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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

Public redacted version of

**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:

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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 ‘Decision on Mr Ngaïssona’s Restrictions on Contacts and Communications in Detention’.

I. Procedural history and submissions

1. Following Mr Ngaïssona’s surrender to the Court on 23 January 2019, Pre-Trial Chamber II (the ‘PTC II’) issued several decisions restricting Mr Ngaïssona’s contacts and communications in pre-trial detention, pursuant to Regulation 101 of the Regulations (the ‘Pre-Trial Decisions’ and the ‘Pre-Trial Restrictions’,

respectively).¹ The Registry reported on the implementation of the Pre-Trial Restrictions in several filings.²

¹ Decision pursuant to Regulation 101 of the Regulations of the Court, 23 January 2019, ICC-01/14-01/18-98-Conf-Exp, only available to the Prosecution, the Ngaissona Defence, the Yekatom Defence and the Registry (the ‘23 January 2019 Decision’); Decision pursuant to Regulation 101 of the Regulations of the Court, 29 January 2019, ICC-01/14-01/18-106-Conf-Exp, only available to the Prosecution and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence, the Yekatom Defence and the Registry, notified the same day, ICC-01/14-01/18-106-Conf-Exp-Red) (the ‘29 January 2019 Decision’); Third Decision pursuant to Regulation 101 of the Regulations of the Court, 6 February 2019, ICC-01/14-01/18-114-Conf-Exp, only available to the Prosecution and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence and the Registry, notified the same day); Decision Pursuant to Regulation 101 of the Regulations of the Court, 1 March 2019, ICC-01/14-01/18-137-Conf-Exp, only available to the Prosecution, the Ngaissona Defence, the Yekatom Defence and the Registry (the ‘1 March 2019 Decision’); Decision Pursuant to Regulation 101 of the Regulations of the Court, 15 April 2019, ICC-01/14-01/18-176-Conf-Exp, only available to the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-176-Conf-Red) (the ‘15 April 2019 Decision’); Decision Pursuant to Regulation 101 of the Regulations of the Court, 9 July 2019, ICC-01/14-01/18-240-Conf-Exp, only available to the Prosecution, the Ngaissona Defence and the Registry (the ‘9 July 2019 Decision’); Decision Pursuant to Regulation 101 of the Regulations of the Court, 18 September 2019, Decision ICC-01/14-01/18-357-Conf-Exp, only available to the Ngaissona Defence and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence and the Registry, notified the same day) (the ‘18 September 2019 Decision’); Decision on the Registry’s Request for an Extension and the Contact Restrictions in place for Ngaissona, 3 October 2019, Decision ICC-01/14-01/18-374-Conf-Exp, only available to the Ngaissona Defence and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence and the Registry, notified the same day, ICC-01/14-01/18-374-Conf-Exp-Red) (the ‘3 October 2019 Decision’); Decision pursuant to Regulation 101 of the Regulations of the Court, 23 December 2019, ICC-01/14-01/18-413-Conf-Exp, only available to the Ngaissona Defence and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence and the Registry, notified the same day, ICC-01/14-01/18-413-Conf-Exp-Red) (the ‘23 December 2019 Decision’); Decision Pursuant to Regulation 101 of the Regulations of the Court, 3 February 2020, ICC-01/14-01/18-424-Conf-Exp, only available to the Ngaissona Defence and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, Ngaissona Defence and Registry notified the same day, ICC-01/14-01/18-424-Conf-Exp-Red) (the ‘3 February 2020 Decision’).

² Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge, 6 February 2019, ICC-01/14-01/18-115-Conf-Exp, only available to the Ngaissona Defence and the Registry (with four confidential *ex parte* annexes, only available to the Ngaissona Defence and the Registry); Second Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Édouard Ngaissona Ordered by the Single Judge, 25 February 2019, ICC-01/14-01/18-125-Conf-Exp, only available to the Ngaissona Defence and the Registry (with two confidential *ex parte* annexes, only available to the Ngaissona Defence and the Registry) (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence and the Registry, with confidential redacted Annexes I and II, notified the same day); Third Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice Édouard Ngaissona Ordered by Pre-Trial Chamber II, 8 April 2019, ICC-01/14-01/18-166-Conf-Exp, only available to the Ngaissona Defence and the Registry (with five confidential *ex parte* annexes, only available to the Ngaissona Defence and the Registry) (confidential *ex parte* redacted version, only available to the Prosecution, the Ngaissona Defence and the Registry, with five confidential redacted annexes, filed the same day); Fourth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaissona Ordered by the Pre-Trial Chamber II”, 17 June 2019, ICC-01/14-01/18-225-Conf-Exp, only available to the Ngaissona Defence and the Registry (with confidential *ex parte* annex I, only available to the Ngaissona Defence and the Registry and confidential *ex parte* annex II, only available to Prosecution, Ngaissona Defence and the Registry) (confidential redacted version, with one confidential *ex parte* redacted annex, only available to the Prosecution, the Ngaissona Defence and the Registry, notified the same day); Fifth Registry Report on the Implementation of the

2. On 15 April 2019, PTC II established the following procedure for its review of Pre-Trial Restrictions (the ‘Reporting Procedure’): (i) the Registry shall submit separate reports on the implementation of the restrictive measures (the ‘Registry Reports’), together with confidential redacted versions of said reports, every two months, and inform PTC II of any violation of the applicable restrictions or any other significant developments immediately; (ii) the Office of the Prosecutor (the ‘Prosecution’) shall submit observations on the Registry Reports, if any, together with confidential redacted versions of said observations, within five days of notification; and (iii) the Yekatom and the Ngaïssona Defence shall submit observations on the respective Registry Reports, as well as on the Prosecution’s observations, if any, together with confidential redacted versions of said observations, within 10 days of notification of the Registry Reports.³

3. On 18 September 2019, PTC II found that Mr Ngaïssona had violated the Pre-Trial-Restrictions in place at the time by (i) engaging in a call over speaker phone with an unauthorised third party, using coded language,⁴ and (ii) repeatedly communicating with [REDACTED] using coded language.⁵ In light of these violations, PTC II ordered further measures in order to protect the integrity of the proceedings (the ‘Increased Restrictions’).⁶ In addition, PTC II ordered the

Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II, 15 August 2019, ICC-01/14-01/18-276-Conf-Exp, only available to the Ngaïssona Defence and the Registry (with one confidential *ex parte* annex, only available to the Ngaïssona Defence and the Registry) (confidential redacted version, only available to the Prosecution, the Ngaïssona Defence and the Registry, notified the same day); Sixth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II”, 13 September 2019, ICC-01/14-01/18-337-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 on 17 September 2019); Seventh Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II, 4 November 2019, ICC-01/14-01/18-390-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-01/14-01/18-390-Conf-Exp-Red) (the ‘Seventh Registry Report’); 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) (the ‘Eighth Registry Report’); Ninth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II, 6 March 2020, ICC-01/14-01/18-444-Conf-Exp, only available to the Prosecution, the Ngaïssona Defence and the Registry.

³ 15 April 2019 Decision, ICC-01/14-01/18-176-Conf-Red, para. 32.

⁴ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp-Red, para. 48.

⁵ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp, para. 49.

⁶ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp-Red, para. 52.

Registry (i) to investigate the identity of the unauthorised third party, (ii) to conduct an expanded investigation into Mr Ngaïssona's non-privileged phone calls as of 17 June 2019, and (iii) to report on any breaches of the communications regime.⁷

4. On 23 December 2019, after receiving the results of the Registry's expanded investigation,⁸ PTC II found that Mr Ngaïssona had violated the Pre-Trial Restrictions on a number of other occasions by, *inter alia*, (i) communicating with non-authorised individuals, and (ii) providing instructions to individuals on how to present their relationship to Mr Ngaïssona to the Detention Centre during the verification process.⁹ PTC II considered that Mr Ngaïssona had 'engaged in a pattern of conduct designed to circumvent the rules and the restrictions imposed' and that there was a high risk of further attempts to circumvent the restrictive measures in place.¹⁰ In light of this, PTC II concluded that maintaining the Increased Restrictions for the remainder of the pre-trial proceedings was the least restrictive means to ensure the integrity of the proceedings.¹¹
5. On 3 February 2020, PTC II decided to maintain the Increased Restrictions for the remainder of the pre-trial proceedings due to a 'high risk that [...] Mr Ngaïssona may engage in further attempts to circumvent the restrictions in place.'¹² In light of Mr Ngaïssona's decision to cease all telephone calls as he had 'lost trust in the Registry's objectivity when it [came] to monitoring', PTC II directed the Registry to [REDACTED].¹³ PTC II further found that there is no evidence showing any bias of the Registry towards Mr Ngaïssona.¹⁴
6. [REDACTED].¹⁵

⁷ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp-Red, paras 54-56.

⁸ Seventh Registry Report, ICC-01/14-01/18-390-Conf-Exp, paras 15-31.

⁹ 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp, paras 82-84.

¹⁰ 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp-Red, para. 85.

¹¹ 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp-Red, para. 86.

¹² 3 February 2020 Decision, ICC-01/14-01/18-424-Conf-Exp-Red, para. 29.

¹³ 3 February 2020 Decision, ICC-01/14-01/18-424-Conf-Exp, paras 23-24.

¹⁴ 3 February 2020 Decision, ICC-01/14-01/18-424-Conf-Exp-Red, para. 25.

¹⁵ Registry Report Following the "Decision Pursuant to Regulation 101 of the Regulations of the Court", ICC-01/14-01/18-424-Conf-Exp, ICC-01/14-01/18-429-Conf-Exp, only available to the Ngaïssona Defence and the Registry, paras 10-12.

7. On 6 March 2020, the Registry filed its ‘Ninth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II’, reporting on Mr Ngaïssona’s non-privileged telephone calls, visits and incoming and outgoing mail since 6 January 2019 (the ‘Ninth Registry Report’).¹⁶ The Registry submits that during the reporting period (i) Mr Ngaïssona did not make any non-privileged phone calls,¹⁷ (ii) no incidents were reported during non-privileged visits by family members,¹⁸ and (iii) no incidents were reported with regard to Mr Ngaïssona’s written correspondence or packages.¹⁹
8. On 11 March 2020, PTC II directed the Prosecution and the Ngaïssona Defence (the ‘Defence’) to submit observations on the Ninth Registry Report to the Trial Chamber to be constituted or, pending its constitution, to the Presidency for it to include them in the case record, within the applicable time limit.²⁰
9. On 16 March 2020, the Prosecution filed its observations on the Ninth Registry Report (the ‘Prosecution Observations’).²¹ The Prosecution submits that the restrictions set out in PTC II’s 18 September 2019 and 3 October 2019 Decisions should be maintained in order to minimise the risk to the integrity of the proceedings and to witnesses whose identities are known to the accused and whose security is at risk.²² The Prosecution further submits, *inter alia*, that (i) the circumstances warranting Mr Ngaïssona’s restrictions have not changed²³ and (ii)

¹⁶ Ninth Registry Report, ICC-01/14-01/18-444-Conf-Exp.

¹⁷ Ninth Registry Report, ICC-01/14-01/18-444-Conf-Exp, para. 12.

¹⁸ Ninth Registry Report, ICC-01/14-01/18-444-Conf-Exp, para. 14.

¹⁹ Ninth Registry Report, ICC-01/14-01/18-444-Conf-Exp, para. 15.

²⁰ Email Order by PTC II to the Ngaïssona Defence, 11 March 2020, at 13:26.

²¹ Prosecution’s Observations on 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-01/14-01/18-453-Conf-Exp, only available to the Prosecution, the Ngaïssona Defence and the Registry. The Chamber notes that the filing was addressed to the Presidency. Following the transmission of the case record to the Chamber on 17 March 2020 (*see* Transmission to Trial Chamber V of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18-455), and in compliance with PTC II’s Email Order on 11 March 2020, the Chamber considers itself competent to address the matter.

²² Prosecution Observations, ICC-01/14-01/18-453-Conf-Exp, para. 2.

²³ Prosecution Observations, ICC-01/14-01/18-453-Conf-Exp, para. 5.

restrictions continue to be necessary in light of Mr Ngaïssona's 'predisposition' and 'apparent resourcefulness and intentions to circumvent the measures'.²⁴

10. On 19 March 2020, the Defence filed its observations on the Ninth Registry Report (the 'Defence Observations') and requests the Chamber to 'order the Detention Centre to immediately lift, in practice, the current restrictions on Mr Ngaïssona's contacts' (the 'Request').²⁵ The Defence submits that the current restrictions imposed on Mr Ngaïssona's contacts with the outside world 'are bereft of any legal and factual basis'²⁶ and have been rendered moot since PTC II had extended them only 'for the remainder of the pre-trial-proceedings', which have ended with the transmission of the case record to the Trial Chamber.²⁷ In the alternative, the Defence asks that the Chamber review the restrictions *de novo* on the basis of a new Prosecution request pursuant to Regulation 101(2) of the Regulations and lift all restrictions on contacts.²⁸
11. In the Defence's submission, the imposed restrictions fail to meet the principles of proportionality and necessity and amount to a violation of Mr Ngaïssona's human rights.²⁹ According to the Defence, the restrictions imposed on Mr Ngaïssona isolate him from the outside world and [REDACTED]. Moreover, the Defence submits, his isolation has been further exacerbated by measures recently taken by the Detention Centre due to the Coronavirus disease (COVID-19) pandemic (the 'Coronavirus Pandemic').³⁰ Finally, the Defence submits that Mr Ngaïssona's decision to stop making non-privileged phone calls stems from his lack of trust in the Registry and fear of 'further accusation of impropriety'.³¹

²⁴ Prosecution Observations, ICC-01/14-01/18-453-Conf-Exp, paras 6-10.

²⁵ 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, only available to the Prosecution, the Ngaïssona Defence and the Registry.

²⁶ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 2, 15.

²⁷ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 2, 12-13.

²⁸ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 3, 14-15, 17-22.

²⁹ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 3, 23-31.

³⁰ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 11, 25, 30.

³¹ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, para. 27.

12. On 24 March 2020, following an inquiry by the Prosecution,³² the Chamber clarified that the Pre-Trial Restrictions remain in place until the Chamber has issued its decision on restrictions.³³
13. On 6 April 2020, following the Chamber's order,³⁴ the Registry filed its observations to the Defence Observations.³⁵ With regard to the Ninth Registry Report and the Defence Observations thereto, the Registry submits that (i) it reports incidents neutrally and in implementation of PTC II's orders,³⁶ (ii) the Chief Custody Officer's decisions to remove certain [REDACTED] family members from Mr Ngaïssona's contact list have been confirmed by PTC II,³⁷ (iii) [REDACTED],³⁸ and (iv) [REDACTED].³⁹
14. As regards the special measures taken in response to the Coronavirus Pandemic, the Registry reports that (i) it has issued a memo to all detainees and their legal defence teams informing them of the urgent measures taken at the Detention Centre to protect them against the spread of the Coronavirus Pandemic, which include the temporary suspension of all visits, including legal visits (the 'Temporary Detention Centre Measures');⁴⁰ (ii) these measures were recommended by the Medical Officer, pursuant to Regulation 155(2) of the Regulations of the Registry⁴¹ and are consistent with the host State policy;⁴² (iii) complaints against these measures should be addressed to the Registrar and Presidency following the procedure regarding detention conditions set out in the

³² Email from the Prosecution to the Chamber and the Ngaïssona Defence, 24 March 2020, at 17:58.

³³ Email from the Chamber to the Prosecution and the Ngaïssona Defence, 24 March 2020, at 19:46.

³⁴ Email from the Chamber to the Detention Section, the Prosecution and Ngaïssona Defence, 23 March 2020, at 11:33. The deadline for submissions was subsequently extended from 30 March 2020 to 6 April 2020, see email from the Chamber to the Registry, 27 March 2020, at 13:49.

³⁵ 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, ICC-01/14-01/18-469-Conf-Exp, only available to the Ngaïssona Defence and the Registry (confidential *ex parte* redacted version, only available to the Prosecution, Ngaïssona Defence and the Registry, notified the same day, ICC-01/14-01/18-469-Conf-Exp-Red) (the 'Registry Observations').

³⁶ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 21.

³⁷ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 22.

³⁸ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 23.

³⁹ Registry Observations, ICC-01/14-01/18-469-Conf-Exp, para. 25.

⁴⁰ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, paras 18, 26.

⁴¹ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 27.

⁴² Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 30

Regulations of the Registry;⁴³ and (iv) informs the Chamber that [REDACTED].⁴⁴ The Registry stresses the importance of contacts with family members to the psycho-social well-being of detainees and its corresponding efforts to facilitate communications and to provide alternatives.⁴⁵ The Registry continues to offer Mr Ngaïssona the option to make telephone calls twice a week and reports that active monitoring can continue as usual during the Coronavirus Pandemic.⁴⁶ Lastly, the Registry reports that Mr Ngaïssona has not made any calls since 7 November 2019.⁴⁷

II. Analysis

A. The restrictions in place

15. The restrictions currently in place are as follows (the ‘Current Restrictions’):

- i. *Contact between Mr Ngaïssona and Mr Yekatom:* Mr Ngaïssona is allowed to have contact with Mr Yekatom.⁴⁸
- ii. *Non-privileged telephone calls:*
 - a. Family: Mr Ngaïssona may call his family 60 minutes per week, subject to active monitoring.⁴⁹ All forms of communication between Mr Ngaïssona and [REDACTED] with whom he had engaged in coded conversation are suspended and [REDACTED] is excluded from the list of contacts.⁵⁰ Furthermore, [REDACTED] were removed from his list of contacts⁵¹ and [REDACTED] was not added.⁵²

⁴³ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 28.

⁴⁴ Registry Observations, ICC-01/14-01/18-469-Conf-Exp, para. 28.

⁴⁵ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, paras 31-34.

⁴⁶ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 32.

⁴⁷ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 32.

⁴⁸ 29 January 2019 Decision, ICC-01/14-01/18-106-Conf-Exp-Red, paras 20-21.

⁴⁹ 3 October 2019 Decision, ICC-01/14-01/18-374-Conf-Exp-Red, para. 40.

⁵⁰ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp, para. 52; 3 October 2019, ICC-01/14-01/18-374-Conf-Exp, para. 40.

⁵¹ The Chief Custody Officer decided to remove both persons (*see* Seventh Registry Report, ICC-01/14-01/18-390-Conf-Exp, para. 29), which PTC II subsequently found appropriate (*see* 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp, para. 84).

⁵² The Registry had determined that the individual was not a family member (*see* Registry Observations, ICC-01/14-01/18-469-Conf-Exp, para. 22.c.), which was subsequently confirmed by PTC II (*see* 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp, paras 83-84).

- b. Other individuals: Calls to other individuals are currently suspended.⁵³
- c. Identities and contact details of individuals have to be duly verified beforehand by the Chief Custody Officer, who may request support of the Victims and Witnesses Unit (the 'VWU').⁵⁴
- d. Discussions related to the present case with the individuals referred to above are prohibited, as well as the use of obscure or coded language.⁵⁵
- e. Languages used in calls are limited to French and Sango.⁵⁶
- f. Mr Ngaïssona is prohibited from accessing the telephone facilities at the disposal of the other detainees of the Detention Centre.⁵⁷

iii. *Non-privileged visits:*

- a. Family: Family visits are allowed (except from [REDACTED] with whom Mr Ngaïssona engaged in coded conversation and other individuals excluded from the contact list⁵⁸) but subject to active monitoring).⁵⁹
- b. Other individuals: Visits from other individuals are currently suspended.⁶⁰
- c. Identities and contact details of individuals have to be duly verified beforehand by the Chief Custody Officer, who may request support of the VWU.⁶¹

⁵³ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp-Red, para. 52. It is noted that prior to this suspension, all non-privileged calls were subject to random active monitoring, *see* 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 8; 1 March 2019 Decision, ICC-01/14-01/18-137-Conf-Exp, para. 19. [REDACTED], *see* 9 July 2019 Decision, ICC-01/14-01/18-240-Conf-Exp, para. 30.

⁵⁴ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 8; modified by 1 March 2019 Decision, ICC-01/14-01/18-137-Conf-Exp, para. 21.

⁵⁵ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 8.

⁵⁶ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 10.

⁵⁷ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 10.

⁵⁸ *See above* ii) non-privileged telephone calls.

⁵⁹ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp, para. 52; 3 October 2019 Decision, ICC-01/14-01/18-374-Conf-Exp-Red, para. 40.

⁶⁰ 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp-Red, para. 52. It is noted that prior to the suspension, visits from non-family individuals were subject to random active monitoring, *see* 1 March 2019 Decision, ICC-01/14-01/18-137-Conf-Exp, para. 19. [REDACTED], *see* 9 July 2019 Decision, ICC-01/14-01/18-240-Conf-Exp, para. 30.

⁶¹ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 11; 1 March 2019 Decision, ICC-01/14-01/18-137-Conf-Exp, para. 21.

- d. Discussions related to the present case with the individuals referred to above is prohibited,⁶² as well as the use of obscure or coded language.⁶³
- e. Languages used during visits are limited to French and Sango.⁶⁴
- f. Non-privileged visits are audio recorded and actively monitored by a Court staff member fluent in French or Sango.⁶⁵
- iv. *Written correspondence:*
 - a. Non-privileged mail communications are restricted to those individuals on Mr Ngaïssona's non-privileged contact list.⁶⁶
 - b. Mr Ngaïssona is prohibited from mentioning the present case and using obscure or coded language in written correspondence.⁶⁷
 - c. Languages of correspondence are limited to French and Sango.⁶⁸

B. The Chamber's determinations

16. The Chamber notes that a detained person is entitled to 'receive correspondence, mail and packages', 'communicate by letter or telephone with his or her family and other persons' and 'to receive visits', pursuant to Regulations 99(g) and (h) and 100(1) of the Regulations. The Chamber further considers that the accused's right to privacy and family is implicitly recognised under the Court's statutory framework.⁶⁹ Moreover, the Chamber recalls that the right to privacy and family life is an internationally recognised human rights principle⁷⁰ and thus also guides the Chamber's interpretation of the Court's legal framework by virtue of Article 21(3) of the Statute.⁷¹

⁶² 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 11.

⁶³ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 11, *mutatis mutandis*.

⁶⁴ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 11.

⁶⁵ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 11.

⁶⁶ 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp-Red, para. 89.

⁶⁷ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 9.

⁶⁸ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 10.

⁶⁹ See *e.g.* Regulation 99(1)(i) of the Regulations; Regulations 179(1) and 186(2)(h) of the Regulations of the Registry.

⁷⁰ See Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights, Article 11 of the American Convention on Human Rights. See also Principle 5 of the Basic Principles for the Treatment of Prisoners.

⁷¹ See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts, 18 August 2015, ICC-01/04-02/06-785-Red (the

17. Nonetheless, the Chamber notes that these rights are not absolute and may be subject to restrictions. Notably, restrictions on contacts may be imposed (i) pursuant to Regulation 101(2) of the Regulations, *inter alia*, ‘if the Prosecutor has reasonable grounds⁷² to believe that such contact [...] could prejudice the outcome of the proceedings against a detained person, or any other investigation’⁷³ or ‘[i]s a threat to the protection of the rights and freedom of any person’;⁷⁴ or (ii) ‘in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre’ as set out in the Regulations of the Registry,⁷⁵ pursuant to Regulation 99(2) and 100(3) of the Regulations. Furthermore, Articles 64(2) and 68(1) of the Statute mandate the Chamber to balance the rights of the accused with ensuring the well-being of victims and witnesses, and its objectives to ensure fair and expeditious conduct of trial.⁷⁶
18. The Chamber further recalls that the Appeals Chamber has previously considered that ‘the passage of time is a factor that could become more significant as more time elapses and that [a] Trial Chamber must continue to actively review the restrictions in place and carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact’.⁷⁷

‘*Ntaganda Decision*’), para. 42; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA 4), para. 36.

⁷² The Chamber considers that the same standard also applies to the Chamber’s assessment. *See also* 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) (the ‘*Ntaganda Appeals Chamber Judgment*’), para. 48.

⁷³ Regulation 101(2)(b) of the Regulations.

⁷⁴ Regulation 101(2)(f) of the Regulations.

⁷⁵ Chapter 5 of the Regulations of the Registry provides further specific regulations regarding detention matters, including in respect to correspondence, telephone communications and visits.

⁷⁶ *See also Ntaganda Appeals Chamber Judgment*, ICC-01/04-02/06-1817-Conf, paras 44, 72, 102; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Mr Al Hassan’s restrictions and accesses while in detention, 21 January 2020, ICC-01/12-01/18-557-Exp (public redacted version was notified on 14 February 2020), para. 10.

⁷⁷ *Ntaganda Appeals Chamber Judgment*, ICC-01/04-02/06-1817-Red, para. 72. *See also* paras 44, 102. *See further* PTC II, 23 December 2019 Decision, ICC-01/14-01/18-413-Conf-Exp-Red, para. 78.

19. Before turning to its analysis of the Current Restrictions, the Chamber addresses the Defence's submission that the restrictions imposed by PTC II expired with the transfer of the case to this Chamber.⁷⁸ In this regard, the Chamber recalls its recent communication to the parties, clarifying that the Current Restrictions remain in place until this Chamber has reviewed the matter.⁷⁹ Accordingly, the Defence's submissions are dismissed as moot.
20. In determining whether the Current Restrictions should be maintained,⁸⁰ modified or lifted,⁸¹ the Chamber has duly reviewed the considerations by PTC II in its Pre-Trial Decisions, the Registry Reports (in particular the latest Ninth Registry Report) and the parties' submissions.
21. At the outset, the Chamber stresses the utmost importance of preserving the integrity of the proceedings and the protection of witnesses to the conduct of a fair trial. Consequently, the Chamber's assessment as to whether the Current Restrictions remain necessary and proportional, is guided by the factors set out in paragraphs 16-18 above, the stage of the proceedings, as well as the Chamber's determination to protect the evidence from undue influence and to ensure victims' and witnesses' safety.
22. First and foremost, the Chamber notes Mr Ngaïssona's multiple violations of restrictions during the pre-trial phase. In this regard, the Chamber recalls that in spite of a prohibition to do so, Mr Ngaïssona repeatedly used coded language, interacted with unauthorised individuals⁸² and [REDACTED],⁸³ [REDACTED].⁸⁴ In the Chamber's view, these incidents demonstrate his willingness to disregard the restrictions and to conceal conversations from the Registry and ultimately the Chamber. This is, as PTC II noted,⁸⁵ a serious matter.

⁷⁸ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 2, 12-13.

⁷⁹ Email from the Chamber to the Prosecution and the Defence, 24 March 2020, at 19:46.

⁸⁰ Prosecution Observations, ICC-01/14-01/18-453-Conf-Exp, para. 2.

⁸¹ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 3, 14-15, 17-22.

⁸² See above paras 3-4.

⁸³ The Chamber notes that this person was removed from the contact list as a result of the general restriction of non-privileged telephone contacts to family members, see Seventh Registry Report, ICC-01/14-01/18-390-Conf-Exp, para. 22.

⁸⁴ Seventh Registry Report, ICC-01/14-01/18-390-Conf-Exp, para. 23.

⁸⁵ See 18 September 2019 Decision, ICC-01/14-01/18-357-Conf-Exp, para. 49.

23. Second, the Chamber takes note of the Prosecution's submission that Mr Ngaïssona now knows the identity of several witnesses,⁸⁶ which may put them at risk. In this context, it is also important to recall that PTC II had originally considered restrictions to be necessary because of Mr Ngaïssona's important roles in the Anti-Balaka and the CAR, which could enable him to 'reach, intimidate, or harm (potential) witnesses, their families or other individuals cooperating with the Court'.⁸⁷ In the Chamber's view, these factors have not changed and demonstrate that Mr Ngaïssona has the means to reach out to witnesses in this case, who largely reside in the CAR.
24. Third, while the Chamber notes that Mr Ngaïssona has not made any calls since 7 November 2019⁸⁸ and no violations have therefore been reported, the Chamber is not persuaded that the mere absence of incidents violating the restrictions leads to the conclusion that restrictions are no longer necessary.⁸⁹ After all, refraining from prohibited conduct should be the norm. Similarly, the Chamber is not persuaded that the passage of time, without more, leads to the conclusion that the imposed restrictions should be lifted. Although the Chamber has taken these factors into consideration, it considers that there has been no change in circumstances that would warrant modifying the Current Restrictions since PTC II last assessed them.
25. In the Chamber's view, the gathering and organising of the evidence is crucial and at risk of interference during this stage of the proceedings, therefore requiring measures to protect it. Consequently, in light of the information available at this point and balancing the Current Restrictions against Mr Ngaïssona's rights, the Chamber considers that 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. The Chamber thus finds the

⁸⁶ Prosecution Observations, ICC-01/14-01/18-453-Conf-Exp, para. 2.

⁸⁷ 23 January 2019 Decision, ICC-01/14-01/18-98-Conf-Exp, para. 7. PTC II noted Mr Ngaïssona's key role in the Anti-Balaka, as well as his previous positions as minister, founder and President of a political party and successful businessman.

⁸⁸ Eighth Registry Report, ICC-01/14-01/18-416-Conf-Exp-Red, para. 9; Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 32.

⁸⁹ See also 3 February 2020 Decision, ICC-01/14-01/18-424-Conf-Exp-Red, para. 28. See further *Ntaganda* Decision, ICC-01/04-02/06-785-Red, para. 59.

Current Restrictions necessary and proportional to ensure a fair trial and protect the integrity of the proceedings.

26. Nonetheless, the Chamber acknowledges its obligation to regularly review the restrictions in place and will do so where circumstances change and require reassessment of the Current Restrictions.
27. As regards the Defence's submission that Mr Ngaïssona's lacks trust in the Registry and fears of 'further accusation of impropriety',⁹⁰ the Chamber notes that it cannot discern any bias in the Registry's submissions. Naturally, conversations are interpreted differently by different individuals. Nonetheless, the Registry should, and rightfully did so in the past, err on the side of caution in case of doubt, by flagging all potential breaches of the Current Restrictions to the Chamber. In this regard, the Chamber also appreciates the Registry's reassurances as to its neutrality when reporting on these potential violations.⁹¹
28. Lastly, while the Chamber recognises Mr Ngaïssona's grievances over the Temporary Detention Centre Measures,⁹² it recalls that these measures are owed to the exceptional circumstances caused by the Coronavirus Pandemic. These circumstances are unfortunately beyond the Court's control and affect not only the Detention Centre, but the Court as a whole, the host State and numerous other countries world-wide. The Chamber stresses that the Temporary Detention Centre Measures are imposed in order to protect the health, safety and lives of the detained persons at the Detention Centre,⁹³ including Mr Ngaïssona's. The Chamber therefore considers that these measures, which are consistent with the host State policy⁹⁴ and enacted following advice by the Medical Officer of the Detention Centre,⁹⁵ are warranted under Regulations 155 of the Regulations of the Registry. Complaints against these Temporary Detention Centre Measures must be made in accordance with the complaints procedure on detention matters, as set out in the Regulations of the Registry.⁹⁶

⁹⁰ Defence Observations, ICC-01/14-01/18-460-Conf-Exp, para. 27.

⁹¹ Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 21.

⁹² Defence Observations, ICC-01/14-01/18-460-Conf-Exp, paras 11, 25, 30.

⁹³ See also Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, paras 18, 26.

⁹⁴ See also Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 30.

⁹⁵ See also Registry Observations, ICC-01/14-01/18-469-Conf-Exp-Red, para. 27.

⁹⁶ See Chapter 5, Section 5 of the Regulations of the Registry.

C. The Reporting Procedure

29. Finally, in order to regularly monitor the implementation of the Current Restrictions, the Chamber adopts the Reporting Procedure put in place by PTC II,⁹⁷ with the modification that the Registry is now ordered to submit its reports every three months.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

DECIDES that the Current Restrictions as described in paragraph 15 be maintained;

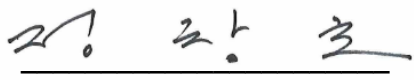
ORDERS the Registry to submit reports on the implementation of the Current Restrictions and any violations thereof, together with confidential redacted versions of said reports, every three months, as set out above in paragraph 29;

ORDERS the Prosecution to submit observations on the Registry reports, if any, together with confidential redacted versions of said observations, within five days of notification, as set out above in paragraph 29;

ORDERS the Defence to submit observations on the Registry reports, as well as on the Prosecution's observations, if any, together with confidential redacted versions of said observations, within 10 days of notification of the Registry reports, as set out above in paragraph 29.

⁹⁷ 15 April 2019 Decision, ICC-01/14-01/18-176-Conf-Red, para. 32. *See also* para. 2 above.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 16 February 2021

At The Hague, The Netherlands