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

Public redacted version of

**Fourth Decision on Mr Ngaïssona's Restrictions on Contacts and
Communications in Detention**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and 68(1) of the Rome Statute (the ‘Statute’), Regulations 99-101 of the Regulations of the Court (the ‘Regulations’) and Regulations 169, 173-175 and 217-222 of the Regulations of the Registry (the ‘Registry Regulations’), issues this ‘Fourth Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention’.

I. Procedural history and submissions

1. The Chamber recalls the procedural history set out in its previous decisions on Mr Ngaïssona’s restrictions on contacts and communications in detention (the ‘First Restrictions Decision’,¹ the ‘Second Restrictions Decision’² and the ‘Third Restrictions Decision’³). Notably, in its First and Second Restrictions Decisions, the Chamber decided to maintain the restrictions imposed by the Pre-Trial Chamber.⁴ In its Third Restrictions Decision, the Chamber increased the allotted time for phone calls from 60 to 180 minutes per week to be distributed in 90 minutes periods, two times a week, and subject to active monitoring (the ‘Current Restrictions’).⁵
2. On 8 March 2021, in line with the amended reporting procedure established in the Third Restrictions Decision,⁶ the Registry filed its third report on the implementation of the restrictions on Mr Ngaïssona’s contacts and communications during detention (the ‘Third Registry Report’).⁷ The Registry

¹ Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention, 17 April 2020, ICC-01/14-01/18-484-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-484-Conf-Red and public redacted version notified on 16 February 2021, ICC-01/14-01/18-484-Red2).

² Second Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention, 8 July 2020, ICC-01/14-01/18-582.

³ Third Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention, 5 October 2020, ICC-01/14-01/18-672-Conf.

⁴ First Restrictions Decision, ICC-01/14-01/18-484-Red2, para.15, p. 17; Second Restrictions Decision, ICC-01/14-01/18-582, p. 11.

⁵ Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 21, pp. 12-13.

⁶ Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 25, p. 13.

⁷ Third Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V, ICC-01/14-01/18-901-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (with one confidential *ex parte* annex, only available to the

informs the Chamber that, during the reporting period, no incidents have taken place during Mr Ngaïssona's non-privileged telephone calls,⁸ and Mr Ngaïssona has not received any in-person non-privileged visits due to the temporary measures imposed at the Detention Centre in light of the Coronavirus Pandemic.⁹

3. However, the Registry reports one incident regarding Mr Ngaïssona's written correspondence. Specifically, the Registry reports having found, [REDACTED], two handwritten letters signed by Mr Ngaïssona and dated 16 December 2020 and 31 January 2021 (the 'Letters'). [REDACTED] informed the Chief Custody Officer (the 'CCO') that the Letters 'came from Mr Ngaïssona and were addressed to Mr Ngaïssona's friend'. Upon review of the Letters, the CCO found that they 'do not appear to be in vague or coded language or discuss his case'. However, the Registry notes that the addressee of the Letters, [REDACTED], does not appear on Mr Ngaïssona's list of non-privileged contacts (the 'List') and that the incident is 'an improper circumvention' of the Registry Regulations, which require that the CCO review all non-privileged outgoing mail.¹⁰
4. On 15 March 2021, the Office of the Prosecutor (the 'Prosecution') filed its observations on the Third Registry Report.¹¹ The Prosecution requests the Chamber to maintain the Current Restrictions, on the basis that (i) the risks found in the Third Restrictions Decision continue to prevail; (ii) further to the commencement of the trial and the Prosecution's presentation of evidence, lifting or reducing the restrictions would 'create a concrete risk that the Accused will seek to intimidate Prosecution witnesses' and thus 'place the integrity of

Ngaïssona Defence and the Registry) (confidential redacted version notified the same day, ICC-01/14-01/18-901-Conf-Red).

⁸ Third Registry Report, ICC-01/14-01/18-901-Conf-Red, para. 5.

⁹ Third Registry Report, ICC-01/14-01/18-901-Conf-Red, paras 6-7.

¹⁰ Third Registry Report, ICC-01/14-01/18-901-Conf-Exp, paras 8-10.

¹¹ Prosecution's Observations on the "Third Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V" (ICC-01/14-01/18-901-Conf-Red), ICC-01/14-01/18-912-Conf (the 'Prosecution Observations').

the proceeding at an unnecessary risk’; and (iii) the Letters ‘clearly violated’ the Chamber’s order.¹²

5. In addition, the Prosecution requests access to the Letters and information regarding the identity of their intended recipients, arguing that (i) it is ‘best placed to analyse the communication to determine whether there are any risks to witnesses’ security and to the integrity of [its] evidence’; and (ii) such access ‘may reasonably assist the Prosecution in assessing and implementing responsive measures to protect its witnesses and/or to preserve evidence potentially exposed to a heightened risk’.¹³ Given the reported incident, the Prosecution further requests ‘access to all relevant information on any other security breaches relating to [Mr Ngaïssona’s] non-privileged outgoing mail’ (collectively, the ‘Requests for Access’).¹⁴
6. On 19 March 2021, the Ngaïssona Defence (the ‘Defence’) filed its observations,¹⁵ requesting the Chamber to (i) reject the Requests for Access, and (ii) order the Detention Centre to add three individuals to Mr Ngaïssona’s List (the ‘Request to Add Individuals to the List’).¹⁶
7. As regards the Letters, the Defence submits, at the outset, that it ‘wishes to convey Mr Ngaïssona’s apologies for this inadvertent attempt to circumvent the Chamber’s order and the Regulations of the Registry’. According to the Defence, Mr Ngaïssona was unaware that sending correspondence to persons not appearing on the List would amount to a violation of the Current Restrictions and the Registry Regulations, as he was ‘under the mistaken belief that the scope of the [L]ist was limited to establishing the persons with whom he

¹² Prosecution Observations, ICC-01/14-01/18-912-Conf, paras 2, 6-8, 13.

¹³ Prosecution Observations, ICC-01/14-01/18-912-Conf, paras 10-11, 13.

¹⁴ Prosecution Observations, ICC-01/14-01/18-912-Conf, paras 12-13.

¹⁵ Defence Observations on the “Third Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V” (ICC-01/14-01/18-901-Conf-Exp), ICC-01/14-01/18-924-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (with confidential *ex parte* Annexes I and II) (confidential redacted version notified the same day, ICC-01/14-01/18-924-Conf-Red).

¹⁶ Defence Observations on the “Second Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V” (ICC-01/14-01/18-645-Conf), ICC-01/14-01/18-662-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-662-Conf-Red) (the ‘Defence Observations’), paras 1, 16.

could have telephone contact'. The Defence further notes that the Letters do not contain vague or coded language, or concern case-related information.¹⁷

8. Concerning its Request to Add Individuals to the List, the Defence submits that on 3 November 2020, the CCO rejected its requests to add two individuals to the List, on the grounds that they are not members of Mr Ngaïssona's family. The Defence submits that the Detention Centre's definition of family as including the mother, father, parents-in-law, host family, brothers, sisters, recognised partner, and children of a detained person is 'excessively limited', and that the Detention Centre should adopt a 'culturally sensitive' approach.¹⁸
9. The Defence further submits that on 12 March 2021, the CCO rejected Mr Ngaïssona's request to add another individual, [REDACTED] on the ground that this individual is not a member of Mr Ngaïssona's family. According to the Defence, [REDACTED].¹⁹

II. Analysis

A. Review of the Current Restrictions

10. The Chamber recalls the standard and the criteria of assessment set out in its First Restrictions Decision, as incorporated by reference in its Second and Third Restrictions Decisions.²⁰ Notably, the Chamber recalls that it will regularly review the restrictions in place, where circumstances change.²¹ In doing so, the Chamber continues to be guided by its obligation to 'carefully balance the need

¹⁷ Defence Observations, ICC-01/14-01/18-924-Conf-Red, paras 8-9, 12.

¹⁸ Defence Observations, ICC-01/14-01/18-924-Conf-Exp, paras 13-15, *referring to* the approach adopted by Trial Chamber II, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in the context of its assessment of victim applications, in Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, para. 168.

¹⁹ Defence Observations, ICC-01/14-01/18-924-Conf-Exp, para. 16.

²⁰ *See* First Restrictions Decision, ICC-01/14-01/18-484-Red2, paras 16-18, 21. *See also* Second Restrictions Decision, ICC-01/14-01/18-582, para. 10; Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 9.

²¹ *See* First Restrictions Decision, ICC-01/14-01/18-484-Red2, para. 26. *See also* Second Restrictions Decision, ICC-01/14-01/18-582, para. 10; Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 9.

for and proportionality of the restrictions against the important right accorded to detained persons to have contact’.²²

11. In this regard, the Chamber previously clarified that the Registry’s reports are intended mainly for the benefit of the Chamber and ‘strongly encourage[d]’ the parties to only respond to these reports or make requests regarding restrictions ‘to the extent that there is a change of circumstances warranting a modification’.²³ In accordance with this direction, the Chamber notes that, save for the Request to Add Individuals to the List addressed below, the Defence does not raise any change of circumstances warranting a modification of the Current Restrictions.
12. Turning to the review of the Current Restrictions, the Chamber recalls the circumstances underlying the First and Second Restrictions Decisions, and the subsequent findings therein, as summarised in the Third Restrictions Decision.²⁴ In the Third Restrictions Decision, the Chamber found that the Current Restrictions remained necessary, on the basis that (i) the circumstances underlying the First and Second Restrictions had not changed; (ii) the observance of the restrictions by the accused was ‘insufficient in itself to justify the lifting of such restrictions’; (iii) Mr Ngaïssona’s awareness of the witnesses the Prosecution intends to call to testify at trial was relevant to its assessment; and (iv) given the seriousness of Mr Ngaïssona’s violations of restrictions during the pre-trial phase, there were reasonable grounds to believe that lifting the Current 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 this case.²⁵ It further found that the Current Restrictions were ‘the least restrictive available in the circumstances

²² See First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 18, *referring to* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016, 8 March 2017, ICC-01/04-02/06-1817-Conf (public redacted version notified the same day, ICC-01/04-02/06-1817-Red), paras 72, 44, 102. See also Second Restrictions Decision, ICC-01/14-01/18-582, para. 10; Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 9.

²³ Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 26.

²⁴ Third Restrictions Decision, ICC-01/14-01/18-672-Conf, paras 10-12, *referring to* First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 24; Second Restrictions Decision, ICC-01/14-01/18-582-Conf, para. 11.

²⁵ Third Restrictions Decision, ICC-01/14-01/18-672-Conf, paras 10-15.

and proportional to ensure a fair trial and protect the integrity of the proceedings'.²⁶

13. The Chamber notes that the circumstances underlying the First, Second and Third Restrictions Decisions have not changed. It further notes that new circumstances that have arisen since the Third Restrictions Decision include (i) the commencement of the trial; (ii) the fact that the Prosecution has called its first witnesses; and (iii) the incident involving the Letters as reported by the Registry.
14. As regards the Letters, the Chamber recalls that under the Current Restrictions, Mr Ngaïssona's '[n]on-privileged mail communications are restricted to those individuals on [the List]'.²⁷ Further, Regulation 169(1) of the Registry Regulations provides that the CCO 'shall review all incoming and outgoing mail with the exception of items addressed to or sent by' four clearly delineated categories of persons.
15. Noting that the addressee of the Letters is neither on the List nor one of the categories of individuals provided for under Regulation 169(1) of the Registry Regulations, the Chamber finds that by handing over the Letters to [REDACTED], Mr Ngaïssona did not comply with the Current Restrictions and the Registry Regulations.
16. However, the Chamber notes that the Letters, drafted in English,²⁸ do not appear to contain any 'obscure or coded language' or 'mention [...] the present case' as prohibited under the Current Restrictions.²⁹ Rather, they appear to be written to their addressee in a purely personal capacity in order to [REDACTED]. The Chamber notes the Defence's acknowledgment of this breach and appreciates Mr Ngaïssona's apology in this regard. Noting further Mr Ngaïssona's assurances to that effect, the Chamber trusts that Mr Ngaïssona will comply with the relevant restrictions in the future.

²⁶ Third Restrictions Decision, ICC-01/14-01/18-672-Conf, para. 24.

²⁷ See First Restrictions Decision, ICC-01/14-01/18-484-Red2, para. 15(iv)(a).

²⁸ The Chamber notes that under the Current Restrictions, the languages of correspondence are limited to French and Sango. See First Restrictions Decision, ICC-01/14-01/18-484-Red2, para. 15(iv)(c).

²⁹ See First Restrictions Decision, ICC-01/14-01/18-484-Red2, para. 15(iv)(b).

17. Under these circumstances, the Chamber considers that the Current Restrictions continue to be necessary and proportional and shall therefore be maintained.

B. Requests for Access

18. In light of its findings in paragraphs 14 to 16 above, the Chamber is of the view that the incident involving the Letters does not pose any risk to witnesses' security or to the integrity of evidence on which the Prosecution intends to rely at trial. Accordingly, and absent any indication of other 'security breaches' by Mr Ngaïssona, the Requests for Access are rejected.

C. Request to Add Individuals to the List

19. The Chamber notes that under the Current Restrictions, Mr Ngaïssona is entitled to call members of his family, whose identities and contact details have to be duly verified beforehand by the CCO, who may request support of the Victims and Witnesses Unit (the 'VWU'). [REDACTED], with whom he had engaged in coded conversations, [REDACTED] are excluded from the List. Telephone calls to other individuals are also suspended.³⁰
20. The Request to Add Individuals to the List is based on the Defence's argument that the Detention Centre's definition of family is 'excessively limited' and should be expanded in line with a 'culturally sensitive approach', similar to the approach adopted by Trial Chamber II in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in the context of applications of victims to participate in the proceedings.
21. The Chamber notes that the CCO rejected Mr Ngaïssona's requests on the basis that the individuals sought to be added to the List do not qualify as 'family' as defined in Section II of the 'Detention Centre Policy on Family Visits pursuant to Regulation 179(1) of the Regulations of the Registry'.³¹ Under these circumstances, the Chamber does not consider it to be its place or role to entertain any disputes concerning the application of the Detention Centre's

³⁰ See First Restrictions Decision, ICC-01/14-01/18-484-Red2, para. 15(ii)(a), (b).

³¹ The Chamber notes that the Registry provided the Chamber with a copy of this policy by way of email on 28 January 2021, at 17:16.

policy in this respect. Rather, the Chamber finds that any challenges in this regard can be more appropriately addressed within the framework of the complaints procedure as provided for in Regulations 217 to 222 of the Registry Regulations.

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES to maintain the Current Restrictions;

REJECTS the Requests for Access; and

REJECTS the Request to Add Individuals to the List.

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

 Judge Péter Kovács	 Judge Bertram Schmitt Presiding Judge	 Judge Chang-ho Chung
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Dated 23 April 2021

At The Hague, The Netherlands