

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: *ICC-01/14-01/18*

Date: 12 April 2019

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 Redacted Version

**Confidential Redacted Version of Defence Observations Pursuant to the
“Decision Pursuant to Regulation 101 of the Regulations of the Court” (ICC-01/14-
01/18-137-Conf-Exp), 10 April 2019, ICC-01/14-01/18-171-Conf-Exp**

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence of Mr Ngaïssona

Mr Geert-Jan Alexander Knoops

Counsel for the Defence of Mr Yekatom

Mr Stéphane Bourgon

Ms Mylene Dimitri

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Following the “Third Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Edouard Ngaïssona Ordered by Pre-Trial Chamber II”¹ (“the Third Report”), the Defence hereby submits that the restrictions on contact of Mr Patrice-Edouard Ngaïssona, that have been imposed since 23 January 2019, *i.e.*, for seventy-seven days, should be lifted immediately.

II. Confidentiality

2. These submissions are filed “confidential, EX PARTE, only available to the Prosecution and the Ngaïssona Defence” as they concern decisions of the same classification, as well as information which, if divulged, may defeat the purpose of the submissions. The Defence will file a confidential redacted version as soon as practicable.

III. Procedural history

3. On 23 January 2019, Mr Patrice-Édouard Ngaïssona was transferred to the ICC Detention Centre where he is currently held.
4. On 23 January 2019, the Single Judge of Pre-Trial Chamber II issued the First Decision in which the Registry was, *inter alia*, directed to put in place several measures that restrict Mr Ngaïssona’s contact with the outside world through

¹ ICC-01/14-01/18-166-Conf-Red, dated 8 April 2019.

written correspondence, non-privileged telephone calls and family visits.²

5. On 6 February 2019, the Registry submitted its "Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge".³ In this report, the Registry reported no incidents during the monitoring of Mr Ngaïssona's contact with the outside world.
6. On 6 February 2019, the Chamber issued its Third Decision in which it ordered the Registry to prepare a report on the implementation of the restrictions on contact as ordered in the First Decision "*setting out any relevant information relating to Ngaïssona's behaviour on communications that may give rise to suspicion that he interferes with the Prosecutor's investigation (in particular that he poses a threat to potential witnesses and victims) or that he engages in activities that may affect the outcome of the proceedings*".⁴
7. On 25 February 2019, the Registry issued its "Second Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Edouard Ngaïssona Ordered by the Single Judge" ("the Second Report").⁵ In this report, the Registry reported no incidents during the monitoring of Mr Ngaïssona's contact with the outside world.
8. On 27 February 2019, the Prosecution filed its observations on the Second Report, requesting the extension of the current contact restrictions for an additional 30 days beyond 1 March 2019.⁶
9. On 1 March 2019, the Chamber granted provisionally the extension of the restrictive measures concerning Mr Ngaïssona's communications and contacts

² Single Judge, "Decision pursuant to Regulation 101 of the Regulations of the Court", 23 January 2019, ICC-01/14-02/18-11-Conf-Exp.

³ Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge", 6 February 2019, ICC-01/14-02/18-28-Conf-Exp.

⁴ ICC-01/14-02/18-27-Conf-Exp-Red, para. 12.

⁵ ICC-01/14-01/18-125-Conf-Red.

⁶ ICC-01/14-01/18-131-Conf-Red ("Prosecution's Request"), para. 2.

put in place by way of the 23 January 2019 Decision, as modified by the 29 January 2019 Decision and paragraphs 19-21 of this decision, until Monday, 15 April 2019 (inclusive).⁷

10. On 8 April 2019, the Registry issued the Third Report, in which it reported no incidents during the monitoring of Mr Ngaïssona's contact with the outside world.

IV. Submissions

11. As recalled by the Chamber, *"restrictions on contacts and communications under the Court's statutory framework must be (re-)assessed in light of concrete, specific and up-to-date information"*.⁸ However, the Defence is of the view that, under the circumstances at hand, it cannot make concrete, specific and up-to-date submissions on a potential continuation of the restrictions. The Defence also submits that, after seventy-seven days of restriction without any incidents, the time has come to lift the restrictions on communication imposed to Mr Ngaïssona, given the heavy consequences they bear on his fundamental rights to privacy, intimacy and family life.

A. The impossibility for the Defence to make concrete, specific and up-to-date submissions

12. Pursuant to Regulation 101(3) of the Regulations of the Court ("the Regulations"), *"[t]he detained person shall be informed of the Prosecutor's request [to restrict contact] and shall be given the opportunity to be heard or to submit his or*

⁷ "Decision Pursuant to Regulation 101 of the Regulations of the Court", dated 1 March 2019, ICC-01/14-01/18-137-Conf-Exp (the "Decision").

⁸ Decision, para. 18.

her views". In the instant case, several factors prevent the Defence from making complete and up-to-date submissions.

13. First, on 23 January 2019, the Single Judge issued the "Decision pursuant to Regulation 101 of the Regulations of the Court", in which it was considered *"that 'exceptional circumstances' exist within the meaning of Regulation 101(3) of the Regulations – i.e. urgency – which warrant the issuance of the present decision before Ngaïssona is informed of the Request"*.⁹ As a consequence, Mr Ngaïssona did not have the opportunity to submit his observations on the request seeking the application of restrictions.
14. On 6 February 2019, the Chamber provisionally granted the extension of the contact restrictions imposed on Mr Ngaïssona and ordered the Prosecution and the Defence to submit their observations including on the Registry report, if any, no later than 27 February 2019. Similarly, on 1 March 2019, the Chamber provisionally granted the extension of the restrictions until 15 April 2019 and invited the Prosecution and the Defence to submit their observations, including on the Registry report, no later than 10 April 2019.
15. The Defence hence notes that the Chamber has ordered twice the Prosecution and the Defence to present observations on the same day, which renders it materially impossible for the Defence to respond to the Prosecution's requests to maintain restrictions on Mr Ngaïssona's communications and while Regulation 101(3) of the Regulations states that *"[t]he detained person shall be informed of the Prosecutor's request and shall be given the opportunity to be heard or to submit his or her views"*. In practice, when the Prosecution requests the extension of the restrictions, it may present new arguments that the Defence will not have an opportunity to examine and to respond to as both observations have to be submitted on the same day. It therefore makes it

⁹ ICC-01/14-01/18-98-Conf-Exp, para. 12.

impossible for Mr Ngaïssona to effectively “submit his views” on the Prosecution’s request to extend the restrictions and to make fully informed submissions.

16. Besides, as the extension of the restrictions on communications is “requested” by the Prosecution, the Defence should have the right to present a “response” to such a request. In this regard, it is striking to note that, when summarizing the proceedings and the titles of the Prosecution’s observations on restrictions, the Chamber itself considered them as “Request[s] for Restrictions”.¹⁰

17. Second, the Defence still has no access to the Prosecution’s Application for a Warrant of Arrest against Patrice-Edouard Ngaïssona, nor does it have access to the initial and original Prosecution’s application under Regulation 101 of the Regulations contained in this application,¹¹ which prevents the Defence to make fully informed submissions on the issues at stake and the arguments raised and to be raised by the Prosecution.

18. Therefore, the Defence is not in a position to present fully informed, concrete, specific and up-to-date submissions in response to the request for the extension of the restrictions to be presented today by the Prosecution. However, the Defence submits that several key elements militate in favour of the lifting or, in the alternative, the lightening of the restrictions currently imposed.

B. The continued absence of incidents

¹⁰ Decision, para. 12.

¹¹ See ICC-01/14-01/18-98-Conf-Exp, para. 1.

19. In the Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge dated 6 February 2019¹², in the Second Report,¹³ and now in this Third Report,¹⁴ the Registry informed the Chamber that no incidents had been reported with respect to Mr Ngaïssona's contact to the outside world. The Defence submits that this repeated absence of incidents should be taken into account by the Chamber to lift the restrictions imposed or, in the alternative to modify and lighten them. The Defence notes that, for the third time in a row, the Registry did not report any incident involving Mr Ngaïssona's contacts with the outside world.

20. The Defence also notes that as reported by the Registry, Mr Ngaïssona *"currently has 14 individuals on his non-privileged telephone contact list out of the 25 allowed in accordance with the DC policy on telephone contacts"*, and asked for the further inclusion in this list of 4 individuals, which inclusion has either been rejected or is pending,¹⁵ which further demonstrates Mr Ngaïssona's will and determination to comply with the rules applying before the Court and at the Detention Centre, since he himself limited the number of persons on his list of non-privileged contacts.

C. The arguments previously raised by the Prosecution to request an extension of restrictions on communications can no longer apply

21. Regulation 101(2) of the Regulations places on the Prosecution the onus to prove that there are "reasonable grounds" to believe that contacts with the outside world could lead to at least one of the six consequences mentioned from subparagraph (a) to subparagraph (f) of Regulation 101(2) of the Regulations.

¹² ICC-01/14-02/18-28-Conf-Exp.

¹³ Second Report, para. 1.

¹⁴ Third Report, para. 1.

¹⁵ Third Report, paras 13-19.

22. However, on 27 February 2019, the Prosecution presented a number of unsubstantiated arguments that would allegedly justify the extension of restrictions on communications, all of them actually related to speculative risks.

23. *First*, the Prosecution has not pointed to any evidence that would substantiate its allegation that “NGAISSONA’s *Anti-Balaka* associates – still active in CAR – are clearly influential”.¹⁶ In the same vein, the Prosecution points to a press article that would substantiate the allegation that “[Patrice-Edouard Ngaïssona] remains their recognised leader”,¹⁷ whereas the content of the referenced article does not contain the term “recognised leader”, or any reported statement of that kind and, to the contrary, mentions an “absolute silence” following the arrest of Patrice-Edouard Ngaïssona, presented as a “*coordinateur principal*”.¹⁸ The Prosecution has failed to prove that “main coordinator” and “recognised leader” would be synonyms when, on the contrary, they remain allegations embracing different realities.

24. *Second*, the Prosecution has not pointed out to one single element that would substantiate the allegation that “[a]s a Suspect, NGAISSONA is necessarily interested in the outcome of the pending proceedings. He has a strong reason and motive to interfere with them given that the case threatens his freedom and future, whether political or economic”.¹⁹ This allegation, if accepted by the Chamber, would apply to every Suspect before the Court and would hence warrant the application of restrictions under Regulation 101 of the Regulations to every Suspect, whereas restrictions to contacts stand as an exception. In the same vein, the Prosecution has not shown that Mr Ngaïssona would have “not only

¹⁶ Prosecution’s Request, para. 7.

¹⁷ *Ibid.*

¹⁸ See Bangui.com, Centrafrique : Ras-le-bol des commandants de zones des ex-antibalaka, 18 February 2019.

¹⁹ Prosecution’s Request, para. 8.

*the support, but the means, to [REDACTED]”.*²⁰ When the Prosecution submits that “[n]othing has transpired in the intervening period since the Chamber made this finding to attenuate this concrete risk”,²¹ it intends to reverse the onus to prove the circumstances warranting restrictions, by placing on the Defence the burden to prove that the circumstances have changed. However, Regulation 101 of the Regulations is clear and does not implement a mechanism that would reverse the burden of proof for the purpose of extending restrictive measures. The Prosecution has therefore failed to prove that the circumstances warranting the restrictive measures have not changed.

25. *Third*, the Prosecution has failed to prove how a Report from the UN Secretary General could substantiate the existence of an alleged risk to witnesses in the present case and to the Prosecution’s ongoing investigation.²² The Prosecution has not demonstrated that “NGAISSONA’s access to sensitive information regarding the case against him and Alfred YEKATOM (“YEKATOM”) as a result of required disclosure is a potential danger to the security of witnesses and the Prosecution’s ongoing investigations, absent the current restrictions”.²³ Once again, the Prosecution uses general arguments that could apply to any Suspect or Accused before the Court, to artificially characterize an alleged risk.

26. *Fourth*, the Prosecution mentions a UN Secretary General Report to substantiate alleged threats from Anti-Balaka members in Bossangoa against MINUSCA, NGOs and civilians.²⁴ However, the Defence notes that, in the Report mentioned, these threats are not substantiated by any kind of evidence and stand as a pure allegations made by the drafters of the Report.²⁵ Besides,

²⁰ *Ibid.*

²¹ *Ibid.*

²² Prosecution’s Request, para. 10, ftn 14.

²³ Prosecution’s Request, para. 11.

²⁴ Prosecution’s Request, para. 13.

²⁵ See United Nations Secretary General, Report on the Situation in the Central African Republic, 15 February 2019, para. 9 [last accessed 10 April 2019].

the Prosecution, more than one month after the issuance of the said Report, has not proven that the alleged threats have materialized into concrete acts of reprisal.

27. *Fifth*, when stating that “the current political process in CAR foresees the participation of armed group in the government’s affairs, including members of the Anti-Balaka”,²⁶ the Prosecution has failed to precisely characterize the individuals that would take part to the government’s affairs and their alleged link to Patrice-Edouard Ngaïssona. Such information only amounts to speculation. More generally, the Prosecution cannot attribute the current Anti-Balakas’ alleged intentions to Patrice-Edouard Ngaïssona, especially in light of the past seventy-seven days of the restriction regime imposed on him, and the additional months he spent in detention in France, pending transfer to the seat of the Court. There is a serious inconsistency in the Prosecution’s reasoning that the same person could, at the same time, respect a long period of restriction on communications with the outside world and influence or undermine the proceedings against him through contacts with the outside world.

28. *Sixth*, the Prosecution has failed to characterize, circumscribe and identify the alleged “established network of influential Anti-Balaka associates and supporters, including those currently or prospectively within the CAR government”.²⁷

29. *Seventh*, the Prosecution has failed to substantiate how lifting the contact restrictions imposed on Mr Ngaïssona risks undermining those imposed on Alfred Yekatom.²⁸ Once again, the Prosecution reasons through general arguments related to the joinder of the cases and the co-existence of both suspects at the Detention Centre. In this regard, the Prosecution makes a

²⁶ Prosecution’s Request, para. 14.

²⁷ Prosecution’s Request, para. 16.

²⁸ Prosecution’s Request, paras 17-19.

completely irrelevant reference to a report on alleged witness interference in other cases that was drafted three years ago. The Prosecution highlights a sentence taken from the said report: *"ICC judges have recognized that witness interference may indeed have been committed across nearly all ICC cases that have moved to the trial phase"*.²⁹ However, this sentence appears unsubstantiated by any form of evidence, quotes or speeches from ICC Judges. Concretely, in the referenced report, the sentence is simply put, without any footnotes authenticating its origin.

D. The disproportion of the restrictions on telephone calls imposed on Mr Ngaïssona

30. The current restrictions imposed on Mr Ngaïssona's contact with the outside world, and in particular, the considerable restrictions on his telephone communications, are unnecessary, disproportionate and incompatible with Regulation 101 of the Regulations and with Mr Ngaïssona's fundamental and internationally recognized human rights. The Defence respectfully requests that the Chamber lift, or in the alternative, vary the current restrictions and monitoring imposed on Mr Ngaïssona.

31. At present, the restrictions on the number, nature and duration of telephone calls allocated to Mr Ngaïssona are disproportional and entirely unsuitable to Mr Ngaïssona's family situation. In its Decision pursuant to Regulation 101 of the Regulations of the Court, the Single Judge imposed, *inter alia*, significant limits on the number of telephone calls which Mr Ngaïssona may place as well as on the duration of those calls, which were limited to 60 minutes per week. The duration of calls allocated to Mr Ngaïssona were later increased by

²⁹ Prosecution's Request, fn. 23.

the Registry to one and a half hours.³⁰ Moreover, around 50% of Mr Ngaïssona's non-privileged telephone calls are actively monitored at random.³¹ These restrictions effectively impede Mr Ngaïssona's ability to stay in touch with his family and to exercise his fundamental right to have contact with his family. One and a half hours per week is clearly insufficient for Mr Ngaïssona to remain updated with all of his children and his immediate family, which is extensive. One of Mr Ngaïssona's immediate family members is [REDACTED] and given the restrictions, he is unable to speak with him or be properly updated on [REDACTED]. As a suspect, who has been detained and transferred to the Court, and who still does not know the nature of the charges alleged against him – and therefore finds himself in a situation of heightened uncertainty – Mr Ngaïssona's only source of reassurance is the limited contact he has with his family and his ability to receive updates and update his relatives concerning his [REDACTED].

32. Mr Ngaïssona informed the Defence team that his call allowance is, in reality, significantly reduced because the time for Detention Unit staff to set up each individual call is counted towards his overall call allowance. Mr Ngaïssona explained to the Defence team that, for instance, a 45-minute telephone session will amount, ultimately, to about 30 minutes or less of actual call time, because for each new person called, the telephone number must be checked and the call must be set up.

33. The Defence kindly requests the Chamber to direct the Detention Centre to ensure that Mr Ngaïssona's already limited calling time is not further curtailed by the logistics of setting up the phone calls.

34. Furthermore, the limit on the duration of Mr Ngaïssona's telephone calls per week does not take into consideration cultural context or norms, insofar as the

³⁰ Third Report, para. 10.

³¹ Third Report, para. 11; Decision, para. 19.

notion of “family” in Central African Republic, as in many other African countries, does not necessarily correspond to Euro-centric notions of family, which are rather conceived as the nuclear family.

35. Moreover, Mr Ngaïssona’s family members are for the most part [REDACTED]. As a result, telephone calls are Mr Ngaïssona’s main method of communication with his family and to an extent, his lifeline.

36. As expressed in the 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”*.³² 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.³³ 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”*.³⁴

37. These human rights standards have been endorsed in the Court’s own jurisprudence, which identifies the principles of necessity and proportionality as required in order for restrictive measures to be imposed.³⁵ It is submitted

³² Rule 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.

³³ Rule 58, *Ibid*.

³⁴ Rule 43(3), *Ibid*.

³⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui”, ICC-01/04-01/07-322, 13 March 2008, p. 9.

that the current restrictions on communications considerably aggravate Mr Ngaïssona's pre-trial detention, both physically and mentally. Most significantly, they lack necessity and proportionality; such measures are no longer justified, in the absence of concrete indications that Mr Ngaïssona "*[c]ould prejudice or otherwise affect the outcome of the proceedings against [him], or any other investigation*".³⁶ As evidenced by the Third Report, no incidents have been reported with regard to Mr Ngaïssona.

E. Restrictions on communication with the Case Manager of the Defence team

38. On 2 April 2019, the Case Manager of Mr Ngaïssona's Defence team was not permitted to visit Mr Ngaïssona alone upon requesting a visit for the next day, on 3 April 2019. The Detention visit request was refused on the basis that, as a non-privileged visit, it would have been "too risky" for the Case Manager to meet with Mr Ngaïssona alone, in light of the ongoing monitoring of Mr Ngaïssona's non-privileged calls and visits. The Defence team was informed that the Detention Centre considered that such a visit could not be permitted because any word or sentence that the interpreters would understand or interpret as bring "obscure" or "coded language," regardless if this was in fact the case, would be flagged to the Chamber as a violation of the current restrictions.

39. It is submitted that such limits to Mr Ngaïssona's access to his Defence team are unjustified, and curtail his right to have "adequate time and facilities for the preparation of the defence".³⁷

³⁶ Regulation 101(2)(b), Regulations of the Court.

³⁷ Article 67(1)(b), Rome Statute.

40. In light of the above, the Defence respectfully requests that the Chamber include the Case Manager position in the list of persons entitled to privileged visits with Mr Ngaïssona.

41. For the fore going reasons, the Defence submits that the restrictions on communications imposed on Patrice-Edouard Ngaïssona should be lifted immediately. In the alternative, these restrictions should be modified, reduced and lightened.

RELIEF SOUGHT

42. The Defence respectfully requests the Chamber to:

- **LIFT** the contact restrictions imposed on Patrice-Edouard Ngaïssona by the Single Judge's Decision of 23 January 2019 and extended by the Decision.

43. In the alternative, the Defence respectfully requests the Chamber to:

- **MODIFY and REDUCE** the contact restrictions imposed on Patrice-Edouard Ngaïssona by the Single Judge's Decision of 23 January 2019 and extended by the Decision, including the relief sought in paragraph 33, above.
- **ORDER** the Registry to authorize visits of Case Managers as privileged visits during the time that restrictions and monitoring are maintained.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 12 April 2019,
At The Hague, the Netherlands.