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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. ALFRED YEKATOM AND*
PATRICE-EDOUARD NGAÏSSONA

Public redacted version of

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:

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PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision Pursuant to Regulation 101 of the Regulations of the Court.

I. Procedural History

1. On 30 October 2018, the Prosecutor submitted under seal, *ex parte*, an application for the issuance of warrants of arrest for Patrice-Edouard Ngaïssona and Alfred Yekatom.¹ The Prosecutor further requested, *inter alia*, that their contacts be restricted upon arrival at the ICC Detention Centre, submitting that there are reasonable grounds to believe that contact between Ngaïssona, Yekatom and their associates would prejudice the outcome of the investigation within the meaning of regulation 101(2)(b) of the Regulations of the Court (the ‘Regulations’).²

2. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’.³

3. On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic.⁴ On the same day, the Single Judge, acting on behalf of the Chamber,⁵ issued the ‘Decision pursuant to Regulation 101 of the Regulations of the Court’ (the ‘17 November 2018 Decision’), thereby restricting Yekatom’s communications upon his arrival at the ICC Detention Centre for a period of two weeks.⁶ The Single Judge limited the number of individuals Yekatom could make telephone calls to and receive visits from, ordered the active monitoring of his telephone calls and visits, and limited the duration of his telephone calls to 60 minutes per week as well as the languages of communication to French and Sango.⁷ On 18 November 2018, Yekatom arrived at the ICC Detention Centre.⁸

¹ ICC-01/14-01/18-2-US-Exp, together with 11 under seal, *ex parte* annexes.

² ICC-01/14-01/18-2-US-Exp, para. 357.

³ ICC-01/14-01/18-1-US-Exp. A public redacted version of the warrant of arrest is also available; see [ICC-01/14-01/18-1-Red](#).

⁴ Registry, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, ICC-01/14-01/18-17-US-Exp, paras 19-24.

⁵ Pre-Trial Chamber II, Decision designating a Single Judge, 9 November 2018, ICC-01/14-01/18-10.

⁶ ICC-01/14-01/18-11-Conf-Exp.

⁷ ICC-01/14-01/18-11-Conf-Exp, paras 6-9.

⁸ ICC-01/14-01/18-17-US-Exp, para. 25.

4. Between 4 December 2018 and 15 February 2019, upon requests by the Prosecutor,⁹ the Chamber issued four decisions pursuant to regulation 101 of the Regulations,¹⁰ thereby each time extending the restrictions on Yekatom's contacts, with one modification: Yekatom was granted the right to have private family visits on 10 January 2019 (the '10 January 2019 Decision').¹¹

5. On 7 December 2018, the Chamber issued the 'Warrant of Arrest for Patrice-Edouard Ngaïssona'.¹²

6. On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.¹³ On the same day, the Single Judge, acting on behalf of the Chamber,¹⁴ issued the 'Decision pursuant to Regulation 101 of the Regulations of the Court' (the '23 January 2019 Decision'), thereby restricting Ngaïssona's contacts and communications upon his arrival at the ICC Detention Centre.¹⁵ The Single Judge prohibited any exchange of contact between Ngaïssona and Yekatom, limited for a period of two weeks the number of individuals Ngaïssona could make telephone calls to and receive visits from, ordered the active monitoring of his telephone calls and visits, and limited the duration of his telephone calls to 60 minutes per week as well as the languages of communication to French and Sango.¹⁶

7. On 29 January 2019, the Chamber issued the 'Second Decision pursuant to Regulation 101 of the Regulations of the Court', thereby rescinding the separation of Ngaïssona and Yekatom (the '29 January 2019 Decision').¹⁷

⁹ ICC-01/14-01/18-24-Conf-Red; ICC-01/14-01/18-44-Conf-Exp; ICC-01/14-01/18-69-Conf-Exp; ICC-01/14-01/18-83-Conf.

¹⁰ ICC-01/14-01/18-25-Conf-Exp; ICC-01/14-01/18-52-Conf-Exp; ICC-01/14-01/18-75-Conf-Exp; ICC-01/14-01/18-86-Conf-Exp.

¹¹ ICC-01/14-01/18-52-Conf-Exp.

¹² ICC-01/14-01/18-89-Conf-Exp. A public redacted version of the warrant of arrest is also available; see [ICC-01/14-01/18-89-Red](#).

¹³ Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

¹⁴ Pre-Trial Chamber II, Decision designating a Single Judge, 6 December 2018, ICC-01/14-01/18-90.

¹⁵ ICC-01/14-01/18-98-Conf-Exp.

¹⁶ ICC-01/14-01/18-98-Conf-Exp, paras 8-11.

¹⁷ ICC-01/14-01/18-106-Conf-Exp. A confidential *ex parte*, redacted version is also available; see ICC-01/14-01/18-106-Conf-Exp-Red.

8. On 6 February 2019, upon request by the Prosecutor,¹⁸ the Chamber issued the ‘Third Decision pursuant to Regulation 101 of the Regulations of the Court’, thereby provisionally extending the restrictions on Ngaïssona’s contacts until 1 March 2019.¹⁹

9. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.²⁰

10. On 1 March 2019, the Chamber issued the ‘Decision Pursuant to Regulation 101 of the Regulations of the Court’, thereby provisionally extending, until 15 April 2019 (inclusive), the restrictive measures concerning Yekatom’s and Ngaïssona’s communications and contacts put in place by way of the 17 November 2018 Decision and the 23 January 2019 Decision respectively, as modified by the 10 January 2019 Decision and the 29 January 2019 Decision respectively, with the following modifications: (i) non-privileged telephone conversations by Yekatom and Ngaïssona and visits to them (apart from private family visits) are to be actively monitored at random; (ii) Ngaïssona may receive private family visits – from his wife and children only – without any monitoring or the use of ‘sensitive listening devices’; and (iii) in conducting the verification procedure concerning individuals whom the suspects wish to add to their non-privileged contact lists and/or whom they wish to receive visits from, the Chief Custody Officer may request the support of the Victims and Witnesses Unit (the ‘VWU’ and the ‘1 March 2019 Decision’).²¹

11. On 15 April 2019, the Chamber issued the ‘Decision Pursuant to Regulation 101 of the Regulations of the Court’, thereby: (i) rejecting the Prosecutor’s request to reinstate the original contact restrictions initially imposed on Yekatom and Ngaïssona as well as the Prosecutor’s related requests; (ii) deciding to extend the regime of restrictions on contacts – put in place by way of the 17 November 2018 Decision, as modified by the 10 January 2019 Decision and the 1 March 2019 Decision for Yekatom and put in place by way of the 23 January 2019 Decision, as modified by the

¹⁸ ICC-01/14-01/18-112-Conf-Exp. A confidential redacted version is also available; see ICC-01/14-01/18-112-Conf-Red.

¹⁹ ICC-01/14-01/18-114-Conf-Exp, para. 11, p. 7. A confidential *ex parte*, redacted version is also available; see ICC-01/14-01/18-114-Conf-Exp-Red.

²⁰ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

²¹ ICC-01/14-01/18-137-Conf-Exp.

29 January 2019 Decision and the 1 March 2019 Decision for Ngaïssona - and to maintain it for the remainder of the pre-trial proceedings; (iii) ordering the Registrar to submit to the Chamber separate reports on the implementation of the restrictive measures concerning Yekatom's and Ngaïssona's communications and contacts every two months and to inform the Chamber immediately of any violation of the applicable regime; (iv) ordering the Prosecutor to submit observations on the Registry reports, if any, within five days of the notification of the Registry reports, and ordering the Yekatom Defence and the Ngaïssona Defence to submit observations on the Registry reports and the Prosecutor's observations, if any, within 10 days of notification of the Registry reports; (v) instructing the Registry to ensure that any time required to set up a telephone call does not affect the time allotted to Yekatom and Ngaïssona to speak on the telephone; (vi) rejecting any other requests to vary the restrictive measures concerning Ngaïssona's communications and contacts; and (vii) granting the request by the Ngaïssona Defence to include its case manager in the list of persons entitled to privileged visits with Ngaïssona (the '15 April 2019 Decision').²²

12. On 15 May 2019, the Chamber issued the 'Decision on the "Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines"', thereby deciding that the confirmation hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019.²³

13. On 17 June 2019, the Chamber received the 'Fourth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II' (the 'Fourth Registry Report').²⁴

14. On 24 June 2019, the Chamber received the 'Prosecution's Observations Pursuant to the "Decision Pursuant to Regulation 101 of the Regulations of the Court" (ICC-01/14-01/18-176-Conf-Exp)' (the 'Prosecutor Observations').²⁵

²² ICC-01/14-01/18-176-Conf-Exp. A confidential redacted version is also available; see ICC-01/14-01/18-176-Conf-Red.

²³ [ICC-01/14-01/18-199](#).

²⁴ ICC-01/14-01/18-225-Conf-Exp, together with 2 confidential, *ex parte* annexes. Confidential redacted versions of the Fourth Registry Report and Annex I to this Report are also available; see ICC-01/14-01/18-225-Conf-Exp-Red; ICC-01/14-01/18-225-Conf-Exp-AnxI-Red. Annex II to the Fourth Registry Report was reclassified as 'Confidential, Ex-Parte Defence of Patrice-Edouard Ngaïssona, Office of the Prosecutor and Registry' on 20 June 2019; see ICC-01/14-01/18-225-Conf-Exp-AnxII.

15. On 1 July 2019, the Chamber received the ‘Defence Observations Pursuant to the “Decision Pursuant to Regulation 101 of the Regulations of the Court” (ICC-01/14-01/18-176-Conf-Red)’ (the ‘Ngaïssona Defence Observations’).²⁵

II. Submissions

A. The Registry

16. The Fourth Registry Report indicates that, ‘[a]s of 13 March 2019, considering the reasonable demands of the daily schedule at the [ICC Detention Centre] and the availability of the interpreter, Mr Ngaïssona has been able to make non-privileged telephone calls for one and a half hours every week’. The Registry further reports that the ICC Detention Centre actively monitored certain calls made by Ngaïssona at random and that no incidents occurred during these calls.

17. Furthermore, the Registry indicates that ‘Mr Ngaïssona currently has 19 individuals on his non-privileged telephone contact list out of the 25 allowed’. According to the Fourth Registry Report, Ngaïssona made seven requests to add persons to his non-privileged telephone contact list. In this regard, the Registry states that the ICC Detention Centre contacted the persons concerned in order to confirm their relationship with Ngaïssona and the additional information provided by him. In addition, according to the Registry, the Chief Custody Officer ‘requested the support of the VWU to further verify the identit[ies] and contact details’ of these persons. With regard to three requests submitted by Ngaïssona, the Fourth Registry Report specifies that, [REDACTED]. The Registry further indicates that the VWU confirmed the identity of one individual and the telephone number of another individual referred to in two other requests submitted by Ngaïssona, which led the Chief Custody Officer to add these persons to Ngaïssona’s non-privileged telephone contact list as well. The Fourth Registry Report also specifies that the VWU submitted its reports in relation to the two remaining requests submitted by Ngaïssona

²⁵ ICC-01/14-01/18-228-Conf-Exp. A confidential redacted version is also available; see ICC-01/14-01/18-228-Conf-Exp-Red.

²⁶ ICC-01/14-01/18-234-Conf-Exp. A confidential redacted version is also available; see ICC-01/14-01/18-234-Conf-Red. On 4 July 2019, the Chamber ordered that the confidential redacted version of the Ngaïssona Defence Observations be reclassified as confidential, *ex parte*, only available to the Prosecutor, the Defence for Patrice-Edouard Ngaïssona, the Victims and Witnesses Unit, and the Detention Section.

and that these reports are currently under review by the Chief Custody Officer. In addition, according to the Fourth Registry Report, ‘the Registry has ensured that any time required to set, connect, reconnect or get a telephone call answered does not affect the time allocated to [...] Mr Ngaïssona to speak on the telephone’.

18. Moreover, the Fourth Registry Report indicates that ‘four [...] applications for permission to visit Mr Ngaïssona have been submitted’ and the Chief Custody Officer also ‘requested the support of the VWU to further verify the identity and contact details of these individuals’. In this regard, the Fourth Registry Report states that, for one of them, [REDACTED] and, accordingly, ‘this individual has been authorized to visit Mr Ngaïssona’. [REDACTED]. The Registry also states that Ngaïssona received non-privileged visits on several occasions in [REDACTED] 2019.

19. Finally, the Fourth Registry Report states that ‘Mr Ngaïssona has not received or sent any written correspondence or packages’.

B. The Prosecutor Observations

20. The Prosecutor requests that ‘the Chamber impose the most stringent conditions on NGAISSONA’s contacts in detention’ as ‘[w]itness security in these proceedings remains precarious, and [REDACTED]’ (the ‘Prosecutor’s First Request’).

21. Furthermore, the Prosecutor asserts that she is ‘seriously concerned by the decision of the ICC Detention Centre Chief Custody Officer [...] [REDACTED]’. According to the Prosecutor, ‘[w]hile it cannot be said that in every case a Suspect will seek to violate the rules of the Detention Centre, what is at issue here is the reasoned and reasonable balancing of *risk*, which the [Chief Custody Officer’s] decision fails adequately to address’. The Prosecutor adds that ‘[i]t is well-known that the ICC Detention Centre has been the subject of serious breaches by Suspects in custody’. In addition, the Prosecutor argues that ‘[REDACTED]’. According to the Prosecutor, this approach is ‘unacceptable in view of the Court’s statutory obligations’ and [REDACTED] only exacerbates the error’.

22. On the basis of the preceding arguments, the Prosecutor further requests the Chamber to ‘vacate the Detention Centre [Chief Custody Officer’s] [REDACTED]’ (the ‘Prosecutor’s Second Request’).

C. The Ngaïssona Defence Observations

23. The Ngaïssona Defence submits that ‘the redactions applied by the Prosecution prevent the Defence from making concrete, specific and up-to-date submissions on the [Prosecutor’s Observations]’. The Ngaïssona Defence argues that the Prosecutor’s First and Second Request ‘should therefore be rejected, or in the alternative, the Prosecution should be ordered to provide the Defence with an unredacted version of its initial application requesting the restrictions regime, as well as of its subsequent requests for maintaining the regime’ (the ‘First Ngaïssona Defence Request’).

24. Furthermore, according to the Ngaïssona Defence, ‘[t]he Prosecution fails to substantiate its request that restrictions should be maintained at this stage’. The Ngaïssona Defence argues that the Prosecutor ‘merely incorporates by reference its previous observations and previous Chamber’s findings’, which ‘defeats the purpose of having a review process in the first place, whose goal is to assess on a punctual basis whether restrictions on contacts continue to be warranted in light of up-to-date information’. The Ngaïssona Defence also submits that the Prosecutor ‘evokes vague notions such as the challenges for the Prosecution in conducting investigations in [the Central African Republic] and the particular vulnerability of witnesses’ to which it has already responded in detail in previous filings.

25. The Ngaïssona Defence is also of the view that ‘[t]he Prosecution’s request that the [Chief Custody Officer’s] decision [REDACTED] finds no basis’. According to the Ngaïssona Defence, the Prosecutor’s ‘reliance on breaches by *other* Suspects at the Detention Centre is wholly inappropriate’ as ‘[p]ast incidents involving different Suspects, in the context of entirely distinct situations, different restrictions regimes, and at entirely different phases of the case, simply cannot be held against Mr Ngaïssona’. The Ngaïssona Defence further asserts that the Chief Custody Officer ‘sought the [VWU’s] assistance, on a voluntary basis, in conformity with the Chamber’s directive in its Decision dated 1 March 2019’. It adds that the Prosecutor ‘fails to acknowledge that the [Chief Custody Officer] [REDACTED]’.

26. In addition, the Ngaïssona Defence submits that ‘the time has come to lift the restrictions on communication imposed on Mr Ngaïssona’ (the ‘Second Ngaïssona Defence Request’). According to the Ngaïssona Defence, the ‘repeated absence of incidents warrants the lifting of restrictions imposed on Mr Ngaïssona’s

contacts’. The Ngaïssona Defence further avers that ‘the current restrictions imposed on Mr Ngaïssona’s contact with the outside world, and in particular, the restrictions on his telephone communications are unnecessary, disproportionate at this stage, and difficult to reconcile with Mr Ngaïssona’s fundamental and internationally recognized human rights’. In this regard, the Ngaïssona Defence submits that ‘[o]ne 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’. The Ngaïssona Defence also argues that ‘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 notion of “family” in Central African Republic, as in many other African countries, does not necessarily correspond to Euro-centric notions of family’. The Ngaïssona Defence adds that ‘telephone calls are Mr Ngaïssona’s main method of communication with his family and to an extent, his lifeline’.

III. Determination by the Chamber

27. The Chamber notes articles 57(3)(a) and 68(1) of the Rome Statute (the ‘Statute’), regulations 99(1)(i), 100 and 101 of the Regulations and regulations 173, 174, 175, 183 and 184 of the Regulations of the Registry.

A. The Prosecutor’s Requests

28. With regard to the Prosecutor’s First Request, the Chamber notes that the Prosecutor has not provided any specific information in relation to her assertion that [REDACTED]. Similarly, in relation to the Prosecutor’s contention that certain previous ‘filings and the Chamber’s decisions elaborate the relevant and still prevailing justifications’, the Chamber recalls that it rejected an identical request by the Prosecutor in the 15 April 2019 Decision and observes that she has not provided any arguments demonstrating why the Chamber should depart from that finding in the present circumstances. Therefore, the Prosecutor’s First Request is unsubstantiated and must, accordingly, be rejected.

29. The Chamber turns to the Prosecutor’s Second Request. The Chamber is mindful of the difficulties [REDACTED]. However, the Chamber is of the view that such difficulties cannot undermine Ngaïssona’s rights to ‘communicate by [...] telephone with his [...] family and other persons’ and ‘to receive visits’ pursuant to regulations 99(1)(i) and 100(1) of the Regulations. In this regard, the Chamber also

takes into account that, as with the other Registry reports regarding the implementation of the restrictions imposed on Ngaïssona's contacts, the Fourth Registry Report indicates that no incidents occurred during the telephone calls that were monitored by the Registry. Accordingly, the Chamber rejects the Prosecutor's Second Request.

30. Nevertheless, the Chamber finds it appropriate to order the Registry to substantially increase the random monitoring of Ngaïssona's telephone calls [REDACTED] (apart from private family visits), according to the Fourth Registry Report. This additional safeguard duly balances the obligation to protect victims and witnesses under article 68(1) of the Statute and Ngaïssona's aforementioned rights pursuant to regulations 99(1)(i) and 100(1) of the Regulations. The Chamber leaves the practical implementation of this order to the Registry.

B. The Ngaïssona Defence Request

31. Having rejected the Prosecutor's First and Second Requests, the Chamber considers that the First Ngaïssona Defence Request has become moot.

32. Turning to the Second Ngaïssona Defence Request, the Chamber notes that the Ngaïssona Defence repeats arguments considered and rejected by the Chamber in the 15 April 2019 Decision.²⁷ Furthermore, the Chamber recalls that, in the same decision, it decided 'to extend the current regime of restrictions on contacts [...] and to maintain it for the remainder of the pre-trial proceedings'. In that decision, it also held that it 'will reassess the current regime concerning the restrictions on [...] Ngaïssona's contacts if necessary'. In the view of the Chamber, there are currently no indications that the circumstances justifying the restrictions on Ngaïssona's contacts have changed. Accordingly, the Chamber considers that the Ngaïssona Defence has failed to establish that the Chamber should reassess the current regime regarding the restrictions on Ngaïssona's contacts. Therefore, the Chamber rejects the Second Ngaïssona Defence Request.

²⁷ ICC-01/14-01/18-176-Conf-Red, paras 24, 26, 31.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **REJECTS** the Prosecutor's First and Second Requests;
- b) **ORDERS** the Registry to substantially increase the random monitoring of Ngaïssona's telephone calls [REDACTED] (apart from private family visits), according to the Fourth Registry Report;
- c) **FINDS** that the First Ngaïssona Defence Request has become moot; and
- d) **REJECTS** the Second Ngaïssona Defence Request.

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