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No. ICC-01/14-02/18
Date of original: 29 January 2019
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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. PATRICE-EDOUARD NGAÏSSONA*

Public redacted version of

Second Decision pursuant to Regulation 101 of the Regulations of the Court

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

The Office of the Prosecutor

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James Stewart, Deputy Prosecutor
Kweku Vanderpuye

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

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Detention Section

Harry Tjonk

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court” or “ICC”) issues this decision pursuant to regulation 101 of the Regulations of the Court (the “Regulations”).

I. PROCEDURAL HISTORY

1. On 30 October 2018, the Prosecutor submitted under seal, *ex parte*, an application for the issuance of a warrant of arrest for Patrice-Edouard Ngaïssona (“Ngaïssona”) whereby she also requested the Chamber *inter alia* to order the Registry to “prohibit any exchange or contact between” Ngaïssona and Alfred Yekatom (“Yekatom”) upon arrival at the ICC Detention Centre.¹

2. On 7 December 2018, the Chamber issued a warrant of arrest against Ngaïssona.²

3. On 12 December 2018, Ngaïssona was arrested by the authorities of the French Republic pursuant to the Court’s request for cooperation seeking his arrest and surrender.³

4. On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic and arrived at the ICC Detention Centre.⁴

5. On the same day, the Single Judge, acting on behalf of the Chamber,⁵ rendered the “Decision pursuant to Regulation 101 of the Regulations of the Court” whereby he *inter alia* provisionally prohibited any exchange or contact between Ngaïssona and Yekatom and ordered that the two suspects be placed in [REDACTED] the Detention Centre until 29 January 2019 (inclusive). The Single Judge further (i) ordered the Registrar to submit a report on the feasibility and the direct and indirect costs of separating Ngaïssona and Yekatom within the ICC Detention Centre, as well as on the effects of such a measure on the personal lives and rights of the two suspects; and (ii)

¹ ICC-01/14-02/18-1-US-Exp, para. 357.

² Pre-Trial Chamber II, Warrant of Arrest for Patrice-Edouard Ngaïssona, ICC-01/14-02/18-2-US-Exp; a public redacted version is also available, *see* ICC-01/14-02/18-2-Red.

³ ICC-01/14-02/18-9-US-Exp, paras 4 and 6.

⁴ ICC-01/14-02/18-14-US-Exp, paras 5-11 and 15.

⁵ Pre-Trial Chamber II, Decision designating a Single Judge, 6 December 2018, ICC-01/14-02/18-3-US-Exp.

directed the Prosecutor to submit a request to the Chamber if she wished to maintain Ngaïssona and Yekatom in [REDACTED] the Detention Centre after 29 January 2019.⁶

6. On 25 January 2019, the Chamber received the “Registry Report on the Feasibility, Costs and Effects of Separating Mr Ngaïssona and Mr Yekatom within the ICC Detention Centre”.⁷

7. On 28 January 2019, the Chamber received the “Prosecution’s Request to Continue the Separation of NGAISSONA and YEKATOM at the ICC Detention Centre” (the “Prosecutor’s Request”).⁸

II. THE REGISTRY’S AND THE PROSECUTOR’S SUBMISSIONS

8. The Registry submits that in order for the prohibition of any exchange or contact between the two suspects to be effective, Ngaïssona and Yekatom [REDACTED].⁹

9. The Registry highlights that this would result in a *de facto* segregation of Ngaïssona and would entail a significant lack of meaningful human and social interaction for him.¹⁰ Further, it would also result in an overall reduction of opportunities for all detained persons to access fresh air, sports, receive visits and have educational lessons, [REDACTED].¹¹

10. In terms of costs, the Registry submits that the financial impact of this detention regime [REDACTED].¹²

11. The Prosecutor submits that unrestricted contact between Ngaïssona and Yekatom could undermine the integrity of the proceedings and prejudice the Prosecutor’s ongoing investigation. In the Prosecutor’s view, there is a high possibility of collusion between the two suspects and between them and insider witnesses given the nature and gravity of the alleged crimes, the fact that the two cases are related, the

⁶ 23 January 2019, ICC-01/14-02/18-11-Conf-Exp, para. 6 and p. 7.

⁷ ICC-01/14-02/18-15-Conf-Exp.

⁸ ICC-01/14-02/18-17-Conf-Exp; a confidential redacted version is also available, *see* ICC-01/14-02/18-17-Conf-Red.

⁹ ICC-01/14-02/18-15-Conf-Exp, paras 7-9.

¹⁰ ICC-01/14-02/18-15-Conf-Exp, para. 14.

¹¹ ICC-01/14-02/18-15-Conf-Exp, paras 11-12.

¹² ICC-01/14-02/18-15-Conf-Exp, para. 10.

suspects' histories, network of supporters and their association with an active, violent rebel group.¹³

12. Further, the Prosecutor submits that the separation is a fair and proportionate measure to counter the risk of collusion as it does not eliminate the suspects' contact with other detainees or access to activities, but entails only a reduction in their activities.¹⁴ The Prosecutor stresses that segregation is not a *sine qua non* consequence of a separation order and advances that [REDACTED] is neither a legal basis, nor a justification for "*not doing what can be done* with the capacity and facilities available to best approximate the intended objectives of Separation".¹⁵ The Prosecutor also highlights that the immediate cost of separation is far less detrimental to the Court than the long-term consequences of collusion.¹⁶

13. For these reasons, the Prosecutor requests the Chamber to extend the separation of Ngaïssona and Yekatom for another 21 days. Alternatively, the Prosecutor requests the Chamber to order the Registry to implement measures to minimise contact between the suspects and otherwise actively monitor their interactions.¹⁷

¹³ ICC-01/14-02/18-17-Conf-Red, paras 1-2, 6-7 and 12-14.

¹⁴ ICC-01/14-02/18-17-Conf-Red, para. 16.

¹⁵ ICC-01/14-02/18-17-Conf-Red, paras 18-20 (emphasis in the original).

¹⁶ ICC-01/14-02/18-17-Conf-Red, paras 10 and 21.

¹⁷ ICC-01/14-02/18-17-Conf-Red, paras 1, 3-4 and 23.

III. THE CHAMBER'S DETERMINATION

14. The Chamber notes articles 21(1)(a) and (3) and 57(3)(a) of the Rome Statute (the “Statute”) and regulations 99 and 101 of the Regulations.

15. The Chamber recalls that pursuant to regulation 101(2) of the Regulations, the Chamber may

prohibit, regulate or set conditions for contact between a detained person and any other person, with the exception of counsel, if the Prosecutor has *reasonable grounds to believe* that such contact: [...] (b) [c]ould prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation; [or] (c) [c]ould be harmful to a detained person or any other person; [...] (emphasis added).

16. Having reviewed the Prosecutor’s Request, the Chamber finds that the reasons provided by the Prosecutor therein do not establish reasonable grounds to believe¹⁸ that contact between Ngaïssona and Yekatom could prejudice or affect the investigation and outcome of the proceedings. The Chamber considers that the risk identified by the Prosecutor is neither sufficiently concrete, nor specific to this situation and amounts to mere speculation. Rather than providing the Chamber with direct proof, in these particular cases, that contact between the two suspects could prejudice the investigation, the Prosecutor relies on incidents that have occurred in other cases to argue that such a risk exists, it would seem, almost automatically.¹⁹ This renders the test of “reasonable grounds to believe” in regulation 101(2) of the Regulations meaningless.

17. Secondly, the Chamber is not persuaded that if the suspects have the “opportunity to align their versions of events” the integrity of the proceedings will be affected. The Chamber will not base its decision on the confirmation of the charges on the versions of events presented by the suspects, but rather on the totality of the evidence presented by the parties.

18. Thirdly, the Chamber considers that the risk to the integrity of the investigation and outcome of the proceedings needs to be balanced against the rights and entitlements

¹⁸ See Pre-Trial Chamber III, *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 24.

¹⁹ ICC-01/14-02/18-17-Conf-Red, para. 9; see paras 2 and 8 where the Prosecutor suggests that unrestricted contact is a “licence to collude” and “would invite [the] free exchange of details and evidence, [...] necessarily including the identities of witnesses”.

of the detained persons. In this regard, the Chamber recalls regulation 99 of the Regulations which provides that:

Every detained person shall be entitled, *inter alia*, to the following: (a) To participate in a work programme; [...] (e) To the use of a common space equipped with reading and writing materials, a television, radio and computer, which shall be provided for the general use of all detained persons; (f) To a period of exercise in the open air of at least one hour per day; (g) To engage in sporting activities [...].

19. The Chamber takes note of the Registry's submission that in order for the prohibition of any exchange or contact between Ngaïssona and Yekatom to be effective, [REDACTED] resulting in a *de facto* segregation.²⁰ The Chamber is mindful of the fact that this would entail a significant lack of social interaction for the suspect in question and could have, over an extended period of time, a damaging effect on his mental health, physical health and social abilities. Considering the risks to the suspect's health and well-being, the Chamber stresses that this measure may not be imposed for long periods of time. Yet, the Prosecutor makes no argument that circumstances will change within the next 21 days.

20. Furthermore, as highlighted by the Registry, separating the two suspects would also entail a reduction for all detainees in the opportunities that they have to use the communal areas, avail themselves of fresh air or perform sports and educational activities.²¹ In light of all of the above, the Chamber considers that the separation of Ngaïssona and Yekatom [REDACTED] would be disproportionate and unjustified in the present circumstances. In making this determination, the Chamber is also mindful of the high costs that would be incurred [REDACTED].

21. Regarding the Prosecutor's alternative request that contact between Ngaïssona and Yekatom be minimised and actively monitored, the Chamber considers that this request should equally be rejected. The Chamber is persuaded by the Registry's submission that it would be virtually impossible over time to prevent the exchange of information [REDACTED].²² Additionally, the language spoken by the suspects would impede any proper monitoring, as it would not be understood by the custody officers.

²⁰ ICC-01/14-02/18-15-Conf-Exp, paras 7-8.

²¹ ICC-01/14-02/18-15-Conf-Exp, paras 11-12.

²² ICC-01/14-02/18-15-Conf-Exp, paras 7-9.

22. [REDACTED].²³

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Prosecutor's Request;

ORDERS the Registrar to report to the Chamber, without delay, any suspicious behaviour on the part of Ngaïssona and Yekatom which could have an impact on the integrity of the Prosecutor's investigation, the integrity of the proceedings or the safety and security of (potential) witnesses; and

ORDERS the Registrar to also file the present decision in the record of the case of *The Prosecutor v. Alfred Yekatom* with the same level of classification.

²³ ICC-01/14-02/18-15-Conf-Exp, para. 15.

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 8 February 2021

At The Hague, The Netherlands