered as part of privileged communications.

29. Moreover, the Prosecution does not make any expressed submissions aiming at accessing privileged material. The only justification given by the Prosecution to convince the Chamber to grant the Request for Access is “to assess any potential security implications and to determine whether any additional measures should be requested”.³⁹ These vague concerns cannot be a basis justifying the forfeiture of legal privilege and seem to confirm the circumscribed scope of the Request for Access.

30. *Second*, should it turn out that the Prosecution’s Request for Access in fact extends to privileged communications, the Defence strongly contests the Prosecution’s entitlement in the present case to such a prejudicial infringement of the rights of the Defence and Mr Ngaïssona.

31. Indeed, the Prosecution did not make the Request for Access under the crime / fraud privilege exception and it lacks any legal basis upon which the Trial Chamber can grant it to the extent that it relates to privileged communications.⁴⁰ The Prosecution does not present any evidence, let alone *sufficient evidence*, that the Defence and/or Mr Ngaïssona might use the privileged [REDACTED] with a view to furthering a criminal scheme.⁴¹ No evidence has ever been presented that would strongly indicate that this is the case.⁴²

32. In any event, whether or not, and to which extent, Mr Ngaïssona should be entitled to have access to the type of information included in the Content

³⁹ Prosecution’s Observations, para. 15. *See also* para. 14 : “Likewise, *for the same reasons*, [...]” (emphasis added).

⁴⁰ ICC-01/05-52-Red2, para. 4; ICC-01/05-01/13-408, page 5; ICC-01/05-01/13-947, para. 14.

⁴¹ ICC-01/05-52-Red2, paras 3-5; ICC-01/05-01/13-408, page 5; ICC-01/05-01/13-947, para. 14.

⁴² *Compare*, for instance, with the type of evidence presented in the Prosecution’s requests ICC-01/05-44-Conf-Exp and ICC-01/05-52-Red2.

through privileged channels of communication is not a question that might affect the security of the witnesses or the integrity of the proceedings. In addition, so far as the Defence is aware, the Prosecution never requested any restrictions in relation to Mr Ngaïssona's access to news information in accordance with regulation 101(1) of the RoC, access which he is entitled to under regulation 99(1) of the RoC.⁴³ Similarly, the Prosecution fails to substantiate how obtaining access to the names of the Defence team members having sent [REDACTED]the Content [REDACTED] would be relevant to "potential security implications".⁴⁴ Therefore, the outcome on this very specific question, which is pending before the Chamber, should not have any impact on the adjudication of the present request, which should be rejected irrespective of the Chamber's decision.

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

- DECLINE to consider the Prosecution's Observations;

34. In the alternative:

- REJECT the Prosecution's request to increase the frequency of "random active monitoring";
- REJECT the Prosecution's request to obtain access to the transcripts of the phone calls and the identities of the related interlocutor(s); and
- REJECT the Prosecution's request to obtain access to the materials allegedly referenced in Mr Ngaïssona's conversations and sent by the Defence to its client.

⁴³ Regulation 101(1) of the RoC states: "A Chamber seized of the case may, at the request of the Prosecutor, order that access to the news be restricted, if it is considered necessary in the interests of the administration of justice, in particular, if unrestricted access could prejudice the outcome of the proceedings against that detained person or the outcome of any other investigation."

⁴⁴ Prosecution's Observations, paras 15-17.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

The Hague, 26 September 2022