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Date: 6 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Observations on the “Eighth Registry
Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona
Ordered by Trial Chamber V”(ICC-01/14-01/18-2012-Conf-Red)”,
ICC-01/14-01/18-2018-Conf, 7 August 2023**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) provides its observations on the Registry’s 1 August 2023 “Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V” (“Eighth Report”).¹ For the reasons set out below, Trial Chamber V (“Chamber”) should reinstate the restrictions on NGAISSONA’s contacts in detention, as provided in its 17 April 2020 Decision (“Order”).²

2. The Eighth Report raises —for a second time³ — serious concerns regarding NGAISSONA’s apparent access to non-privileged communications [REDACTED] at the ICC Detention Centre.⁴ And moreover, the content of which the Registry admittedly lacks the capacity to ensure the Accused’s compliance with the conditions of his detention.

3. The Chamber’s reinstatement of the Order is justified and proportional, in view of the attendant risks that the Eighth Report reveals.

4. The Prosecution also requests that the transcripts of the non-privileged telephone calls of [REDACTED]⁵ be made available immediately and in their entirety, and the identities of the interlocutors disclosed. In addition, [REDACTED] the identities of the purveyors of [REDACTED] discussed in the Calls [REDACTED], as the Registry may further identify [REDACTED], should be similarly provided. In this way, the Prosecution may fully and independently assess any potential security implications concerning witnesses.

¹ ICC-01/14-01/18-2012-Conf-Red.

² ICC-01/14-01/18-484-Red2.

³ See ICC-01/14-01/18-1536-Conf-Red.

⁴ Hereinafter, “ICC DC”.

⁵ ICC-01/14-01/18-2012-Conf-Red, paras. 8 and 9 (together, “Calls”).

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential”, as it refers to filings and decisions of the same classification. A confidential redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Order should be reinstated

6. The contact restrictions as set out in the Chamber’s 17 April 2020 Order⁶ are essential to protect witnesses and victims pursuant to regulation 101(2)(c) and (f) of the RoC, and to safeguard the integrity of the proceedings, pursuant to regulation 101(2)(b). The circumstances under which the Chamber issued and extended its Order, particularly given the facts presented in the Eighth Report,⁷ warrant the careful control of the Accused’s contacts and the enforcement of restrictions.

7. *First*, although the Registry states that it “does not have any incidents to report in relation to written correspondence”,⁸ the Eighth Report makes clear that the Chief Custody Officer (“CCO”) does not have access to [REDACTED] to which NGAISSONA referred in two discrete non-privileged conversations in [REDACTED].⁹ Of particular concern, and as was the case regarding the “Sixth Report” a year ago,¹⁰ is the Registry reporting that:

“[REDACTED]”¹¹

8. *Second*, as is clear from information at the disposal of the Chamber and Parties, including trial testimony, NGAISSONA retains an active support network in the

⁶ See ICC-01/14-01/18-484-Red2.

⁷ See ICC-01/14-01/18-2012-Conf-Red, paras. 10-11.

⁸ ICC-01/14-01/18-2012-Conf-Red, para. 12.

⁹ ICC-01/14-01/18-2012-Conf-Red, para. 10.

¹⁰ ICC-01/14-01/18-1536-Conf-Red, para. 15.

¹¹ ICC-01/14-01/18-2012-Conf-Red, para. 11 (emphasis added).

Central African Republic (“CAR”).¹² Also, as the Prosecution has repeatedly underscored and substantiated on prior occasions, the majority of Prosecution witnesses reside in CAR, providing NGAISSONA with the opportunity to reach those within his sphere of influence. Continuing lesser restrictions on contacts, rather than reinstating those required by the Order, would not mitigate the increased risks as the Eighth Report shows, including of witness interference in this case.¹³

9. *Third*, the dire political and security situation in CAR outlined in the Registry’s 5 May 2023 report,¹⁴ creates fertile ground for witness interference. This is due in part to the CAR authorities’ reduced ability to protect against potential intimidation and retaliation. The current situation augments the already well-established risk of chilling witnesses’ prospective cooperation with the Prosecution — which the Chamber has seen; of retaliation; and of other corrupt conduct aimed at perverting the course of justice in this case.¹⁵ It bears underscoring, that the trial proceedings are far from over, and great prudence should be exercised.

10. Finally, the restrictions provided in the April 2020 Order are justified and proportionate in the circumstances. Properly implemented, they allow for the necessary monitoring of NGAISSONA’s contacts while respecting his right to communicate with his family and those close to him in an appropriately regulated manner. They further accommodate the Court’s compelling interests in witness security under article 68, and advance the Chamber’s truth-finding responsibilities.

¹² See *e.g.*, ICC-01/14-01/18-T-092-CONF-RED-ET, p. 6, ln. 19 - p. 7, ln. 22; see also ICC-01/14-01/18-1971-Conf, paras. 34-36, 39-41, 59-63; see also, CAR-OTP-00000071, CAR-OTP-00001430.

¹³ See generally, ICC-01/14-01/18-1971-Conf.

¹⁴ See ICC-01/14-01/18-1889-Conf Annex to Twelfth Periodic Report of the Registry on the Political and Security Situation in the Central African Republic, ICC-01/14-01/18-1889-Conf-Conf-Anx.

¹⁵ See ICC-01/14-01/18-1575-Conf, para. 26 (noting that “the Prosecution has [REDACTED] and recalls its concerns over the Prosecution’s reports that witnesses have reported being ‘threatened and/or otherwise sought to absent themselves or withdraw their cooperation, including out of fear’”) (citations omitted).

B. Random active monitoring should be reinstated

11. Although, as the Chamber has found previously “Mr Ngaïssona is entitled to ‘keep himself [...] regularly informed of the news by way of newspapers, periodicals and other publications, radio and television broadcasts’, according to Regulation 99(1)(d)”, such privilege does not exclude the Registry’s obligation to ensure the proper function of the ICC DC. As such, while the Registry may not exclude such information from a defendant except as provided under the terms of the regulations,¹⁶ a defendant has no right to circumvent the Registry’s responsibility to inspect any material which originates externally to the ICC DC:

“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.”¹⁷

12. The extent to which the defendant’s conduct frustrates this imperative, and the Registry’s ability to control the conditions of his detention as prescribed is alarming, and it should not be permitted.

13. As the Eighth Report details, NGAISSONA received [REDACTED]¹⁸ [REDACTED]. Coupled with the fact that the CCO does not have access [REDACTED], and that without any apparent affirmative indication that the material *is privileged* “has not been monitored”,¹⁹ the prevailing circumstances of the Accused’s detention present an untenable risk. Moreover, as noted, the risk is one that the regulations are designed to avoid by mandating the Registry’s implementation of security controls. As the Eighth Report makes clear, [REDACTED]. The means of transmitting the [REDACTED]. Rather than a third-party sending a letter to the Accused for instance which would be subject to security control including pursuant

¹⁶ See e.g., Regulation 167(2)(a) and (b) of the RoR.

¹⁷ Regulation 167 of the RoR.

¹⁸ ICC-01/14-01/18-2012-Conf-Red, para. 11.

¹⁹ ICC-01/14-01/18-2012-Conf-Red, para. 10.

to regulations 167 and 168 of the RoR, [REDACTED]. This renders null the effectiveness of the ICC DC's security framework, as it would become wholly dependent on either the defendant's lapse in coyness, or alternatively, the good will of his Defence notwithstanding.

14. At this time, it is unclear whether the Registry has inquired or intends to inquire with the NGAISSONA Defence as to the nature of [REDACTED]. Either way, the circumstances are such that the conduct of the defendant supplants the Registry's independent responsibility to administer the ICC DC in accordance with its regulatory responsibilities.

15. Given the inherent risks in impeding the security functions of the Registry that the transmittal of non-privileged material to the Accused [REDACTED] poses, the Chamber should reinstate the April 2020 Order. This would best minimise the possibility of NGAISSONA engaging in unauthorised communications and/or the receipt of material that is either unauthorised or transmitted through unauthorised means. It would further advance the Chamber's obligations under articles 64 and 68, to protect witnesses, victims, and their relatives, and insulate the integrity of the proceedings as much as possible from the inherent risks of the current detention situation.

C. Transcripts of the Calls, the identities of interlocutors and of the providers of the Content, and the Content itself should be made available

16. The Prosecution requires access to the transcripts of NGAISSONA's Calls to assess any potential security implications, and to determine whether any additional measures should be requested.

17. Mindful of article 68(1), the Prosecution requests the Chamber to direct the Registry to make the transcripts and identities of the interlocutors of the Calls immediately available, as it has done in the past.²⁰

18. For the same reasons, the Prosecution requests that the identities of the purveyors of the Content at issue to NGAISSONA directly or indirectly, be made available, as well as the Content itself.

IV. CONCLUSION

19. For the reasons above, the Chamber should: (i) reinstate its April 2020 Decision on content restrictions, as set out above; and (ii) direct the Registry to provide the Prosecution promptly with 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, to the extent identified and/or can be recovered.



Karim A. A. Khan KC, Prosecutor

Dated this 6th day of November 2023
At The Hague, The Netherlands

²⁰ See e.g., ICC-01/14-01/18-1148-Conf, para. 12; see also ICC-01/14-01/18-502, p.5 (noting that “granting access will allow the Prosecution to assess and fully discharge its obligations to take appropriate measures to protect the safety, as well as the physical and psychological well-being, of witnesses pursuant to Article 68(1) of the Statute”).