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No. **ICC-01/14-01/18**
Date of original: **21 February 2020**
Date: **28 January 2021**

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 NGAÏSSONA

Public redacted version of

Decision on the Ngaïssona Defence Request for Leave to Appeal the 3 February 2020
Decision Pursuant to Regulation 101

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

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Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the Ngaïssona Defence Request for Leave to Appeal the 3 February 2020 Decision Pursuant to Regulation 101.

I. Procedural history

1. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’.¹
2. On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.² On the same day, the Single Judge, acting on behalf of the Chamber,³ and pursuant to the request of the Prosecutor,⁴ issued the ‘Decision pursuant to Regulation 101 of the Regulations of the Court’, thereby restricting Ngaïssona’s contacts and communications upon his arrival at the ICC Detention Centre.⁵
3. The Chamber subsequently issued a number of decisions pursuant to regulation 101 of the Regulations of the Court (the ‘Regulations’), thereby extending the restrictions on Ngaïssona’s contacts with certain modifications. In this regard, the Chamber recalls the procedural history set out in its previous decisions.⁶
4. On 11 December 2019, the Chamber issued the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’.⁷
5. On 6 January 2020, the Registry submitted the ‘Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II’ (the ‘Eighth Registry Report’).⁸
6. On 3 February 2020, the Chamber issued the ‘Decision Pursuant to Regulation 101 of the Regulations of the Court’ (the ‘Decision’).⁹

¹ ICC-01/14-01/18-89-Conf-Exp. A public redacted version of the warrant of arrest is also available; *see* [ICC-01/14-01/18-89-Red](#).

² Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

³ Pre-Trial Chamber II, Decision designating a Single Judge, 6 December 2018, ICC-01/14-01/18-90.

⁴ ICC-01/14-01/18-2-US-Exp, para. 357.

⁵ ICC-01/14-01/18-98-Conf-Exp.

⁶ *See* Decision Pursuant to Regulation 101 of the Regulations of the Court, 23 December 2019, ICC-01/14-01/18-413-Conf-Exp, paras 1-29.

⁷ ICC-01/14-01/18-403-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-403-Red.

⁸ ICC-01/14-01/18-416-Conf-Exp. A confidential redacted version is also available, *see* ICC-01/14-01/18-416-Conf-Exp-Red.

⁹ ICC-01/14-01/18-424-Conf-Exp.

7. On 10 February 2020, the Defence for Ngaïssona submitted the ‘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’ (the ‘Request’).¹⁰

8. On 17 February 2020, the Prosecutor filed the ‘Prosecution’s Response to 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’ (the ‘Response’).¹¹

II. Applicable law

9. The Chamber notes article 82(1)(d) of the Rome Statute (the ‘Statute’), rule 155 of the Rules of Procedure and Evidence (the ‘Rules’) and regulation 65 of the Regulations.

10. The Chamber, mindful of the exceptional character of the remedy of the interlocutory appeal, recalls that in order for a request for leave to appeal to be granted, the following factors must be satisfied:

- a) The matter is an ‘appealable issue’ emanating from the impugned decision;
- b) The issue at hand would significantly affect:
 - i. The fair and expeditious conduct of the proceedings; or
 - ii. The outcome of the trial; and
- c) In the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. According to established jurisprudence, an ‘issue’ is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.¹² Furthermore, the leave to appeal criteria are cumulative, and as such, failure to fulfil one of the criteria will result in the rejection of the request.

¹⁰ ICC-01/14-01/18-426-Conf-Exp. A corrigendum was filed on 11 February 2020, 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. A confidential redacted version is also available, *see* ICC-01/14-01/18-426-Conf-Exp-Corr.

¹¹ ICC-01/14-01/18-427-Conf-Exp.

¹² Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, para. 9.

12. Before turning to its analysis, the Chamber clarifies that, while a determination pursuant to article 82(1)(d) of the Statute is not an opportunity to examine arguments on the merits of the decision, the Chamber will do so, to a certain extent, when such arguments have a bearing on the criteria set out in article 82(1)(d) of the Statute.¹³

III. Submissions

i. The Request

13. The Ngaïssona Defence seeks leave to appeal on the issue of ‘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’ (the ‘Proposed Issue’). In particular, the Defence asserts that the Chamber erred by failing to take into account: (i) the absence of any concrete incidents related to the Prosecutor’s investigations; (ii) the duration of the current regime as a factor in the proportionality test; and (iii) the serious effect that the continued restrictions have on Ngaïssona’s human rights and mental well-being.

14. In the view of the Defence, ‘the Chamber could not have reasonably reached the conclusion that the current measures remain necessary and proportionate to the aims pursued, since this finding is entirely based on a presumption that Mr Ngaïssona may potentially try to interfere with the investigations in the future’. Since there were no reported incidents within the period covered in the Eighth Registry Report, the Defence submits that the Chamber’s finding that the current contact restrictions are necessary constitutes an overly broad interpretation of regulation 101(2) of the Regulations.

15. The Defence further submits that the Decision involves an issue that affects the fairness and expeditiousness of the proceedings and potentially the outcome of the trial, as: (i) ‘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’; and (ii) ‘the current restrictions on Mr Ngaïssona’s contacts are so detrimental as to affect his capability to meaningfully participate in the proceedings, [REDACTED]’.

ii. The Response

¹³ Pre-Trial Chamber III, *The Prosecutor v. Jean Pierre-Bemba Gombo*, [Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure](#), 25 August 2008, ICC-01/05-01/08-75, para. 9.

16. The Prosecutor submits that the Request represents a mere disagreement with the Decision, and as such, that the Defence fails to identify an appealable issue within the meaning of article 82(1)(d) of the Statute. In the view of the Prosecutor, the Chamber ‘correctly determined that the risk assessed was neither speculative nor presumptive but actual’. The Prosecutor further submits that the Defence’s argument that the Chamber based its finding on a presumption that Ngaïssona may interfere with investigations ‘ignores the seriousness of the Accused’s substantiated and multiple violations of the imposed contact restrictions in July and August of 2019 – as recently as six months ago’.

17. Even if, *arguendo*, the Request articulates an appealable issue, the Prosecutor submits that it fails to meet the cumulative requirements of article 82(1)(d) of the Statute, as ‘[c]ontinuing contact restrictions merely for the remainder of the Pre-Trial phase does not significantly affect the fair or expeditious conduct of the proceedings, or the outcome of the case’. Rather, the Prosecutor argues that the ‘continued restrictions are necessary and proportionate, in that they are limited in nature and duration, and subject to continuous review during the reporting period.’

18. In response to the Defence argument that the contact restrictions should be lifted as there were no new incidents in the Eighth Registry Report, the Prosecutor submits that ‘having one reporting period during which there was no detection of prohibited conduct does not justify lifting the contact restrictions. Rather, it shows the restrictions are potentially serving their purpose of protecting the integrity of the proceedings’.

19. In the view of the Prosecutor, the argument that the restrictions could affect the Accused’s human rights and mental well-being is ‘speculative and unsubstantiated particularly because [Ngaïssona] chose to stop all telephone contact until further notice, despite still being allowed to make calls to family’. The Prosecutor submits that the Defence has not shown how the fairness and expeditiousness of the proceedings are affected, particularly because the Decision extends the contact restrictions only for the remainder of the Pre-Trial proceedings. Finally, the Prosecutor further argues that ‘an interlocutory appeal at this stage might actually prolong the proceedings, given the imminent assignment of this case to a Trial Chamber that would likely trigger a review of the current restrictions in any event’.

IV. Determination by the Chamber

20. At the outset, in relation to the arguments surrounding Ngaïssona's mental well-being, the Chamber reiterates that, under the current restrictions, Ngaïssona is entitled to contact a number of family members, and the Chamber has encouraged Ngaïssona to make use of the call time available to him.¹⁴ To the extent that Ngaïssona's choice to refrain from making use of the allotted call time is affecting his mental well-being, the Chamber notes that this decision was self-imposed. Therefore, this aspect of the Request cannot be said to emanate from the Decision.¹⁵

21. Turning to the Proposed Issue, the Chamber considers that it is inconsistent with the aforementioned requirement that only an 'issue' may form the subject of an appealable decision, and constitutes a disagreement with the Decision as a whole.

22. By arguing that the Chamber has relied on a presumptive risk that the Accused may interfere with the proceedings, the Defence has overlooked the fact that Ngaïssona has violated the contact restrictions on more than one occasion, and has attempted to circumvent the verification procedures of the Detention Centre. The Chamber reiterates its serious concerns regarding these violations.

23. Furthermore, contrary to the assertion of the Defence, the Chamber considered the fact that no new incidents were reported in the Eighth Registry Report. However, as noted in the Decision, abiding by the rules should be considered the norm.¹⁶

24. The Chamber is required to conduct a balancing exercise based on *all* relevant factors and interests at stake. The Decision is a result of exactly such a balancing exercise. The Defence focuses on certain aspects of the Decision in isolation and, therefore, merely disagrees with the manner in which the Chamber has appraised all the various factors and interests at stake.

25. Having found that the Proposed Issue does not constitute an appealable issue, it is unnecessary for the Chamber to consider the remaining criteria under article 82(1)(d).

¹⁴ Decision, para. 25.

¹⁵ The Chamber notes that it takes the concerns raised regarding Ngaïssona's well-being seriously, and recalls that to address any such concerns, the Registry was directed in the Decision to take certain steps. The Chamber notes that the Registry has acted pursuant to this direction, as set out in the 'Registry Report "Decision Pursuant to Regulation 101 of the Regulations of the Court", ICC-01/14-01/18-424-Conf-Exp', ICC-01/14-01/18-429-Conf-Exp.

¹⁶ Decision, para. 28.

26. In light of the above, the Request is accordingly rejected.

**FOR THESE REASONS, THE CHAMBER HEREBY
REJECTS** the Request for Leave to Appeal the Decision.

Done in both English and French, the English version being authoritative.

/Signed/

**Judge Antoine Kesia-Mbe Mindua,
Presiding Judge**

/Signed/

Judge Tomoko Akane

/Signed/

Judge Rosario Salvatore Aitala

Dated the 28 January 2021

At The Hague, The Netherlands