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**International
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Court**



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Date: **21 September 2020**

TRIAL CHAMBER V

Before: Judge 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
NGAÏSSONA***

Confidential

Confidential Redacted Version of “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)”, 21 September 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. Pursuant to Trial Chamber V ("the Chamber")'s "Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention"¹, the Defence of Mr Patrice-Edouard Ngaïssona ("Defence") hereby presents its observations in relation to the "Second Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V" ("Second Registry Report").² The Defence respectfully requests the Chamber to lift the restrictions on Mr Ngaïssona's contact with the outside world. In the alternative, the Defence respectfully requests the Chamber to modify the current restrictions as to ensure Mr Ngaïssona's ability to communicate effectively with his family.

II. Confidentiality

2. In accordance with regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), these submissions are filed as confidential, EX PARTE, only available to the Registry, as they concern information regarding Mr Ngaïssona's private life, family and detention-related matters. The Defence will file a confidential redacted version simultaneously.

III. Procedural history

3. Since his transfer to the Court on 23 January 2019 and at the Prosecution's request,³ Mr Ngaïssona has been subjected to considerable limitations on his contacts with the outside world, including with his immediate family members.

¹ ICC-01/14-01/18-484-Conf-Exp

² ICC-01/14-01/18-645-Conf-Exp

³ ICC-01/14-01/18-98-Conf-Exp, para. 1, referring to ICC-01/14-01/18-2-US-Exp.

4. Following the reporting of alleged incidents by the Registry over one year ago,⁴ the Pre-Trial Chamber considerably toughened the conditions of Mr Ngaïssona's contact with the outside world, by *inter alia*: prohibiting contact with non-family members included in Mr Ngaïssona's list of non-privileged contacts; prohibiting contact between Mr Ngaïssona and [REDACTED], [REDACTED] and [REDACTED]; imposing an active monitoring order on Mr Ngaïssona's non-privileged family phone calls; and imposing an active monitoring order on Mr Ngaïssona's non-privileged family visits.⁵ These conditions have been maintained by the Chamber and remain in place to this day.⁶
5. On 8 September 2020, pursuant to the Chamber's order to submit reports on the implementation of the imposed restrictions every three months,⁷ the Registry issued its "Second Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V" ("Second Registry Report"),⁸ in which no incidents were reported.⁹ This is consistent with no incident having taken place for the past 14 months.¹⁰
6. On 18 September 2020, the CCO issued his decision to extend the measures in place at the Detention Centre in response to the Covid-19 pandemic until 16

⁴ ICC-01/14-01/18-276-Conf-Exp, paras 15-17; ICC-01/14-01/18-337-Conf-Exp, paras 13-16; ICC-01/14-01/18-390-Conf-Exp, paras 13-31.

⁵ ICC-01/14-01/18-374-Conf-Exp, para. 40 and ICC-01/14-01/18-413-Conf-Exp, para. 84.

⁶ ICC-01/14-01/18-484-Conf-Exp, para. 25; ICC-01/14-01/18-582-Conf, para. 17.

⁷ ICC-01/14-01/18-484-Conf-Exp, para. 29.

⁸ ICC-01/14-01/18-645-Conf-Exp.

⁹ ICC-01/14-01/18-645-Conf-Exp, para. 1.

¹⁰ The last reported incident took place on 25 July 2020: ICC-01/14-01/18-390-Conf-Exp, para. 31. Since that date, no further incidents have taken place: ICC-01/14-01/18-390-Conf-Exp, para. 35; ICC-01/14-01/18-416-Conf-Exp, para. 1; ICC-01/14-01/18-444-Conf-Exp; ICC-01/14-01/18-546-Conf-Exp, para. 1; ICC-01/14-01/18-645-Conf-Exp, para. 1.

October 2020.¹¹ These measures have been in place since 19 March 2020 and entail, *inter alia*, the prohibition of all counsel and family visits to detainees.¹²

IV. Submissions

A. The Prosecution fails to demonstrate the existence of reasonable grounds that would warrant the maintaining of the current restrictions

7. Pursuant to regulations 99 (h), (i) and 100(1) of the Regulations and internationally recognised human rights, Mr Ngaïssona is entitled to the protection of his private and family life.¹³ Such right is not absolute, and may be limited if the Prosecution demonstrates that there are reasonable grounds to believe that contact with the outside world may, *inter alia*, affect the Prosecution's investigations and the outcome of the proceedings, pursuant to regulation 101(2) of the Regulations. However, any restriction on contact with the outside world must be absolutely necessary and proportionate to the aim pursued.¹⁴ The disproportionality of existing restrictive measures is heightened with the passage of time.¹⁵

8. In its Observations on the Second Registry Report,¹⁶ the Prosecution fails to demonstrate the existence of reasonable grounds to believe that the lifting or

¹¹ CCO memo DS/2020/078/PC/mb

¹² CCO memo DS/2020/023/PC/mb

¹³ As recognized by the Chamber, Mr Ngaïssona's right to private and family life is implicitly recognised under the Court's statutory framework and, as an internationally recognised human right, guides the Chamber's interpretation of the Court's legal framework by virtue of article 21(3) of the Statute. ICC-01/14-01/18-484-Conf-Exp, para. 16.

¹⁴ ICC-01/04-01/07-322, 13 March 2008, p. 9; ICC-01/04-02/06-1817-Red, para. 72; ICC-02/04-01/15-1444, para. 24, citing article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...]); art. 11(2) of the Inter-American Convention on Human Rights (prohibiting 'arbitrary or abusive' interference). See also European Court of Human Rights, Grand Chamber, *Paradiso and Campanelli v. Italy*, 24 January 2017, app. no. 25358/12, para. 181 ('According to the Court's established caselaw, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests').

¹⁵ ICC-01/04-02/06-1817-Red, para. 72.

¹⁶ ICC-01/14-01/18-651-Conf.

modifying of the current restrictions regime could negatively affect its investigations or the outcome of the proceedings. In particular, the Prosecution fails to provide up-to-date, concrete and detailed information that would justify the maintaining of the current restrictions regime. On the contrary, the Prosecution's submissions are excessively vague and general, and largely amount to speculation. *First*, the Prosecution generally refers to the fact that "the Anti-Balaka are still active throughout CAR", without specifying how this circumstance would pose a threat to prosecution witnesses, whom are for a large part former Anti-Balaka members themselves.¹⁷ *Second*, the Prosecution vaguely refers to the adverse effect that the ongoing pandemic has had on its capacity to ensure witnesses' security.¹⁸ However, this circumstance does not justify the blanket limitation of Mr Ngaïssona's right to maintain contact with the outside world. Specific risks faced by prosecution witnesses are better addressed with tailored measures aiming at protecting their security, such as the ones recently requested by the Prosecution.¹⁹ *Lastly*, the issuance of a Provisional Witness List has not increased the risk for prosecution witnesses, given that Mr Ngaïssona was already privy to the majority of their identities and statements.

9. The Prosecution's submissions on Mr Ngaïssona's apparent willingness to violate the conditions of his detention and on the fact that he may "take actions to undermine the proceedings" are entirely speculative. Moreover, they stand in stark contrast with Mr Ngaïssona's behavior over the past 20 months. Ever since Mr Ngaïssona's arrest, nothing has given rise to the suspicion that he may interfere with the Prosecution's investigations. For the past 14 months, no incident has taken place during Mr Ngaïssona's contacts

¹⁷ ICC-01/14-01/18-651-Conf, para. 7.

¹⁸ Ibid.

¹⁹ ICC-01/14-01/18-628-Conf-Red.

with the outside world. The few alleged incidents which took place over one year ago, and which the Defence continues to strongly contest, related solely to private matters and did not even remotely involve the current proceedings. The Defence incorporates by reference its previous submissions concerning the private nature of these incidents and the ample explanations that were provided to dispel any suspicion of impropriety on Mr Ngaïssona's part.²⁰

10. The Defence respectfully submits that the Prosecution has failed to demonstrate the existence of reasonable grounds to believe that the lifting or modifying of the current restrictions may endanger its investigations or the outcome of the proceedings. Against this backdrop, the restrictions on Mr Ngaïssona's contact with the outside world are neither necessary nor proportionate, and amount to a violation of his right to private and family life. The lifting of the current restrictions would not place the integrity of the proceedings at *unnecessary* risk,²¹ as argued by the Prosecution, but would rather ensure that Mr Ngaïssona's internationally recognized human rights are properly upheld.

B. Request to modify the restrictions in place

11. In the event that the Chamber would find that restrictions on Mr Ngaïssona's contacts with the outside world remain necessary at this stage, the Defence respectfully requests the Chamber to modify such restrictions in order to effectively ensure Mr Ngaïssona's right to private and family life.

²⁰ ICC-01/14-01/18-300-Conf-Exp, paras 19-28; ICC-01/14-01/18-355-Conf-Exp, paras 8-9; ICC-01/14-01/18-373-Conf-Exp, paras 26-35; ICC-01/14-01/18-397-Conf-Exp, paras 27-30, 34 ; ICC-01/14-01/18-408-Conf-Exp, paras 22-30, 33.

²¹ ICC-01/14-01/18-651-Conf , para.8, emphasis added.

12. At the outset, the Defence respectfully requests the Chamber to increase the number of minutes Mr Ngaïssona can call per week. With the increased isolation brought about by the measures that were put in place at the Detention Centre as a response to the Covid-19 pandemic, it is essential that Mr Ngaïssona, who has not been able to see his family for over six months, be at least provided with sufficient time to effectively communicate with his family. While Mr Ngaïssona has not called his family for the past ten months, the further extension of the Covid-19 measures until 16 October 2020,²² coupled with the isolation experienced over the past six months, prompted his decision to resume calls. However, Mr Ngaïssona is currently afforded only 60 minutes of phone calls per week.²³ Such limited time is insufficient to effectively keep in touch with a large family that is located in several countries, including France and CAR. Hence, the Defence respectfully requests the Chamber to increase such time, to up to 180 minutes per week, as to ensure effective and meaningful communication between Mr Ngaïssona and his family. An increase in Mr Ngaïssona's allocated time for phone calls would partially compensate the adverse effects brought about by the impossibility to receive family visits since March 2020.

13. Moreover, the Defence respectfully requests the Chamber to allow contact between Mr Ngaïssona and [REDACTED], [REDACTED] and [REDACTED], who have been removed from Mr Ngaïssona's list of non-privileged contacts following alleged incidents which took place well over one year ago. The Defence incorporates by reference its past submissions concerning these incidents, and the culturally specific justifications provided thereto.²⁴ In light

²² CCO memo DS/2020/078/PC/mb

²³ ICC-01/14-01/18-645-Conf, para. 9.

²⁴ ICC-01/14-01/18-300-Conf-Exp, paras 19-28; ICC-01/14-01/18-355-Conf-Exp, paras 8-9; ICC-01/14-01/18-373-Conf-Exp, paras 26-35; ICC-01/14-01/18-397-Conf-Exp, paras 27-30, 34 ; ICC-01/14-01/18-408-Conf-Exp, paras 22-30, 33.

of the existence of an active monitoring order, which allows the Registry to timely interrupt conversations when an apparent violation takes place,²⁵ the continued exclusion of Mr Ngaïssona's immediate family members from his contacts appears unnecessary, and excessively restrictive.

14. Pursuant to this Court's jurisprudence, "the restrictions imposed must be the least restrictive possible to the rights of the detained person."²⁶ Modifying the restrictions to Mr Ngaïssona's contacts as outlined above would not heighten any alleged risk of interference with the current proceedings. Moreover, the requested modifications would largely contribute to mitigate the disproportionate effect that the current contact restrictions have on Mr Ngaïssona's private and family life, and the additional isolation brought about by the prohibition of visits at the Detention Centre as a response to the Covid-19 pandemic.

V. Conclusion

15. In conclusion, the Defence respectfully requests the Chamber to lift or modify Mr Ngaïssona's contact restrictions as outlined above. The requested modifications to Mr Ngaïssona's restrictions regime are minimal and will not give rise to any alleged heightened risk to the integrity of the proceedings. Modifying Mr Ngaïssona's contact restrictions as outlined above will ensure that Mr Ngaïssona's right to private and family life is properly upheld, by affording him the possibility to effectively communicate with his family.

²⁵ See, for example, *Prosecutor v Dominic Ongwen*, Decision concerning the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-283, 3 August 2015, at paras 13-14, where the Single Judge found that, in order to balance the need to preserve the integrity of proceedings and Mr Ongwen's rights in detention, the result could be achieved by imposing measures which enabled the Chamber and/or the Registry to intervene without undue delay "in case of any future information which may lead to a reasonable suspicion concerning attempts to exercise some form of influence on persons who possess information relevant to the case."

²⁶ ICC-01/12-01/18-557-Red3, para. 10.

RELIEF SOUGHT

16. The Defence respectfully requests the Chamber to:

- **LIFT** the current restrictions on Mr Ngaïssona's contacts; or
- In the alternative **MODIFY** the current restrictions on Mr Ngaïssona's contacts, by increasing Mr Ngaïssona's weekly time allocation for calls and by allowing him to have contact with his immediate family members who have been removed from his list of non-privileged contacts, as outlined at paragraph 13 of the present submissions.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 21 September 2020,

At The Hague, the Netherlands.