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**International
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TRIAL CHAMBER V

Before: Judge 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
NGAÏSSONA***

Public

Public Redacted Version of “Defence Observations on the ‘First Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V’ (ICC-01/14-01/18-546-Conf-Exp)”, ICC-01/14-01/18-561-Conf-Exp, 19 June 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. Pursuant to Trial Chamber V ("the Chamber")'s "Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention"¹, the Defence of Mr Patrice-Edouard Ngaïssona ("Defence") hereby presents its observations in relation to the "First Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V"² ("First Registry Report").
2. The Defence respectfully requests the Chamber to lift or considerably reduce the restrictions on Mr Ngaïssona's contacts. *First*, the Prosecution has failed to demonstrate that the lifting or modifying of the current contact restrictions could prejudice the ongoing investigations and the outcome of the proceedings. *Second*, the restrictions on Mr Ngaïssona's contacts fail to meet the principles of proportionality and necessity and amount to a violation of Mr Ngaïssona's basic human rights as protected by the Rome Statute ("Statute").

II. Confidentiality

3. In accordance with regulation 23*bis*(1) of the Regulations of the Court ("Regulations"), these submissions are filed "confidential, EX PARTE, only available to the Registrar, the Prosecution, the Detention Centre, and the Defence for Mr Ngaïssona" as they concern information regarding Mr Ngaïssona's private life and detention-related matters, and also respond to documents of the same classification. However, the Defence does not oppose to a reclassification of the present submissions as "confidential".

¹ ICC-01/14-01/18-484-Conf-Exp.

² ICC-01/14-01/18-546-Conf-Exp.

III. Procedural history

4. Since his transfer to the Court on 23 January 2019 and at the Prosecution's request,³ Mr Ngaïssona has been subjected to considerable limitations on his contacts with the outside world, including with his immediate family members.
5. On 15 April 2019, the Pre-Trial Chamber ordered the Registry to submit bimonthly reports on the implementation of the restrictive measures concerning Mr Ngaïssona's communications with the outside world.⁴
6. In its First,⁵ Second,⁶ Third,⁷ Fourth,⁸ Eighth⁹ and Ninth¹⁰ Registry Reports before the Pre-Trial Chamber, the Registry did not report a single incident. In its Fifth, Sixth and Seventh Registry Reports before the Pre-Trial Chamber, the Registry reported certain incidents, involving private matters, claiming that Mr Ngaïssona had used "obscure" or "coded" language and had communicated with unauthorized third parties.¹¹ These incidents have led the Chief Custody Officer ("CCO") to implement strict measures such as excluding core family members from Mr Ngaïssona's list of non-privileged contacts indefinitely, and have led the Pre-Trial Chamber to apply stricter restrictions on Mr Ngaïssona's contacts with the outside world.¹² Each reported incident has been vigorously contested by the Defence. The Defence incorporates by reference its previous submissions, including on the perceived arbitrary nature of certain reported

³ ICC-01/14-01/18-98-Conf-Exp, para. 1, referring to ICC-01/14-01/18-2-US-Exp.

⁴ ICC-01/14-01/18-176-Conf-Red, page 14.

⁵ ICC-01/14-02/18-28-Conf-Exp, para. 1.

⁶ ICC-01/14-01/18-125-Conf-Exp, para. 1.

⁷ ICC-01/14-01/18-166-Conf-Exp, para. 1.

⁸ ICC-01/14-01/18-225-Conf-Exp, para. 1.

⁹ ICC-01/14-01/18-416-Conf-Exp, para. 1.

¹⁰ ICC-01/14-01/18-444-Conf-Exp, para. 1.

¹¹ ICC-01/14-01/18-276-Conf-Exp, paras 15-17; ICC-01/14-01/18-337-Conf-Exp, paras 13-16; ICC-01/14-01/18-390-Conf-Exp, paras 13-31.

¹² ICC-01/14-01/18-374-Conf-Exp.

incidents by the Registry, and pertaining to the Registry's lack of diligence with respect to the provision of transcripts of telephone conversations to the Defence as ordered by the Pre-Trial Chamber.¹³ Never once in the pre-trial phase did the Pre-Trial Chamber find that Mr Ngaïssona's behaviour gave rise to the suspicion that he may interfere with the Prosecution investigations or affect the outcome of the proceedings.¹⁴

7. On 17 April 2020, the Chamber issued its "Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention"¹⁵, in which it maintained all the restrictions imposed by the Pre-Trial Chamber.¹⁶ The Chamber requested the Registry to submit reports on the implementation of the imposed restrictions every three months.
8. On 8 June 2020, the Registry issued its "First Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Trial Chamber V",¹⁷ in which no incidents were reported.¹⁸

IV. Submissions

¹³See ICC-01/14-01/18-300-Conf-Exp, paras 17-28; ICC-01/14-01/18-355-Conf-Exp, paras 7-9; ICC-01/14-01/18-373-Conf-Exp, paras 27-40; ICC-01/14-01/18-397-Conf-Exp, paras 27-36; ICC-01/14-01/18-408-Conf-Exp, paras 21-27.

¹⁴ This was also confirmed by Pre-Trial Chamber II its decision transmitted to the parties by email dated 11 March 2019, in which it rejected the Prosecution's request to obtain the audio recordings of Mr Ngaïssona's telephone conversations and concluded: "As to the Prosecutor's Request, the Chamber recalls its findings (in the 'Decision Pursuant to Regulation 101 of the Regulations of the Court', ICC-01/14-01/18-413-Conf-Exp, and its redacted version, ICC-01/14-01/18-413-Conf-Exp-Red, dated 23 December 2019), to the effect that the information provided to the Prosecutor in the confidential redacted version of the Decision and the confidential redacted versions of the relevant Registry Reports was sufficient, while at the same time protecting Mr Ngaïssona's right to privacy", *see also* ICC-01/14-01/18-446-Conf-Exp.

¹⁵ ICC-01/14-01/18-484-Conf-Exp.

¹⁶ ICC-01/14-01/18-484-Conf-Exp, para 25.

¹⁷ ICC-01/14-01/18-546-Conf-Exp.

¹⁸ ICC-01/14-01/18-546-Conf-Exp, para 1.

A. The Prosecution fails to provide up to date, concrete and detailed information which would warrant the maintaining of the restrictions

9. In its Observations on the First Registry Report¹⁹, the Prosecution argues that the existing restrictions on Mr Ngaïssona's contacts should be maintained, as: (1) Mr Ngaïssona has a "documented history demonstrating a willingness to violate court-ordered contact restrictions while in detention"; (2) the circumstances justifying the order continue to prevail, and have been exacerbated by the Covid-19 pandemic; and (3) "relaxing the order would heighten the risk to witnesses" in the case.

10. The Prosecution's allegation that Mr Ngaïssona has a "documented history of violating the orders of the Court concerning restrictions" is both inaccurate and misleading. While recalling its numerous submissions on this matter,²⁰ the Defence respectfully submits that Mr Ngaïssona's "documented history" of violations can be summarized as follows: (1) over 10 months ago, Mr Ngaïssona briefly spoke to an unauthorized third party over speakerphone, of matters entirely unrelated to the current proceedings;²¹ (2) over 10 months ago, Mr Ngaïssona allowed a family member to listen to two private conversations had with another family member over speakerphone, under the mistaken belief that this was allowed;²² (3) over 11 months ago, Mr Ngaïssona informed a family member that he had registered [REDACTED] as [REDACTED] in the Detention

¹⁹ ICC-01/14-01/18-555-Conf-Exp.

²⁰ ICC-01/14-01/18-300-Conf-Exp; ICC-01/14-01/18-355-Conf-Exp; ICC-01/14-01/18-373-Conf-Exp; ICC-01/14-01/18-397-Conf-Exp; ICC-01/14-01/18-408-Conf-Exp; ICC-01/14-01/18-460-Conf-Exp.

²¹ For the Pre-Trial Chamber's first assessment of this incident see: ICC-01/14-01/18-357, para 48; For the main Defence's submissions on this incident, see: ICC-01/14-01/18-300-Conf-Exp, paras 19-20, 26-28; ICC-01/14-01/18-373-Conf-Exp, paras 27-33; ICC-01/14-01/18-408-Conf-Exp, para 32.

²² The Registry and the Pre-Trial Chamber confirmed the private nature of the first conversation: ICC-01/14-01/18-390-Conf-Exp, paras 16-17; ICC-01/14-01/18-413-Conf-Exp, paras 31-32. For the transcripts of the two conversations see: ICC-01/14-01/18-397-Conf-Exp-AnXI, pages 20-22 and 50-53. For the main Defence's submissions concerning Mr Ngaïssona's lack of awareness about the prohibition of using the speakerphone see: ICC-01/14-01/18-300, paras 21-22; ICC-01/14-01/18-373-Conf-Exp, para 34-35.

Centre's contact form, almost two months after having compiled such form.²³ The Defence considers that these incidents hardly demonstrate Mr Ngaïssona's willingness to violate contact restrictions imposed by the Chamber. Further, the Defence continues to strongly oppose the allegation that Mr Ngaïssona used "coded or obscure language", and recalls its previous submissions on this matter, where it had noted that Mr Ngaïssona's use of certain expressions was not meant to conceal information to the Chamber, but was simply due to cultural customs.²⁴ Moreover, the Prosecution displays an incoherent reasoning when inferring Mr Ngaïssona's willingness to violate the Chamber's order from sporadic incidents relating to private matters,²⁵ whilst at the same time refusing to draw any inferences from Mr Ngaïssona's inactivity and absence of recorded incidents for the past 10 months.²⁶

11. The Prosecution's submissions that the circumstances justifying the order continue to prevail are superfluous, given that such circumstances will likely continue to exist until the end of the current proceedings. The Prosecution itself acknowledges this reality when noting that "all of these circumstances, *by their nature*, remain unchanged presently."²⁷ These circumstances are entirely independent of Mr Ngaïssona. They are generally present in any post-conflict society and therefore they do not constitute sufficient grounds to retain the current restrictions. To find otherwise would run contrary to the Court's consistent jurisprudence that "*restrictions on contacts and communications under*

²³ For the Pre-Trial Chamber's assessment of this incident see ICC-01/14-01/18-413-Conf-Exp, para 36. For the main Defence's submissions about this incident see: ICC-01/14-01/18-397-Conf-Exp, paras 27-30.

²⁴ ICC-01/14-01/18-300-Conf-Exp, paras 26-28; ICC-01/14-01/18-355-Conf-Exp, para 9; ICC-01/14-01/18-373-Conf-Exp, paras 26-30, 32, 36-37, 39-40; ICC-01/14-01/18-408-Conf-Exp, paras 28-30, 33.

²⁵ See the Prosecutor's request to the Chamber to "direct the Registry to release the Recorded Conversations to the Prosecution where their possible relevance to a breach of articles 68 or 70 cannot be excluded", ICC-01/14-01/18-446-Conf-Exp, para 10. The Chamber refused the Prosecutor's request (Pre-Trial Chamber II's e-mail to Counsel of 11 March 2020, at 11:59 am). This confirms that the incidents did not give rise to any fears for the integrity of the Prosecution's investigations.

²⁶ ICC-01/14-01/18-555-Conf-Exp, paras 6-7.

²⁷ ICC-01/14-01/18-555-Conf-Exp, para 10. Emphasis added.

the Court's statutory framework must be (re-) assessed in light of concrete, specific and up-to-date information".²⁸

12. The Prosecution submits that "the response of the Central African Republic ("CAR") to the COVID-19 pandemic has made the assessment and the implementation of witness protection measures even more difficult."²⁹ *First*, in its 15 June submissions, the Prosecution argued that it was not in a position to disclose certain witnesses' identities to the Defence "as the finalisation of their individual risk assessments and potential implementation of risk mitigation measures (...) is pending."³⁰ Therefore the Defence infers that, for those witnesses whose identities have been disclosed, risk assessments have already been conducted, and protection measures have already been put in place by the Prosecution. *Second*, on 15 June, the Prosecution submitted that, in spite of the Covid-19 pandemic, it was able to complete risk assessments and, where relevant, implement risk mitigation measures.³¹ Therefore, the Prosecution has failed to substantiate how the Covid-19 pandemic would exacerbate risks to witnesses' security.

13. In any event, the Defence stresses that Mr Ngaïssona poses no threat to Prosecution witnesses, as demonstrated by his behaviour over the past 17 months. The Prosecution's submission that "relaxing the Order would inevitably heighten the risk to witnesses in this case" is entirely speculative and runs contrary to the Court's jurisprudence, according to which "restrictions (...) must be based on the existence of an objectively justifiable risk".³² Over the past 17 months, Mr Ngaïssona has had knowledge of most of the Prosecution witnesses' identities; never did he attempt to interfere with them or with the

²⁸ ICC-01/14-01/18-176-Conf-Red, para. 29. See also, ICC-01/12-01/18-557-Red3, para. 10.

²⁹ ICC-01/14-01/18-555-Conf-Exp, para 2.

³⁰ ICC-01/14-01/18-553, para 4.

³¹ ICC-01/14-01/18-553, para 13.

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

current proceedings. The Prosecution's provision of a preliminary witness list in no way increases the risk for witnesses, given that most of their identities were already known to Mr Ngaïssona. Moreover, the Prosecution's preliminary list of witnesses entails several redactions to witnesses' identities for whom security measures have not yet been put in place.³³

14. Lastly, by stating that “allowing [Mr] Ngaïssona to maintain contact with his family and others as provided for in the Order, is not unduly burdensome or disproportionate”³⁴, the Prosecution appears to misrepresent the restrictions on Mr Ngaïssona's contacts, which do not envisage the possibility of communicating with anyone other than family members, and even exclude some immediate family members from Mr Ngaïssona's list of contacts.³⁵

B. The restrictions on Mr Ngaïssona's contacts fail to meet the test of necessity and proportionality and amount to a breach of his internationally recognized human rights

15. Pursuant to regulations 99 (h), (i) and 100(1) of the RoC and internationally recognised human rights, Mr Ngaïssona is entitled to the protection of his private and family life.³⁶ While regulation 101(2) of the RoC allows the Chamber to impose restrictions on a detainee's contacts with the outside world, such restrictions must be necessary and proportionate to the aim pursued.³⁷ The

³³ ICC-01/14-01/18-553-Conf-AnxA.

³⁴ ICC-01/14-01/18-555-Conf-Exp, para 17.

³⁵ ICC-01/14-01/18-484-Conf-Exp, para 15.

³⁶ As recognized by the Chamber, Mr Ngaïssona's right to private and family life is implicitly recognised under the Court's statutory framework and, as an internationally recognised human right, guides the Chamber's interpretation of the Court's legal framework by virtue of article 21(3) of the Statute. ICC-01/14-01/18-484-Conf-Exp, para 16.

³⁷ ICC-01/04-01/07-322, 13 March 2008, p. 9; ICC-01/04-02/06-1817-Red, para 72; ICC-02/04-01/15-1444, para. 24, citing article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...]'); art. 11(2) of the Inter-American Convention on

Defence respectfully submits that the restrictions on Mr Ngaïssona's contacts are neither necessary nor proportionate to the aim pursued, namely the protection of investigations or the outcome of the proceedings pursuant to regulation 101(2).

16. As indicated above, for the past 17 months, there has been no indication that Mr Ngaïssona would attempt to interfere with the proceedings or the Prosecution's investigations. The few incidents reported by the Registry, which took place almost one year ago,³⁸ involved private matters and not matters even remotely addressing the case against Mr Ngaïssona.³⁹ The Pre-Trial Chamber even ordered an expanded investigation into all of Mr Ngaïssona's non-privileged calls since the Fourth Registry Report,⁴⁰ pursuant to which the Registry reviewed 197 of Mr Ngaïssona's conversations with 15 different individuals.⁴¹ Nothing in these conversations gave rise to the suspicion that Mr Ngaïssona had ever tried to interfere with the current proceedings and with the Prosecutor's investigation. This conclusion is further reinforced by the fact that Mr Ngaïssona has not made use of the phone for the past 7 months. Against this backdrop, the current restrictions on Mr Ngaïssona's contacts do not appear necessary to the protection of the current proceedings and the Prosecution's investigations.

17. Moreover, the absolute prohibition to have contact with certain family members and friends, coupled with the existing active monitoring order,

Human Rights (prohibiting 'arbitrary or abusive' interference). See also European Court of Human Rights, Grand Chamber, *Paradiso and Campanelli v. Italy*, 24 January 2017, app. no. 25358/12, para. 181 ('According to the Court's established caselaw, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests').

³⁸ ICC-01/14-01/18-413-Conf-Exp, paras 82-83.

³⁹ See footnote 25 above.

⁴⁰ ICC-01/14-01/18-225-Conf-Exp. Reporting period from 8 April, at para. 1; ICC-01/14-01/18-357-Conf-Exp, para. 55.

⁴¹ ICC-01/14-01/18-400-Conf-Exp, para. 15.

constitutes a disproportionate limitation of Mr Ngaïssona's right to private and family life. With the active monitoring order allowing the Detention Unit to timely interrupt calls or visits in case of apparent violations,⁴² the additional prohibition to communicate with certain family members and friends appears unnecessary and in contrast with the Court's jurisprudence, according to which "the restrictions imposed must be the least restrictive possible to the rights of the detained person."⁴³ Moreover, according to the jurisprudence of the Court, the disproportionality of existing restrictive measures is heightened with the passage of time.⁴⁴

18. Furthermore, the current restrictive measures, which were initially imposed by the Pre-Trial Chamber for a limited amount of time, i.e. the pre-trial proceedings,⁴⁵ appear to have been extended with no end in sight. While the Chamber has stated that it will review such measures should new circumstances arise,⁴⁶ its consideration that the absence of incidents and inactivity of Mr Ngaïssona do not amount to a change in circumstances⁴⁷ appears to suggest that no circumstance will ever arise that will justify the lifting or modification of the current contact restrictions for the foreseeable future. Similarly, the exclusion of certain family members from Mr Ngaïssona's list of contacts has never been reviewed, in spite of having been labelled as "temporary".⁴⁸

⁴² See, for example, *Prosecutor v Dominic Ongwen*, Decision concerning the restriction of communications of Dominic Ongwen, ICC-02/04-01/15-283, 3 August 2015, at paras 13-14, where the Single Judge found that, in order to balance the need to preserve the integrity of proceedings and Mr Ongwen's rights in detention, the result could be achieved by imposing measures which enabled the Chamber and/or the Registry to intervene without undue delay "in case of any future information which may lead to a reasonable suspicion concerning attempts to exercise some form of influence on persons who possess information relevant to the case."

⁴³ ICC-01/12-01/18-557-Red3, para. 10.

⁴⁴ ICC-01/04-02/06-1817-Red, para. 72.

⁴⁵ ICC-01/14-01/18-374-Conf-Exp, paras 41-41; ICC-01/14-01/18-413-Conf-Exp, para 86; ICC-01/14-01/18-424-Conf-Exp, para 30.

⁴⁶ ICC-01/14-01/18-484-Conf-Exp, para 26.

⁴⁷ ICC-01/14-01/18-484-Conf-Exp, para 24.

⁴⁸ ICC-01/14-01/18-276-Conf-Exp, para 16.

19. The effective isolation from the outside world experienced by Mr Ngaïssona as a result of his restrictions on contact has only been exacerbated by the closure of the Detention Centre to visitors, including legal teams, in response to the Covid-19 pandemic.⁴⁹ The Detention Centre has also closed its doors to any import of items including documents and privileged materials from defence teams, books, DVDs, and news articles, which could have represented a social lifeline for Mr Ngaïssona during these uncertain times.⁵⁰ In spite of the gradual lifting of similar measures in the Host State prisons since 2 June,⁵¹ the Registry has recently decided to maintain these measures at least until 29 June.⁵² These restrictive measures have further exacerbated detention conditions which were already untenable. In turn, this has led to the serious deterioration of Mr Ngaïssona's well-being, ultimately affecting his ability to assist the Defence in the preparation of the case against him, at a stage where he should be fully engaging with his Defence team in order to effectively prepare for trial, pursuant to article 67(1)(b) of the Statute.⁵³

V. Conclusion

20. In conclusion, the Defence requests the Chamber to put an end to Mr Ngaïssona's effective isolation from the outside world by lifting, or considerably reducing, the restrictions to Mr Ngaïssona's contacts. Such restrictions are no longer necessary nor proportionate, in the absence of indications that Mr Ngaïssona may interfere with the current proceedings. As

⁴⁹ CCO Memo, "URGENT New Detention Centre Temporary Measures Regarding COVID-19", DS/2020/023/PC/mc, 19 March 2020, and relevant extensions.

⁵⁰ Ibid.

⁵¹ See DJI new measures with respect to the Covid-19 pandemic at: <https://www.dji.nl> (retrieved 18 June 2020).

⁵² ICC-01/14-01/18-557-Conf-Exp, para 16.

⁵³ ICC-01/14-01/18-420-Conf-Exp, paras 32-36; ICC-01/14-01/18-420-Conf-Exp-AnxI; ICC-01/14-01/18-426-Conf-Exp-Corr, para 25; ICC-01/14-01/18-460-Conf-Exp, paras 11, 24, 30; ICC-01/14-01/18-496-Conf-Exp, paras 33, 36, 38, 40.

such, they amount to a significant violation of Mr Ngaïssona's fundamental human rights.

RELIEF SOUGHT

21. The Defence respectfully requests the Chamber to:

- **LIFT** the current restrictions on Mr Ngaïssona's contacts; or
- **CONSIDERABLY REDUCE** the current restrictions on Mr Ngaïssona's contacts.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 01 March 2021,

At The Hague, the Netherlands.