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**International
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Court**

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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***

Confidential

**Second 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:

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for the Alfred Yekatom

Mylène Dimitri
Peter Robinson

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Paddy Craig

**Victims Participation and Reparations
Section**

Other

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 57, 61(11), 64 and 68(1) of the Rome Statute (the ‘Statute’), Regulations 96 and 99-101 of the Regulations of the Court (the ‘Regulations’) and Regulations 167-170, 173-175, 177-180, 182-185 and 187 of the Regulations of the Registry, issues this ‘Second Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention’.

I. Procedural history and submissions

1. On 19 March 2020, the Detention Centre imposed temporary measures in light of the Coronavirus Pandemic, following the recommendations by the medical officer of the Detention Centre (the ‘Temporary Measures’).¹ These Temporary Measures, which have been extended until 13 July 2020,² include the suspension of all visits to the detained persons, including by Defence teams, and import of all external material.³
2. On 17 April 2020, the Chamber rendered its first decision on restrictions on Mr Ngaïssona’s contacts and communications in detention (the ‘First Restrictions Decision’).⁴ It decided to, *inter alia*, maintain the restrictions on his

¹ Memorandum DS/2020/023/PC/mc, Annex to the Registry Observations on “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf-Anx (the ‘Annex to the Registry Observations’), pp 2-7. *See also* Registry Observations on “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf, para. 17; Registry Observations on “Defence Observations to the “Ninth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II” (ICC-01/14-01/18-444-Conf-Exp)”, ICC-01/14-01/18-460-Conf-Exp, 6 April 2020, ICC-01/14-01/18-469-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (confidential *ex parte* redacted version, only available to the Ngaïssona Defence, the Prosecution and the Registry, notified the same day), paras 18, 26-27.

² Memorandum DS/2020/065/PC/mc. *See* Registry Update on Detention Centre COVID-19 Measures, 3 July 2020, ICC-01/14-01/18-578-Conf (with confidential Annex I, ICC-01/14-01/18-578-Conf-AnxI, and confidential *ex parte* Annex II, ICC-01/14-01/18-578-Conf-Exp-AnxII, only available to the Registry, the Yekatom Defence and the Ngaïssona Defence).

³ Memorandum DS/2020/023/PC/mc, 19 March 2020; Memorandum DS/2020/046/HT/mc, 24 April 2020, Memorandum DS/2020/061/PC/mc, 16 June 2020; Memorandum DS/2020/065/PC/mc, 30 June 2020. *See* Annex to the Registry Observations, ICC-01/14-01/18-557-Conf-Anx, pp 2, 12, 16; Annex I to the Registry Update on Detention Centre COVID-19 Measures, ICC-01/14-01/18-578-Conf-AnxI, p. 3.

⁴ 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

contacts and communications during detention (the 'Current Restrictions') and adopted the reporting procedure put in place by Pre-Trial Chamber II (the 'PTC II') with the modification that the Registry was ordered to henceforth submit its reports every three months.⁵ The Chamber recalls the procedural history set out therein.⁶

3. On 8 June 2020, the Registry filed its first report on the implementation of restrictions ordered in the First Restrictions Decision (the 'First Registry Report').⁷ The Registry reported that Mr Ngaïssona did not make any non-privileged telephone calls during the reporting period and did not receive any physical visits or any written correspondence.⁸ The Registry informed the Chamber of the Temporary Measures⁹ and indicated to the Chamber its intention to update the Chamber separately on the Temporary Measures.¹⁰
4. On 15 June 2020, the Office of the Prosecutor (the 'Prosecution') provided its preliminary list of witnesses, indicating, *inter alia*, which witnesses it is already certain it will call to testify (the 'Preliminary Witness List').¹¹
5. On the same day, the Prosecution filed its observations on the Registry Report requesting the Chamber to extend the Current Restrictions through the next period of review (the 'Prosecution Request').¹² In support of its request, the Prosecution submits, *inter alia*, that (i) Mr Ngaïssona has a 'documented history demonstrating a willingness to violate court-ordered contact restrictions while in

and the Registry (confidential *ex parte* redacted version, only available to the Ngaïssona Defence, the Prosecution and the Registry notified the same day, ICC-01/14-01/18-484-Conf-Exp-Red).

⁵ See First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, paras 15, 25, 29, p. 17.

⁶ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, paras 1-14.

⁷ First Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V, ICC-01/14-01/18-546-Conf-Exp, confidential *ex parte*, only available to Ngaïssona Defence, the Prosecution and the Registry.

⁸ First Registry Report, ICC-01/14-01/18-546-Conf-Exp, paras 11, 16.

⁹ First Registry Report, ICC-01/14-01/18-546-Conf-Exp, para. 13.

¹⁰ First Registry Report, ICC-01/14-01/18-546-Conf-Exp, para 13, n. 21.

¹¹ See Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528, 15 June 2020, ICC-01/14-01/18-553 (the 'Preliminary Witness List Submission') (with confidential Annex A, ICC-01/14-01/18-553-Conf-AnxA, and confidential *ex parte* Annex B, ICC-01/14-01/18-553-Conf-Exp-AnxB, only available to the Prosecution).

¹² Prosecution's Observations on the "First Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V" (ICC-01/14-01/18-546-Conf-Exp), ICC-01/14-01/18-555-Conf-Exp, confidential *ex parte*, only available to Ngaïssona Defence, the Prosecution and the Registry (the 'Prosecution Observations').

detention’;¹³ (ii) the circumstances justifying the Current Restrictions continue to exist and warrant such an extension;¹⁴ (iii) the Central African Republic (the ‘CAR’) authorities’ response to the Coronavirus Pandemic has made the implementation of witness protection measures more difficult;¹⁵ and (iv) relaxing the Current Restrictions would ‘inevitably heighten the risk to witnesses in this case’.¹⁶ The Prosecution states that the risk that Mr Ngaïssona ‘may undertake action to undermine the proceedings’ increases as the case proceeds to trial¹⁷ and this is especially the case since the Prosecution has already identified the witnesses it intends to call to testify.¹⁸

6. On 19 June 2020, the Ngaïssona Defence (the ‘Defence’) filed its observations, requesting the Chamber to ‘lift or considerably reduce the restrictions on Mr Ngaïssona’s contacts’.¹⁹ The Defence argues that the Current Restrictions fail to meet the principles of proportionality and necessity and amount to a violation of Mr Ngaïssona’s human rights,²⁰ and that the Prosecution has failed to demonstrate that lifting or modifying them could prejudice the ongoing investigations and the outcome of the proceedings.²¹ The Defence argues that the ‘the absolute prohibition to have contact with certain family members and friends, coupled with the existing active monitoring order, constitutes a disproportionate limitation’ and this is in contrast with the Court’s jurisprudence that requires that the restrictions imposed be the ‘least restrictive possible to the rights of the detained person’.²² The Defence adds that this has resulted in Mr Ngaïssona’s ‘effective isolation’ from the outside world which is further exacerbated by the Temporary Measures.²³

¹³ Prosecution Observations, ICC-01/14-01/18-546-Conf-Exp, paras 2, 4-8.

¹⁴ Prosecution Observations, ICC-01/14-01/18-546-Conf-Exp, paras 2, 10-12.

¹⁵ Prosecution Observations, ICC-01/14-01/18-546-Conf-Exp, paras 2, 11.

¹⁶ Prosecution Observations, ICC-01/14-01/18-546-Conf-Exp, paras 2, 11, 15-16.

¹⁷ Prosecution Observations, ICC-01/14-01/18-546-Conf-Exp, para. 13.

¹⁸ Prosecution Observations, ICC-01/14-01/18-546-Conf-Exp, paras 2, 14.

¹⁹ Defence Observations on the “First Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V” (ICC-01/14-01/18-546-Conf-Exp), ICC-01/14-01/18-561-Conf-Exp, confidential *ex parte*, only available to Ngaïssona Defence, the Prosecution and the Registry (the ‘Defence Observations’), paras 2, 21.

²⁰ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, paras 2, 15-20.

²¹ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, paras 2, 9-14.

²² Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 17.

²³ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 19.

7. In response to the Prosecution Request, the Defence argues that the Prosecution's allegation concerning Mr Ngaïssona's 'documented history of violating' the Court's orders is both inaccurate and misleading; and the fact that certain 'incidents' took place does not demonstrate his willingness to violate contact restrictions imposed by the Chamber.²⁴ As regards the Prosecution's submissions regarding the challenges faced during the Coronavirus Pandemic, the Defence submits that it has failed to substantiate how it would exacerbate the risks to witnesses' security.²⁵ The Defence draws attention to Mr Ngaïssona's behaviour 'over the past 17 months' during which time he knew of the identities of Prosecution witnesses but did not interfere with them or with the current proceedings.²⁶ The Defence adds that given the fact that Mr Ngaïssona has not made use of the phone for the past 7 months, the Current Restrictions do not appear necessary.²⁷
8. Furthermore, the Defence submits that, in light of the active monitoring of his calls and visits, the additional prohibition to communicate with certain family members and friends appears 'unnecessary' and contrary to the Court's jurisprudence.²⁸ In this respect, the Defence adds that despite being a temporary measure, the exclusion of certain family members from his list of contacts has 'never been reviewed'.²⁹ The Defence further submits that the imposition of the Temporary Measures has exacerbated Mr Ngaïssona's 'untenable' detention conditions and 'ultimately affect[ed] his ability to assist the Defence in the preparation of the case against him'.³⁰

II. Classification

9. The Chamber notes that the First Registry Report and the respective submissions by the parties are filed confidential *ex parte*, only available to the Ngaïssona Defence, the Prosecution and the Registry. The Chamber sees no

²⁴ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 10.

²⁵ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 12.

²⁶ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 13; *see also* para. 16.

²⁷ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 16.

²⁸ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 17.

²⁹ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 18.

³⁰ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 19.

reason justifying this classification. Further noting that the parties and the Registry do not object to reclassification as confidential,³¹ the Chamber considers it appropriate to reclassify their submissions as confidential.

III. Analysis

10. The Chamber recalls the standard and the criteria of assessment set out in its First Restrictions Decision.³² Notably, the Chamber recalls that it will regularly review the restrictions in place, where circumstances change.³³ The Chamber continues to be guided by its obligation to review the restrictions in place and to 'carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact'.³⁴
11. At the outset, the Chamber recalls the circumstances underlying the First Restrictions Decision and its subsequent findings. The Chamber considered that there had been no change in circumstances since the latest assessment by PTC II³⁵ and found that there were reasonable grounds to believe that the lifting of the Current Restrictions could prejudice the outcome of the proceedings.³⁶ In particular, the Chamber considered Mr Ngaïssona's multiple violations of restrictions during the pre-trial phase which, according to the Chamber, demonstrated his willingness to 'disregard the restrictions and to conceal conversations from the Registry and ultimately the Chamber'.³⁷ The Chamber considered the Prosecution's submissions that Mr Ngaïssona was aware of the identities of several Prosecution witnesses relevant to its assessment.³⁸ In this assessment, the Chamber had regard to Mr Ngaïssona's important roles in the Anti-Balaka and the CAR which could enable him to reach, intimidate or harm

³¹ See Prosecution Observations, ICC-01/14-01/18-555-Conf-Exp, para. 3; Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 3; First Registry Report, ICC-01/14-01/18-546-Conf-Exp, para. 9.

³² First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, paras 16-18, 21.

³³ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 26.

³⁴ 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), para. 72. See also paras 44, 102.

³⁵ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 24.

³⁶ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 25.

³⁷ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 22.

³⁸ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 23.

victims and witnesses, their families or other individuals cooperating with the Court.³⁹ The Chamber also considered that Mr Ngaïssona continues to have the means to reach out to witnesses in this case, who largely reside in the CAR.⁴⁰ Further, while the Chamber noted that Mr Ngaïssona had not made any calls since 7 November 2019⁴¹ and that no violations of the restrictions had been reported, it was not persuaded that the mere absence of incidents led to the conclusion that restrictions were no longer necessary.⁴²

12. In view of the Chamber, the aforementioned circumstances have not changed. Therefore, in assessing whether or not the Current Restrictions remain warranted, the Chamber will assess the circumstances that have changed since the First Restrictions Decision. However, before turning to the assessment at hand, the Chamber first rejects the Defence's arguments attempting to re-litigate the Chamber's conclusions as to Mr Ngaïssona's violations of restrictions during the pre-trial phase of the proceedings.⁴³
13. The Chamber notes the Defence's submission that Mr Ngaïssona has not attempted to interfere with the current proceedings or witnesses, despite his knowledge of their identities,⁴⁴ and has not made use of the phone for the past seven months.⁴⁵ The Chamber notes that no incident of interference has been reported since the First Restrictions Decision.⁴⁶ However, as noted in the First

³⁹ See First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 23.

⁴⁰ See First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 23.

⁴¹ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 24, *referring to, inter alia*, Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II, 6 January 2020, ICC-01/14-01/18-416-Conf-Exp, only available to the Ngaïssona Defence and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaïssona Defence and the Registry, notified the same day, ICC-01/14-01/18-416-Conf-Exp-Red), para. 9.

⁴² First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 24.

⁴³ See Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 10. See further Decision on the Ngaïssona Defence Request for Leave to Appeal the Decision on Restrictions on Contacts and Communications, 22 May 2020, ICC-01/14-01/18-525-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence, the Yekatom Defence, the Prosecution and the Registry, paras 27-28.

⁴⁴ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 13.

⁴⁵ Defence Observations, ICC-01/14-01/18-561-Conf-Exp, para. 16.

⁴⁶ First Registry Report, ICC-01/14-01/18-546-Conf-Exp, para. 1; see also paras 11, 14, 16.

Restrictions Decision, the Chamber finds the observance of the restrictions to be the norm and thereby, insufficient in itself to justify lifting of such restrictions.⁴⁷

14. The Chamber notes that since the First Restrictions Decision, the Prosecution has filed its Preliminary Witness List containing identities of witnesses that the Prosecution is 'already certain it will call to testify'⁴⁸. The Chamber considers Mr Ngaïssona's awareness of this list relevant to its present assessment. More importantly, the Chamber notes that protective measures have not yet been put in place in respect of certain witnesses,⁴⁹ *inter alia* because the Coronavirus Pandemic continues to impact the Prosecution and the Registry's ability to conduct individual risk assessments and implement necessary protection measures.⁵⁰ The Chamber further notes that the Prosecution considers the Preliminary Witness List to be further subject, *inter alia*, to 'witness availability, [and] security', thereby indicating that there are security concerns in respect of certain witnesses that may affect their ability to testify before the Chamber.⁵¹
15. Having regard to these factors, the Chamber will now review the necessity and proportionality of the Current Restrictions. The Chamber is persuaded that, given the seriousness of Mr Ngaïssona's violations of restrictions during the pre-trial phase, there are reasonable grounds to believe that the lifting of 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. This is especially the case in light of the challenges faced by the Court in complying with its obligation to take appropriate protective measures for victims and witnesses under Article 68(1) of the Statute under the Coronavirus Pandemic, as noted above. The Chamber is not persuaded that Mr Ngaïssona's voluntary non-exercise of

⁴⁷ First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 24.

⁴⁸ Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 1. *See also* Annex A to the Preliminary Witness List Submission, ICC-01/14-01/18-553-Conf-AnxA, pp 1-5.

⁴⁹ *See* Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 4.

⁵⁰ Prosecution Observations, ICC-01/14-01/18-555-Conf-Exp, para. 11. *See also* Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 13.

⁵¹ Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 14.

the right to make telephone calls means that the risk of interference *per se* has abated or that the restrictions have become unnecessary.

16. The Chamber notes that the Defence has attempted to introduce the impact of the Temporary Measures as part of this assessment. The Chamber recalls that the Temporary Measures do not and cannot feature in its current assessment.⁵² As the Chamber has held before, these measures have been imposed to protect the health and safety of all detainees as well as that of the personnel charged with their care and as such fall within the purview of the Registrar pursuant to Regulation 103 of the Regulations.⁵³ Further, these measures amount to decisions of a medical nature pursuant to Regulation 155(2) of the Regulations of the Registry. The Chamber also recalls that these measures are exceptional and result from an unprecedented situation beyond anyone's immediate control. Further, these measures are not imposed on Mr Ngaïssona specifically. Complaints against the Temporary Measures must be made in accordance with the complaints procedure on detention matters, as set out in the Regulations of the Registry.⁵⁴
17. Therefore, in reviewing the necessity and proportionality of the Current Restrictions, the Chamber has assessed Mr Ngaïssona's rights, in light of the passage of time, against his violations during the pre-trial phase of the proceedings, his knowledge about the anticipated witnesses, and the impact of the Coronavirus Pandemic on the implementation of protective measures for victims and witnesses. Having regard to these considerations and the Court's obligations under Articles 68(1) and 64(2) of the Statute, the Chamber finds that the Current Restrictions continue to remain necessary and proportional to ensure a fair trial and protect the integrity of the proceedings.

⁵² First Restrictions Decision, ICC-01/14-01/18-484-Conf-Exp-Red, para. 28.

⁵³ See *further* Decision on the Defence Request for In-Person Visit to Mr Ngaïssona to Prepare for First Status Conference, 29 June 2020, ICC-01/14-01/18-575-Conf, para. 24; Decision on the Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits, 24 June 2020, ICC-01/14-01/18-567-Conf, paras 13-14.

⁵⁴ See Chapter 5, Section 5 of the Regulations of the Registry.

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES to maintain the Current Restrictions; and

ORDERS the Registry to reclassify, ICC-01/14-01/18-546-Conf-Exp, ICC-01/14-01/18-555-Conf-Exp and ICC-01/14-01/18-561-Conf-Exp, as confidential.

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



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 8 July 2020

At The Hague, The Netherlands