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**International
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Court**



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Date: 22 May 2020

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Confidential

With Confidential Annex 1

Confidential Redacted Version of "Corrigendum to Defence request for leave to appeal the 'Decision Pursuant to Regulation 101 of the Regulations of the Court', ICC-01/14-01/18-424-Conf-Exp", ICC-01/14-01/18-426-Conf-Exp-Corr, 11 February 2020

Source: Defence of Patrice-Edouard Ngaïssona

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") seeks leave to appeal the Pre-Trial Chamber's "Decision Pursuant to Regulation 101 of the Regulations of the Court" ("the Decision"),¹ in which the Pre-Trial Chamber ("the Chamber") established that there has been no change in circumstances that would warrant the modifying or the lifting of the restrictions on Mr Ngaïssona's contacts with the outside world.² The issue for which the Defence seeks leave to appeal is whether the Chamber erred in determining that the continued restrictions are necessary and proportionate to the objective being served, namely the protection of the integrity of the proceedings.

II. Confidentiality

2. In accordance with regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), these submissions are filed "confidential, redacted, *EX PARTE*, only available to the Registrar, the Prosecutor, the Detention Section, and the Ngaïssona Defence" as they concern information regarding Mr Ngaïssona's private life and detention-related matters, and also respond to documents of the same classification.

III. Procedural history

3. On 23 January 2019, Mr Patrice-Edouard Ngaïssona was transferred to the ICC Detention Centre where he is currently held in pre-trial detention.

¹ ICC-01/14-01/18-424-Conf-Exp.

² ICC-01/14-01/18-424-Conf-Exp, para. 27.

4. On the same day, the Single Judge of Pre-Trial Chamber II issued the “Decision pursuant to Regulation 101 of the Regulations of the Court”,³ directing the Registry to put in place several measures to restrict Mr Ngaïssona’s contact with the outside world.⁴
5. Following the imposition of such measures, the Chamber directed the Registry to submit periodic reports on the implementation of the restrictions on Mr Ngaïssona’s contacts.⁵ The First,⁶ Second,⁷ Third⁸ and Fourth⁹ “Registry Report[s] on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II” did not report any incident during the monitoring of Mr Ngaïssona’s contacts.
6. On 15 August 2019, the Registry filed the “Fifth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II” (“Fifth Report”),¹⁰ in which it reported a single incident relating to a telephone call made from Mr Ngaïssona’s non-privileged telephone list.¹¹
7. On 13 September, the Registry filed its *ex parte* “Sixth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II” (“Sixth Report”), which was only made available to the Defence by way of reclassification on 17 September 2019.¹²
8. On 18 September 2019, the Chamber issued its “Decision Pursuant to regulation 101 of the Regulations of the Court”, in which it found that Mr

³ ICC-01/14-01/18-98-Conf-Exp.

⁴ ICC-01/14-01/18-98-Conf-Exp, para. 12.

⁵ ICC-01/14-01/18-98-Conf-Exp, para. 12; ICC-01/14-01/18-114-Conf-Exp-Red, para. 12.

⁶ ICC-01/14-01/18-115-Conf-Exp.

⁷ ICC-01/14-01/18-125-Conf-Exp.

⁸ ICC-01/14-01/18-166-Conf-Exp.

⁹ ICC-01/14-01/18-225-Conf-Exp.

¹⁰ ICC-01/14-01/18-276-Conf-Exp.

¹¹ ICC-01/14-01/18-276-Conf-Exp, paras 14-15.

¹² ICC-01/14-01/18-337-Conf-Exp, para. 16.

Ngaïssona violated the restrictions regime by using coded language, and ordered *inter alia*, that all of Mr Ngaïssona's non-privileged calls, and all non-privileged and non-family visits be suspended on an interim basis.¹³ The Chamber ordered that Mr Ngaïssona's family visits be subject to active monitoring on an interim basis.¹⁴

9. On 3 October 2019, the Chamber granted the Registry's "Request for an Extension of Time for the submission of the Seventh Report".¹⁵ The Chamber extended the interim contact restrictions for Mr Ngaïssona until 11 October 2019, and ordered that as of 12 October 2019, Mr Ngaïssona shall be granted one hour per week of actively monitored telephone calls with his family only and that Mr Ngaïssona's family visits shall remain subject to active monitoring.¹⁶
10. On 4 November 2019, the Registry submitted its "Seventh Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II" ("Seventh Report"), in which it communicated to the Chamber the outcome of its investigation into all of Mr Ngaïssona's non-privileged phone calls from the Fourth Report to 18 September 2019.¹⁷
11. On 23 December 2019, the Chamber issued its "Decision Pursuant to Regulation 101 of the Regulations of the Court",¹⁸ in which it rejected the Defence's "Defence Urgent Request to Lift Restrictions on Mr Ngaïssona's Contact".¹⁹ The Chamber found that the existing restrictions should be maintained for the remainder of the pre-trial proceedings.²⁰

¹³ ICC-01/14-01/18-357-Conf-Exp, para. 18.

¹⁴ ICC-01/14-01/18-357-Conf-Exp, paras 48-9, 52.

¹⁵ ICC-01/14-01/18-362-Conf-Exp, para. 14.

¹⁶ ICC-01/14-01/18-374-Conf-Exp.

¹⁷ ICC-01/14-01/18-390-Conf-Exp.

¹⁸ ICC-01/14-01/18-413-Conf-Exp.

¹⁹ ICC-01/14-01/18-408-Conf-Exp.

²⁰ ICC-01/14-01/18-413-Conf-Exp, para. 86.

12. On 6 January 2020, the Registry filed its "Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II" ("Eighth Report"),²¹ in which it informed the Chamber that there had been no incidents in relation to Mr Ngaïssona's contacts.²²
13. On 20 January 2020, the Defence submitted its "Defence Observations Pursuant to the "Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II"", asking that, in light of several relevant circumstances, the restrictions on Mr Ngaïssona's contacts be lifted or considerably alleviated.²³
14. On 3 February 2020, the Chamber issued the Decision, in which it rejected the Defence's request, ordering that restrictions on contact should be maintained for the remainder of the pre-trial proceedings.²⁴

IV. Applicable Law

15. Pursuant to article 82(1)(d) of the Rome Statute, either party may, in accordance with the Rules of Procedure and Evidence, appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. Pursuant to rule 155(1) of the Rules of Procedure and Evidence:

²¹ ICC-01/14-01/18-416-Conf-Exp.

²² ICC-01/14-01/18-416-Conf-Exp, paras 11-12.

²³ ICC-01/14-01/18-420-Conf-Exp, para 38.

²⁴ ICC-01/14-01/18-424-Conf-Exp, paras 29-30.

When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

V. Submissions

17. The Defence seeks leave to appeal the Decision. The Defence submits that, when reaching the conclusion that “there has been no change in circumstances that would warrant modifying the current restrictions”,²⁵ the Chamber failed to take into account several relevant circumstances, such as: (1) the absence of any reported incident in the Registry’s Eight Report;²⁶ (2) the serious effect that the continued restrictions have on Mr Ngaïssona’s human rights and mental well-being²⁷; and (3) the proportionality of the restrictions in light of the absence of any alleged incident after July 2019 and the duration of the current regime. Moreover, the Defence submits that the Chamber has before it sufficient factual information to determine that none of the alleged incidents gives rise to the suspicion that Mr Ngaïssona would interfere with the proceedings against him. In light of this information, the Defence submits that the Chamber could not have reasonably reached the conclusion that the current measures remain necessary and proportionate to the aim pursued, since this finding is entirely based on a presumption that Mr Ngaïssona may potentially try to interfere with the investigations in the future.

²⁵ ICC-01/14-01/18-424-Conf-Exp, para. 27.

²⁶ ICC-01/14-01/18-416-Conf-Exp, para. 1.

²⁷ ICC-01/14-01/18-420-Conf-Exp, paras 30-36.

18. The Decision involves an issue that affects the fairness and expeditiousness of the proceedings and, potentially, the outcome of the trial. First, the imposed restrictions had and continue to have a serious effect on Mr Ngaïssona's human right to private and family life while in detention. Second, the current restrictions on Mr Ngaïssona's contacts are so detrimental as to affect his capability to meaningfully participate in the proceedings, [REDACTED].²⁸ Immediate resolution of the issue will therefore materially advance the proceedings, by ridding the judicial process of potential mistakes²⁹ that may otherwise continue to affect the trial proceedings.

A. The issue whether the Chamber erred in determining that the continued restrictions are necessary and proportionate to the objective being served constitutes an appealable issue

19. The Appeals Chamber has defined an appealable issue as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".³⁰ Furthermore, the Appeals Chamber has noted that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".³¹ The issue for which the Defence seeks leave to appeal is whether the Chamber erred in determining that the continued restrictions are necessary and proportionate to the objective being served. In *The Prosecutor v. Ntaganda*, albeit under different factual

²⁸ ICC-01/14-01/18-420-Conf-Exp-Anx; ICC-01/14-01/18-421-Conf-Exp-Anx.

²⁹ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006, para. 14.

³⁰ *Ibid*, para. 9.

³¹ *Ibid*.

circumstances, Trial Chamber VI found the same issue to be “sufficiently specific so as to constitute an appealable ‘identifiable subject or topic’”.³²

20. The Defence submits that the current request does not arise from a mere disagreement with the Pre-Trial Chamber’s assessment of whether the restrictions on Mr Ngaïssona’s contacts continue to be warranted. Rather, the Defence wishes to obtain a resolution to the issue of the correct interpretation of regulation 101(2) of the Regulations. In particular, the question arises whether restrictions on contact pursuant to regulation 101(2) can be imposed out of a mere presumptive “risk” that the accused may potentially try to interfere with the proceedings against him, even though no concrete incidents related to the Prosecutor’s investigations have been reported for already one year of such restrictions being put in place. Moreover, the question arises of whether the passage of time constitutes a factor – being part of the proportionality test³³ – to be taken into account when balancing Mr Ngaïssona’s right to private life against the lack of concrete allegations with respect to the risk of interference in Prosecutor investigations.

21. While the existing restrictions have been put into place by several decisions of the Chamber,³⁴ the current issue directly emerges from the Decision.³⁵ In light of the circumstances outlined in the Eight Report³⁶ and the Defence

³² “The Chamber considers that the Third Alternative Issue, as formulated, is sufficiently specific so as to constitute an ‘identifiable subject or topic’ arising from the Impugned Decision, given its link to certain concrete legal bases of the Impugned Decision, namely: (i) the requirement that ongoing restrictions be ‘necessary and proportionate’; and (ii) the role of Regulation 101(2) of the Regulations of the Court.” *The Prosecutor v Bosco Ntaganda*, Decision on Defence request for leave to appeal the ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’, ICC-01/04-02/06-1513, para. 17.

³³ *The Prosecutor v. Ntaganda*, “Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016”, ICC-01/04-02/06-1817-Red, para. 72

³⁴ ICC-01/14-01/18-98-Conf-Exp; ICC-01/14-01/18-357-Conf-Exp; ICC-01/14-01/18-374-Conf-Exp.

³⁵ ICC-01/14-01/18-424-Conf-Exp.

³⁶ Namely, the absence of any reported incident in the relevant reporting period, and the fact that Mr Ngaïssona didn’t make use of the phone for a period of two months. ICC-01/14-01/18-416-Conf-Exp, paras 9-12.

Observations,³⁷ the Chamber's assessment that the current restrictive measures remain necessary clearly exemplifies the Chamber's (over)broad interpretation of the applicability of regulation 101(2) of the Regulations in its latest decision. Moreover, the Chamber's assessment that the current restrictive measures remain proportionate in spite of the fact that they may have a material effect on Mr Ngaïssona's capacity to meaningfully assist his Defence indicates an imbalance in the Chamber's reasoning. Lastly, the Defence considers that the question whether restrictive measures remain necessary and proportionate can only be assessed with the passage of time, and thus it was through the Decision that the Chamber failed to take into account the significant time that has passed since any alleged breach by Mr Ngaïssona. The Defence respectfully recalls that the Chamber's findings of breaches with respect to using coded language and to the use of speaker phone date back to July and August 2019.³⁸ Moreover, the alleged incident which took place during Mr Ngaïssona's conversation with [REDACTED] dates back to June 2019.³⁹ No other incidents have been reported in the past five months, nor have prior recordings revealed other incidents. Therefore, the issue that arises directly out of the Decision is whether the time that has elapsed is a factor – within the proportionality test – to be taken into account in the Chamber's Decision to continue with the restrictions for the remainder of the pre-trial proceedings.

B. The issue affects the fairness and expeditiousness of the proceedings and the outcome of the trial

22. The issue of whether the Chamber erred in determining that the continued

³⁷ ICC-01/14-01/18-420-Conf-Exp.

³⁸ ICC-01/14-01/18-413-Conf-Exp, para. 82.

³⁹ ICC-01/14-01/18-413-Conf-Exp, paras 83-85.

restrictions are necessary and proportionate to the objective being served significantly affects the fair and expeditious conduct of the proceedings. First, the imposed restrictions gravely affect Mr Ngaïssona's fundamental right to family and private life.⁴⁰ It is the position of the Appeals Chamber that a Chamber ought to "exercise its discretion to broadly interpret the two prongs of [A]rticle 82(1)(d) of the Statute if it considers it necessary due to human rights considerations under Article 21(3) of the Statute".⁴¹ As such, the term "proceedings" in article 82(1)(d) should not be interpreted narrowly, and should include ancillary matters such as detention conditions.⁴² Even though conditions of detention are not *per se* part of the "proceedings", they must be considered as having a "significant impact" on the fairness of the proceedings.⁴³ Therefore, the fairness of the proceedings is seriously affected

⁴⁰ As stated by this Court, "the right to privacy and family life is an internationally recognised human rights principle enshrined in a number of important human rights instruments and thus guides the Chamber's interpretation of the Statute by virtue of Article 21(3) of the Statute", *The Prosecutor v Bosco Ntaganda*, 'Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts', ICC-01/04-02/06-785-Red, para. 42. The ECHR has further held that it "is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family". *The Prosecutor v Germain Katanga*, 'Fourth decision on measures of prohibition and restriction of contacts outside and inside the Detention Centre in respect of Mathieu Ngudjolo', ICC-01/04-01/07-1709-tENG-Red, para. 22, relying inter alia on *Messina v. Italy*, no. 25498/94, 28 September 2000, paras. 61-63. See for instance, 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as the "Nelson Mandela Rules"): "[i]mprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation". The Mandela Rules further provide that "[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals", which includes through telecommunication. With respect to restrictive measures specifically, the Mandela Rules indicate that "[t]he means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order", Rules 3, 58, 43(3) United Nations Standard Minimum Rules for the Treatment of Prisoners, Resolution adopted by the General Assembly on 17 December 2015, https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

⁴¹ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on the "Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.", 23 December 2015, ICC-01/05-01/13-1533 (OA 12), para. 16.

⁴² *Bemba et al.*, Decision on Defence request seeking leave to appeal the 'Decision on request for compensation for unlawful detention,' ICC-01/05-01/13-1893, 13 May 2016: "For this purpose, the Chamber considers the 'proceedings' at hand to be the compensation proceedings of which it is seised. In the context of these compensation proceedings, the Chamber concurs with the Defence that the Impugned Decision constitutes the final disposition of matters involving Mr Mangenda's fundamental human rights, and that the Sixth Issue, which relates to the lawfulness of Mr Mangenda's detention, bears upon such rights."

⁴³ Decision on Defence request for leave to appeal the 'Decision reviewing the restrictions placed on Mr Ntaganda's contacts', ICC-01/04-02/06-1513, para. 18

by the Chamber's determination that the restrictions on Mr Ngaïssona's contacts remain necessary and proportionate to the objective served.

23. Moreover, the question of the necessity and proportionality of contact restrictions directly impacts upon the fairness of the proceedings because the restrictions "were imposed, and maintained, in order to safeguard interests which are fundamental to the fairness of the proceedings, including to ensure the safety of witnesses, prevent breaches of confidentiality and [to] ensure the integrity of the proceedings".⁴⁴
24. The issue also bears upon the expeditious conduct of the proceedings, as ongoing litigation on the necessity and proportionality of the restrictions on communication has already entailed the production of numerous filings and the engagement in resource-intensive activities, for the Defence and for the Registry. If this issue is not resolved swiftly, litigation will continue before the Trial Chamber, further affecting the expeditiousness of the proceedings.
25. Lastly, the impact of the current restrictions on Mr Ngaïssona's mental well-being is currently affecting his right to an effective participation in the trial and, could, ultimately, affect the outcome of the trial. The current restrictions regime excludes several close family members and all of Mr Ngaïssona's friends from his list of contacts and visitors. The current restrictions regime excludes [REDACTED] and all of Mr Ngaïssona's friends from his list of contacts and visitors. Moreover, the Chamber's willingness to accept the Office of the Prosecutor ("the Prosecutor")'s general arguments for maintaining the restrictions, such as the existence of a volatile situation in CAR, actually eliminates all prospect for Mr Ngaïssona that any "circumstance that would warrant the lifting or the modification of the

⁴⁴ Ibid.

restrictions" will ever arise. These circumstances have seriously affected Mr Ngaïssona's well-being, and his capacity to effectively assist his defence team. He is now fully absorbed by this dismal situation. If this situation is indefinitely prolonged, there is the risk that Mr Ngaïssona's fair trial rights will be inevitably affected, as he will not be able to meaningfully participate in the trial against him.⁴⁵ [REDACTED],⁴⁶ [REDACTED].⁴⁷ [REDACTED].

C. Immediate resolution may materially advance the proceedings

26. The Defence submits that an immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings. According to the Appeals Chamber, the notion of "materially advance" involves examination of the degree to which an authoritative determination of the matter in question will "settle the matter posing for decision, thereby ridding the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial".⁴⁸

27. As submitted above, the Decision that the current restrictions remain necessary and proportionate to the objective served has the potential to affect the fairness of the proceedings. First, the Decision directly affects Mr Ngaïssona's human right to private and family life. Second, if indirectly affects Mr Ngaïssona's effectively ability to participate in the preparation of his own Defence. It is therefore essential that the Appeals Chamber provides authoritative guidance as to the standard that should apply when a Chamber

⁴⁵ "The right of an accused to effective participation in his or her criminal trial generally includes, inter alia, not only the right to be present, but also to hear and effectively follow the proceedings." European Court of Human Rights, Case of S.C. v The United Kingdom, 609587/00, 15 June 2004, para 28, referring to *Stanford v The United Kingdom*, 16757/90, 11 April 1994.

⁴⁶ ICC-01/14-01/18-420-Conf-Exp-Anx; ICC-01/14-01/18-421-Conf-Exp-Anx.

⁴⁷ ICC-01/14-01/18-424-Conf-Exp, para. 24.

⁴⁸ *Situation in the Democratic Republic of the Congo*, Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, 13 July 2006, para. 14.

is determining whether to maintain contact restrictions under regulation 101(2) of the Regulations.

28. An authoritative assessment by the Appeals Chamber as to what is the correct interpretation of regulation 101(2) of the Regulations, especially of the requirement that there be “reasonable grounds” underlying the Prosecutor’s request for restrictions would serve the purpose of “removing doubts about the correctness of a decision or mapping a course of action along the right lines”, while providing “a safety net for the integrity of the proceedings”.⁴⁹

VI. Conclusion

29. The Defence submits that the issue whether the Chamber erred in determining that the current restrictions remain necessary and proportionate to the objective being served constitutes an appealable issue. The issue affects the fairness and expeditiousness of the proceedings, as it considerably affects Mr Ngaïssona’s fundamental rights. Immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings by removing doubts that may, otherwise, taint the fairness of the proceedings or the outcome of the trial.

RELIEF SOUGHT

In light of the above, the Defence respectfully requests the Chamber to **GRANT** its request for leave to appeal pursuant to article 82(1)(d) of the Rome Statute.

⁴⁹ Ibid, para 15.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 22 May 2020,

At The Hague, the Netherlands.