

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **22 February
2021**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of "Defence Observations Pursuant to the 'Decision Pursuant to Regulation 101 of the Regulations of the Court' (ICC-01/14-01/18-176-Conf-Red)", 1 July 2019

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. Following the “Fourth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II” (“the Fourth Report”)¹ dated 17 June 2019, and pursuant to the Pre-Trial Chamber’s (“Chamber”) “Decision Pursuant to Regulation 101 of the Regulations of the Court”² dated 15 April 2019, the Defence of Mr Patrice-Édouard Ngaïssona (“Defence”) hereby respectfully requests the Chamber to lift the restrictions on contact which have been imposed on Mr Patrice-Edouard Ngaïssona since 23 January 2019.

II. Confidentiality

2. In accordance with regulations 23*bis*(1) of the Regulations of the Court (“Regulations”), these submissions are filed “confidential, EX PARTE, only available to the Prosecution and the Ngaïssona Defence” as they concern documents of the same classification, as well as information which, if divulged, may defeat the purpose of the submissions. The Defence will file a confidential redacted version of these submissions at the time of filing.

III. Procedural history

3. On 23 January 2019, Mr Patrice-Édouard Ngaïssona was transferred to the ICC Detention Centre where he is currently held.

¹ ICC-01/14-01/18-225-Conf-Exp. The decision was notified on 18 June 2019.

² ICC-01/14-01/18-176-Conf-Red.

4. On the same day, the Single Judge of Pre-Trial Chamber II issued the “Decision pursuant to Regulation 101 of the Regulations of the Court”³ (“First Decision”), directing the Registry to put in place several measures to restrict Mr Ngaïssona’s contact with the outside world through written correspondence, non-privileged telephone calls and family visits.⁴
5. On 6 February 2019, the Registry submitted its “Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge” (“First Report”).⁵ In this report, the Registry reported no incidents during the monitoring of Mr Ngaïssona’s contact with the outside world.
6. On the same day, the Chamber issued its Decision in which it ordered the Registry to prepare a report on the implementation of the restrictions on contact as ordered in the First Decision “*setting out any relevant information relating to Ngaïssona’s behaviour on communications that may give rise to suspicion that he interferes with the Prosecutor’s investigation (in particular that he poses a threat to potential witnesses and victims) or that he engages in activities that may affect the outcome of the proceedings*”.⁶
7. On 25 February 2019, the Registry issued its “Second Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Edouard Ngaïssona Ordered by the Single Judge” (“Second Report”).⁷ In this report, the Registry reported no incidents during the monitoring of Mr Ngaïssona’s contact with the outside world.
8. On 27 February 2019, the Prosecution filed its observations on the Second Report, requesting the extension of the contact restrictions for an additional 30

³ ICC-01/14-01/18-98-Conf-Exp.

⁴ ICC-01/14-02/18-11-Conf-Exp, para. 12.

⁵ ICC-01/14-02/18-115-Conf-Exp.

⁶ ICC-01/14-01/18-114-Conf-Exp-Red, para. 12.

⁷ ICC-01/14-01/18-125-Conf-Exp.

days beyond 1 March 2019.⁸

9. On 1 March 2019, the Chamber provisionally granted the extension of the restrictive measures concerning Mr Ngaïssona's communications and contacts put in place by way of the 23 January 2019 Decision until 15 April 2019.⁹ It also indicated that *"in conducting the verification procedure concerning individuals whom the suspects wish to add to their non-privileged contact list and/or whom they wish to receive visits from, the Chief Custody Officer may request the support of the Victims and Witnesses Unit"*.¹⁰
10. On 8 April 2019, the Registry issued the "Third Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Édouard Ngaïssona Ordered by Pre-Trial Chamber II"¹¹ ("Third Report"), in which it reported no incidents during the monitoring of Mr Ngaïssona's contact with the outside world.
11. On 15 April 2019 the Chamber issued its "Decision pursuant to Regulation 101 of the Regulations of the Court" in which it extended the restrictions on communication for the remainder of the Pre-trial proceedings and ordered the Registry to submit a report every two months.¹²
12. On 17 June, the Registry issued its "Fourth Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Edouard Ngaïssona Ordered by Pre-Trial Chamber II"¹³ ("the Fourth Report"), which was notified on 18 June 2019. In this report, the Registry informed the Chamber that no incident during the monitoring of Mr Ngaïssona's contact with the

⁸ ICC-01/14-01/18-131-Conf-Exp, para. 2.

⁹ ICC-01/14-01/18-137-Conf-Exp.

¹⁰ ICC-01/14-01/18-137-Conf-Exp; ICC-01/14-01/18-176-Conf-Red, para. 10.

¹¹ ICC-01/14-01/18-166-Conf-Exp.

¹² ICC-01/14-01/18-176-Conf-Red, p. 14-15.

¹³ ICC-01/14-01/18-225-Conf-Exp.

outside world has been reported.¹⁴

13. On 24 June, the Prosecution submitted its “Confidential Redacted version of “Prosecution’s Observations Pursuant to the “Decision Pursuant to Regulation 101 of the Regulations of the Court” (“Prosecution Request”), in which it requested the Chamber to “*impose the most stringent conditions on [Mr] Ngaïssona’s contacts in detention*”.¹⁵ It also requested that the Chamber: (i) vacate the Chief Custody Officer’s (“CCO”) decision [REDACTED] or, (ii) immediately suspend the operation of the CCO’s decision, [REDACTED]; or (iii) in the alternative, order the Detention Centre to actively monitor [REDACTED].¹⁶

IV. Submissions

A. The Prosecution’s Request contains redactions which prevent the Defence from presenting full and informed observations to the Prosecution’s Request

14. As a preliminary matter, the redactions applied by the Prosecution prevent the Defence from making concrete, specific and up-to-date submissions on the Prosecution’s Request. Without access to the alleged factual basis and underlying the reasoning which support the Prosecution’s requests to maintain the current restrictions regime and to [REDACTED], the Defence is not in a position to present full and informed observations and therefore, to exercise its full right to be heard.

15. Pursuant to Regulation 101(3) of the Regulations of the Court (“the Regulations”), “[t]he detained person shall be informed of the Prosecutor’s request [to restrict contact] and shall be given the opportunity to be heard or to submit his or her

¹⁴ Fourth Report, para. 1.

¹⁵ Prosecution Request, paras 2, 14.

¹⁶ Prosecution Request, para. 3.

views". As recalled by the Chamber, "restrictions on contacts and communications under the Court's statutory framework must be (re-)assessed in light of concrete, specific and up-to-date information".¹⁷

16. In its Request, the Prosecution submits, *inter alia*, that "*witness security (...) remains precarious, and [REDACTED]*".¹⁸ However, given the redaction, the Defence is prevented from responding to the [REDACTED] which according to the Prosecution impacts the vulnerability of witnesses. The dearth of information made available to the Defence as to the content of these allegations and as to whether they pertain to Mr Ngaïssona at all, not only place the Defence at a considerable disadvantage but also breaches the Defence's right to be informed and to be heard, contrary to regulation 101(3) of the Regulations. This also constitutes a breach of basic internationally recognized human rights, such as the principle of *audi alteram partem*, as enshrined in Regulation 24(1) of the Regulations and Article 21(3) of the Rome Statute.

17. The Defence recalls that it still does not have access to the Prosecution's initial application under Regulation 101 of the Regulations contained in the Prosecution's Application for a Warrant of Arrest against Patrice-Edouard Ngaïssona, to which it also still has no access.¹⁹

18. The Prosecution's 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, which would allow it to exercise its full right to be informed and to be heard.

¹⁷ ICC-01/14-01/18-176-Conf-Red, para. 29; ICC-01/14-01/18-137-Conf-Exp, para. 18.

¹⁸ Prosecution Request, para. 2.

¹⁹ See ICC-01/14-01/18-98-Conf-Exp, para. 1.

B. The Prosecution fails to substantiate its request that restrictions should be maintained at this stage

19. *First*, in support of its request that “*stringent restrictions on the Suspects’ contacts are necessary and should be imposed commensurate to the risks regarding the integrity of the on-going investigation*”²⁰ the Prosecution merely incorporates by reference its previous observations and previous Chamber’s findings.²¹ Such an approach 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 Prosecution’s reliance on previous filings and allegations contradicts the clear statutory and judicial requirement that “*restrictions on contacts and communications under the Court’s statutory framework must be (re-)assessed in light of concrete, specific and up-to-date information.*”²²

20. *Second*, in its introductory paragraphs, the Prosecution evokes vague notions such as the challenges for the Prosecution in conducting investigations in CAR and the particular vulnerability of witnesses due to the “*prevalent instability in the [CAR], together with the participation of armed groups associated with [Mr] Ngaiissona in the present government*”.²³ The Defence has already responded to these arguments in detail, as they had been raised by the Prosecution in previous requests, by arguing *inter alia* that these allegations are speculative and lack a factual basis.²⁴ In the absence of any up-to-date information on the alleged situation and circumstances on the Prosecution’s part, the Defence will therefore not repeat its arguments.

²⁰ Prosecution Request, paras 7-8.

²¹ Prosecution Request, paras 2, 8.

²² ICC-01/14-01/18-176-Conf-Red, para. 29; ICC-01/14-01/18-137-Conf-Exp, para. 18.

²³ Prosecution Request, para. 4.

²⁴ See ICC-01/14-01/18-171-Conf-Exp, paras 22-29.

21. It is striking that the Prosecution fails to provide any concrete and updated information in support to its Request, preferring to reiterate past observations, without explaining how past alleged circumstances continue to prevail. The Prosecution appears to take for granted that the same justifications which applied at the time of its last submissions continue to be relevant, without, however, substantiating this claim. Again, such an approach is incompatible with the purpose of the review process, which aims to assess whether the restrictions regime continues to be justified in light of contemporaneous facts.²⁵
22. Regulation 101(2) of the Regulations places on the Prosecution the onus to prove that there are “reasonable grounds” to believe that contacts with the outside world could lead to at least one of the six consequences mentioned from subparagraph (a) to subparagraph (f) of Regulation 101(2) of the Regulations.
23. In its Request, the Prosecution has failed to meet this onus by failing to demonstrate that the circumstances warranting the restrictive measures have not changed.

C. The Prosecution’s request that the CCO’s decision [REDACTED] finds no basis

24. The Prosecution alleges that the CCO [REDACTED].²⁶ [REDACTED].²⁷ To support its argument, the Prosecution raises “*serious breaches by Suspects in custody*” in the past and submits that [REDACTED].²⁸
25. *First*, the Prosecution’s reliance on breaches by *other* Suspects at the Detention Centre is wholly inappropriate. Past incidents involving different Suspects, in the context of entirely distinct situations, different restrictions regimes, and at

²⁵ ICC-01/14-01/18-176-Conf-Red, para. 29; ICC-01/14-01/18-137-Conf-Exp, para. 18.

²⁶ Prosecution Request, paras 9-13.

²⁷ Prosecution Request, para. 10.

²⁸ Prosecution Request, para. 5.

entirely different phases of the case, simply cannot be held against Mr Ngaïssona [REDACTED]. Such an approach would be excessively unfair and contrary to logic.

26. The Prosecution cites as a sole example of “*well-known security breaches which have occurred within the confines of the ICC Detention Centre in the past*” the case of Mr Ntaganda, which is clearly distinguishable from Mr Ngaïssona’s case.²⁹ In the *Ntaganda* Decision cited by the Prosecution, the Registry had reported that Mr Ntaganda had, at the trial stage:

(i) breached the Detention Centre Policy in that he made extensive use of coded language, spoke with non-registered callers, instructed his contacts to use the same codes and/or to use languages that are not spoken by the staff of the Detention Centre; (ii) disclosed confidential information to his contacts, in particular to [REDACTED], including identifying information of certain protected witnesses; (iii) instructed his associates to contact witnesses, interfere with them and even coach them; and (iv) is willing to fabricate evidence.³⁰

27. This precedent simply cannot assist the Prosecution here. The Registry has consistently reported no incident in relation to Mr Ngaïssona and it is therefore difficult to see how one case relates to the other.

28. In *Katanga and Ngudjolo*, the Single Judge specifically rejected and deemed misleading the Prosecution’s reliance on case-law in which there were “*specific violations of the detention regime by the detained persons against whom such measures were requested*”, or case-law and which were clearly distinguishable, as no such violations had occurred with respect to the co-accused in that case.³¹ The same reasoning applies here: violations relating to communications committed by other detainees cannot be held against Mr Ngaïssona to justify extending the

²⁹ Prosecution Request, para. 5.

³⁰ ICC-01/04-02/06-785-Red, para. 24, cited in Prosecution Request, para. 5.

³¹ ICC-01/04-01/07-322, p. 11.

restrictions on communication imposed upon him, especially in the absence of any breach of the Chamber's Decision on his part. Applying the Prosecution's logic would be excessively unfair.

29. *Second*, the Prosecution's contentions that the CCO [REDACTED]³² – that [REDACTED],³³ and that [REDACTED]³⁴ are wholly unfounded.

30. During the reporting period, the CCO sought the Victims and Witnesses Unit's ("VWU") assistance, on a voluntary basis, in conformity with the Chamber's directive in its Decision dated 1 March 2019, that *"in conducting the verification procedure concerning individuals whom the suspects wish to add to their non-privileged contact list and/or whom they wish to receive visits from, the Chief Custody Officer may request the support of the Victims and Witnesses Unit"*.³⁵

31. During the reporting period, the CCO sought the assistance of VWU, as duly reported in the Fourth Report and its two Annexes, regarding the identity and contact details of the individuals in question, to assist in its assessment of whether the proposed individuals should be added to Mr Ngaïssona's non-privileged telephone list. The CCO was under no obligation to seek the VWU's assistance, but did so nonetheless.

32. In other words, the prosecution fails to acknowledge that [REDACTED].³⁶

33. The Prosecution's contention that [REDACTED]³⁷ is misleading, as it fails to acknowledge that [REDACTED].

³² Prosecution Request, para. 9.

³³ Prosecution Request, para. 12.

³⁴ Prosecution Request, para. 12.

³⁵ Emphasis added, ICC-01/14-01/18-176-Conf-Red, para. 10; ICC-01/14-01/18-137-Conf-Exp.

³⁶ See ICC-01/14-01/18-166-Conf-Exp, para. 14.

³⁷ Prosecution Request, para. 12.

D. The consistent absence of any incident, in conjunction with internationally recognized human rights, warrant the lifting of restrictions on Mr Ngaïssona's communications

34. *First*, after 129 days of restrictions without any incident in this regard reported by the Registry, the time has come to lift the restrictions on communication imposed to Mr Ngaïssona, given the heavy and disproportionate consequences they bear on his fundamental rights to privacy, intimacy and family life. Although the duration of calls allocated to Mr Ngaïssona were slightly increased by the Registry to one and a half hours,³⁸ around 55% of Mr Ngaïssona's non-privileged telephone calls continued to be actively monitored at random during the reporting period.³⁹

35. In the First⁴⁰, Second,⁴¹ Third,⁴² and Fourth⁴³ Reports, the Registry informed the Chamber that no incidents had been reported with respect to Mr Ngaïssona's contact with the outside world. The Defence submits that this repeated absence of incidents warrants the lifting of restrictions imposed on Mr Ngaïssona's contacts.

36. There is a dissonance between the Prosecution's argument that "*stringent contact restrictions should be maintained*"⁴⁴ and the consistent findings of good behaviour and absence of any incident reported by the Registry in its Four Reports.

37. *Second*, the current restrictions imposed on Mr Ngaïssona's contact with the outside world, and in particular, the restrictions on his telephone

³⁸ Fourth Report, para. 11.

³⁹ Fourth Report, para. 12.

⁴⁰ ICC-01/14-01/18-115-Conf-Exp.

⁴¹ Second Report, para. 1.

⁴² Third Report, para. 1.

⁴³ Fourth Report, para. 1.

⁴⁴ Prosecution Request, paras 7-8.

communications are unnecessary, disproportionate at this stage, and difficult to reconcile with Mr Ngaïssona's fundamental and internationally recognized human rights. The disproportionality of these measures is heightened with the passage of time,⁴⁵ i.e.. since the Chamber's last decision, given the additional time elapsed during which Mr Ngaïssona only had limited contact with the outside world.

38. At present, the restrictions on the number, nature and duration of telephone calls allocated to Mr Ngaïssona are disproportional and entirely unsuitable to Mr Ngaïssona's family situation.

39. As previously argued by the Defence, these restrictions effectively impede Mr Ngaïssona's ability to stay in touch with his family and to exercise his fundamental right to have contact with his family. One and a half hours per week is clearly insufficient for Mr Ngaïssona to remain updated with all of his children and his immediate family, which is extensive. As a suspect, who has been detained and transferred to the Court, and who still does not know the nature of the charges alleged against him – and therefore finds himself in a situation of heightened uncertainty – Mr Ngaïssona's only source of reassurance is the limited contact he has with his family and his ability to receive updates and update his relatives concerning his health and situation.

40. Furthermore, the limit on the duration of Mr Ngaïssona's telephone calls per week does not take into consideration cultural context or norms, insofar as the notion of "family" in Central African Republic, as in many other African countries, does not necessarily correspond to Euro-centric notions of family, which are rather conceived as the nuclear family.

⁴⁵ ICC-01/04-02/06-1817-Red, para. 72.

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

42. As expressed in the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as the "Nelson Mandela Rules"): *"[i]mprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation"*.⁴⁶ The Mandela Rules further provide that *"[p]risoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals"*, which includes through telecommunication.⁴⁷ With respect to restrictive measures specifically, the Mandela Rules indicate that *"[t]he means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order"*.⁴⁸

43. These human rights standards have been endorsed in the Court's own jurisprudence, which identifies the principles of necessity and proportionality as required in order for restrictive measures to be imposed.⁴⁹ It is submitted that the current restrictions on communications considerably aggravate Mr Ngaïssona's pre-trial detention, both physically and mentally. Most significantly, they lack necessity and proportionality; such measures are no longer justified, in the absence of concrete indications that Mr Ngaïssona

⁴⁶ Rule 3, United Nations Standard Minimum Rules for the Treatment of Prisoners, Resolution adopted by the General Assembly on 17 December 2015, https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

⁴⁷ Rule 58, *Ibid*.

⁴⁸ Rule 43(3), *Ibid*.

⁴⁹ ICC-01/04-01/07-322, 13 March 2008, p. 9.

“[c]ould prejudice or otherwise affect the outcome of the proceedings against [him], or any other investigation”,⁵⁰ as evidenced by the First, Second, Third and Fourth Registry Reports.

RELIEF SOUGHT

44. The Defence respectfully requests the Chamber to:

- **LIFT** the contact restrictions imposed on Patrice-Edouard Ngaïssona.
- In the alternative, significantly **REDUCE** the contact restrictions imposed on Patrice-Edouard Ngaïssona.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 22 February 2021,
At The Hague, the Netherlands.

⁵⁰ Regulation 101(2)(b), Regulations of the Court.