

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **25 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

Public

Public Redacted Version of “Defence request for access to original audio recordings and Sango transcripts of conversations underlying the Fifth, Sixth and Seventh Registry Reports”, ICC-01/14-01/18-440-Conf-Exp, 4 March 2020

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. With the present request, the Defence of Mr Patrice-Edouard Ngaïssona (“Defence”) respectfully requests Pre-Trial Chamber II (“Chamber”) to order the Registry to provide the Defence with (i) the original audio files and Sango transcripts of all telephone conversations underlying the Registry’s fifth,¹ sixth,² and seventh³ reports and (ii) more generally, any audio file, transcript and translation of all conversations underlying, as the case may be, suspected breaches of the restrictions regime by Mr Ngaïssona in the future.
2. The complete original audio recordings and Sango transcripts of the conversations relied upon by the Registry to report suspected breaches of the restrictions regime by Mr Ngaïssona are essential to the Defence’s ability to fully assess the nature of the conversations and to make relevant submissions in respect of the restrictions regime.

II. Background to the Request

3. Since his transfer to the Court on 23 January 2019 and at the Prosecution’s request,⁴ Mr Ngaïssona has been subjected to significant limitations on his contacts with the outside world, including with immediate family members.
4. On 15 April 2019, the Chamber ordered the Registry to submit bimonthly reports on the implementation of the restrictive measures concerning Mr Ngaïssona’s communications with the outside world.⁵
5. In its first,⁶ second,⁷ third⁸ and fourth⁹ reports, the Registry did not report a single incident. In its Fifth, Sixth and Seventh Registry Reports, the Registry

¹ ICC-01/14-01/18-276-Conf-Exp (“Fifth Registry Report”).

² ICC-01/14-01/18-337-Conf-Exp (“Sixth Registry Report”).

³ ICC-01/14-01/18-390-Conf-Exp (“Seventh Registry Report”).

⁴ ICC-01/14-01/18-98-Conf-Exp, para. 1, referring to ICC-01/14-01/18-2-US-Exp.

⁵ ICC-01/14-01/18-176-Conf-Red, page 14.

⁶ ICC-01/14-02/18-28-Conf-Exp (“First Registry Report”), para. 1.

⁷ ICC-01/14-01/18-125-Conf-Exp (“Second Registry Report”), para. 1.

⁸ ICC-01/14-01/18-166-Conf-Exp (“Third Registry Report”), para. 1.

reported certain incidents as well as suspected breaches of the restrictions regime, claiming that Mr Ngaïssona had used “obscure” or “coded” language.¹⁰ These reports have led the Chief Custody Officer to implement measures such as excluding immediate family members from Mr Ngaïssona’s list of non-privileged contacts indefinitely, and have led the Chamber to apply stricter restrictions on Mr Ngaïssona’s contacts with the outside world.¹¹

6. The Defence has consistently requested that the Registry transmit to it the complete transcripts underlying the Fifth, Sixth and Seventh Registry Reports and the Chamber has granted each request.¹² However, only French translations of the underlying communications were transmitted to the Defence.¹³ Moreover, the transmission of these translations by the Registry has neither been systematic nor complete.
7. For instance, upon reception of the Seventh Registry Report, the Defence noted that no transcript of the underlying conversations had been provided, despite the Registry’s reporting of new purported breaches to the Chamber.¹⁴ On 6 November 2019, the Defence submitted an email to the Registry to request the relevant transcripts underlying its report, which the Registry refused.¹⁵ The Defence therefore submitted a formal request to the Chamber to this effect, which was granted on 11 November 2019.¹⁶ In its decision, the Chamber ordered the Registry to transmit the “full transcripts of all

⁹ ICC-01/14-01/18-225-Conf-Exp (“Fourth Registry Report”), para. 1.

¹⁰ Fifth Registry Report, paras 15-17; Sixth Registry Report, paras 13-16; Seventh Registry Report, paras 13-31.

¹¹ ICC-01/14-01/18-374-Conf-Exp.

¹² ICC-01/14-01/18-374-Conf-Exp; ICC-01/14-01/18-393-Conf-Exp; ICC-01/14-01/18-404-Conf-Exp.

¹³ ICC-01/14-01/18-276-Conf-Exp-Anx; Email from [REDACTED] to [REDACTED], 17 October 2019, 17:44; Email from [REDACTED] to [REDACTED] of 12 November 2019, 10:36; Email from [REDACTED] to [REDACTED] of 13 November 2019, 14:12; Email from [REDACTED] to [REDACTED], 13 December 2019, 14:31; Email from [REDACTED] to [REDACTED], 10 January 2020, 10:48.

¹⁴ ICC-01/14-01/18-390-Conf-Exp, paras 13-31.

¹⁵ Email from [REDACTED] to [REDACTED] of 7 November 2019, 12:07, also attached as Annex A to Defence filing ICC-01/14-01/18-391-Conf-Exp.

¹⁶ ICC-01/14-01/18-393-Conf-Exp.

conversations referred to in the Seventh Registry Report” to the Defence.¹⁷ The following day, the Registry transmitted the French translations of the relevant transcripts to the Defence but not the related original transcripts.¹⁸ Upon reception, the Defence observed that the 27 June 2019 translated transcript appeared incomplete. The Defence requested the full transcript of the relevant conversation, which the Registry transmitted to it via email.¹⁹

8. Later, on 4 December 2019, upon receiving the “Registry Reply to Defence Observations (ICC-01/14-01/18-397-Conf-Exp)”,²⁰ the Defence immediately detected discrepancies between one of the translated conversations cited by the Registry and the translated transcript of that same conversation which had been previously transmitted by the Registry to the Defence.²¹ This inconsistency prompted the Defence to submit another request to the Chamber to obtain the relevant transcript.²² The Chamber granted the Defence request.²³ However, the transcript provided by the Registry to the Defence the following day was a new version of the transcript in question. The Registry’s explanation for the discrepancy was unconvincing and sheds doubts as to the accuracy of all translated transcripts which had been transmitted to the Defence hitherto.²⁴ The Defence raised the issue before the Chamber in an urgent request and the Chamber directed the Registry, once again, “to the extent it has not already done so, to provide the Ngaiissona Defence complete transcripts of all conversations referred to in the Fifth, Sixth and Seventh

¹⁷ ICC-01/14-01/18-393-Conf-Exp.

¹⁸ Email from [REDACTED] to [REDACTED] of 12 November 2019, 10:36.

¹⁹ Email from [REDACTED] to [REDACTED] of 13 November 2019, 14:12. The Registry provided the following explanation for having provided only a part of the relevant transcript: [REDACTED].

²⁰ ICC-01/14-01/18-397-Conf-Exp. ICC-01/14-01/18-400-Conf-Exp. Email from Pre-Trial Chamber II to the Office of the Director DJSS, sent on 22 November 2019, 16:33, referred to in ICC-01/14-01/18-404-Conf-Exp, para. 18.

²¹ ICC-01/14-01/18-276-Conf-Exp-Anx.

²² ICC-01/14-01/18-401-Conf-Exp.

²³ ICC-01/14-01/18-404-Conf-Exp.

²⁴ Email from [REDACTED] to [REDACTED], 13 December 2019, 14:31. The Registry provided the following explanation to the Defence: [REDACTED].

Registry Reports”.²⁵ In its report dated 10 January 2020, the Registry acknowledged that the discrepancies in the transcripts detected by the Defence were the result of an “unintentional oversight” and transmitted reviewed transcripts to the Defence.²⁶

III. Confidentiality

9. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the present request is filed on a confidential, *ex parte*, basis only available to the Defence, the Prosecutor, the Registry and the Detention Section, as it concerns information regarding Mr Ngaissona’s private life and detention-related matters. Moreover, the present request concerns filings of the same classification.

IV. Submissions

10. The Defence respectfully requests the Chamber to order the Registry to provide it with the original Sango transcripts and audio files of the relevant conversations underlying the Fifth, Sixth and Seventh Registry Reports.
11. *First*, the original Sango transcripts are already encompassed in the Chamber’s order to the Registry to “provide to the Ngaissona Defence *complete transcripts of all conversations* referred to in the Fifth, Sixth and Seventh Reports” (emphasis added).²⁷ The completeness of the transmission of such transcripts is conditional upon the transmission of the source transcripts in Sango and not only of their French translation. Therefore, the Chamber’s order will not be fully complied with until the Defence receives the original transcripts of all conversations referred to.

²⁵ ICC-01/14-01/18-413-Conf-Exp, page 23.

²⁶ ICC-01/14-01/18-417-Conf-Exp, para. 24. Email from [REDACTED] to [REDACTED], 10 January 2020, 10:48.

²⁷ ICC-01/14-01/18-413-Conf-Exp, page 24.

12. Allowing the Defence access to the original audio files of the relevant conversations equally falls within the spirit of the Chamber's previous decisions ordering the Registry to transmit full and complete transcripts of the underlying conversations to the Defence. These would allow the Defence to fully analyse the content of the transcripts received, and to compare and verify their accuracy.
13. This is particularly necessary in light of the procedural history detailed above, whereby the Defence has detected inconsistencies in the transcripts transmitted by the Registry. Although the Defence recognizes that discrepancies in the transcripts may be attributable to human error, in light of the severe consequences of the purported breaches on Mr Ngaïssona's well-being, on his ability to participate in his Defence, as well as the reports' potential impact on the proceedings, including future litigation in relation to the restrictions regime, the Defence must be apprised of the underlying conversations in their full original form.
14. Access to the original audio files and Sango transcripts would moreover allow the Defence to detect and review linguistic nuances and variations which may not have been captured by the translations provided, but which may, however, bear significant consequences on the Chamber's assessment of the restrictions regime.
15. *Second*, providing access to the Defence to the original transcripts and audio recordings would not create an additional disclosure obligation on the Registry's part, since the content of the conversations were already communicated to the Defence in their translated form, and since the underlying audio files and original transcripts already exist.

16. *Third*, Mr Ngaïssona has a direct interest in the original transcripts and audio recordings of his own telephonic conversations with his non-privileged contacts, as the principal affected subject and owner of the confidentiality which attaches to the recordings and original transcripts. Therefore, he has a right to access these original materials.²⁸

17. In a recent decision, Trial Chamber X granted a similar defence request to obtain the original audio files underlying suspected breaches of the restrictions regime imposed on Mr Al Hassan.²⁹ The Trial Chamber held that the Defence had justified the need to have the audio files in the original language and noted the Defence argument that these recordings “are relevant in making submissions in relation to the current restrictions imposed on the accused”.³⁰ The fact that Mr Ngaïssona can read French does not detract from the need for the Defence to have access to the full original audio files and Sango transcripts, nor does it impact Mr Ngaïssona’s right to access the original files.

18. Finally, in its decision, Trial Chamber X recognised that “contact with the outside world and visits are imperative for a detained person’s well-being” and that “[r]estrictions imposed on the contact of the accused person must be justified and proportionate, in accordance with internationally recognised human rights”.³¹ It held, moreover, that “the restrictions imposed must be the least restrictive possible to the rights of the detained person” and that such restrictions “because they interfere with the rights of the detained person, must be based on the existence of an objectively justifiable risk”.³²

²⁸ See ICC-01/12-01/18-525, para. 9; ICC-01/05-01/13-947, paras 40-41; ICC-01/05-01/13-893, para. 12.

²⁹ ICC-01/12-01/18-557-Red3, para. 18.

³⁰ ICC-01/12-01/18-557-Red3, para. 13.

³¹ ICC-01/12-01/18-557-Red3, para. 10.

³² ICC-01/12-01/18-557-Red3, para. 10.

19. These findings echo past submissions made by the Defence in relation to the restrictions on Mr Ngaïssona's contacts with the outside world. Mr Ngaïssona has already spent more than one year in pre-trial detention, the entire duration of which he has been under strict restrictions with respect to his contacts with the outside world.³³

20. This situation only heightens the imperative for the Defence, in order to be able to fully address past and future suspected breaches reported by the Registry in its reports, and to have access to the original audio recordings of relevant conversations, as well as the original Sango transcripts.

RELIEF SOUGHT

21. In light of the foregoing, the Defence respectfully requests the Chamber to:

- order the Registry to provide the Defence with the full Sango transcripts and audio recordings of the telephone conversations underlying the Fifth, Sixth, Seventh and Eighth Registry Reports;
- order the Registry to systematically transmit to the Chamber and to the Defence the (i) original, translated transcripts and (ii) original audio files of all conversations underlying suspected breaches of the restrictions regime by Mr Ngaïssona.

³³ See ICC-01/14-01/18-397-Conf-Exp, para. 2.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 25 February 2021
At The Hague, the Netherlands