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**International
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PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

**With Confidential, EX PARTE Annexes 1 and 2, only available to the Registrar,
Detention Section, and Patrice-Edouard Ngaïssona Defence**

**Public Redacted Version of “Defence Observations Pursuant to the ‘Decision
Pursuant to Regulation 101 of the Regulations of the Court’ (ICC-01/14-01/18-357-
Conf-Exp) and the Registry’s Seventh Report (ICC-01/14-01/18-390-Conf-Exp)”
ICC-01/14-01/18-397-Conf-Exp, 15 November 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. Pursuant to the Pre-Trial Chamber II's ("Chamber") "Decision Pursuant to Regulation 101 of the Regulations of the Court" dated 15 April 2019¹ the Defence of Mr Patrice-Edouard Ngaïssona ("Defence") hereby presents its observations in relation to the Registry's "Seventh Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II" ("Seventh Report").
2. Mr Ngaïssona's detention conditions have become untenable. The Defence respectfully requests the Chamber to lift the restrictions on contact imposed on Mr Patrice-Edouard Ngaïssona, or in the alternative, significantly reduce his current restrictions in order to put an end to his effective isolation from the outside world, by ordering the Registry to reinstate his friends² and family members on his list of contacts.
3. The Registry's Fifth, Sixth and Seventh Reports contain allegations with regard to Mr Ngaïssona's conduct, which are wholly unsupported by the facts and serve to paint a negative portrait of Mr Ngaïssona instead of complying with the Chamber's orders. The Defence urges the Chamber to reject the Registry's findings in its Seventh Report and to order an independent investigation into Mr Ngaïssona's detention conditions and into the Registry's ongoing investigations into Mr Ngaïssona telephone communications, on the basis of the lack of impartiality exhibited by the Detention Centre with regard to Mr Ngaïssona's restrictions on contact.

II. Confidentiality

¹ ICC-01/14-01/18-176-Conf-Red.

² Under the current restrictions regime, Mr Ngaïssona may only communicate with the remaining family members which are included on his list of non-privileged contacts.

4. In accordance with regulation 23bis(1) of the Regulations of the Court (“Regulations”), these submissions are filed “confidential, EX PARTE, only available to the Registrar, Detention Centre, and the Ngaïssona Defence” as they concern information regarding Mr Ngaïssona’s private life and detention-related matters, and also respond to documents of the same classification. The Defence will file a confidential redacted version of these submissions.

III. Procedural history

5. On 23 January 2019, Mr Patrice-Edouard Ngaïssona was transferred to the ICC Detention Centre where he is currently held in pre-trial detention.
6. 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.⁴
7. 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 where it reported no incidents during the monitoring of Mr Ngaïssona’s contact with the outside world.
8. On the same day, the Chamber 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*

³ ICC-01/14-01/18-98-Conf-Exp.

⁴ ICC-01/14-01/18-98-Conf-Exp, para. 12.

⁵ ICC-01/14-01/18-115-Conf-Exp.

*that he engages in activities that may affect the outcome of the proceedings”.*⁶

9. 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 incident during the monitoring of Mr Ngaïssona’s contact with the outside world.
10. On 8 April 2019, the Registry issued the “Third Registry Report on the Implementation of the Restrictions on Contact of Mr Patrice-Edouard Ngaïssona Ordered by Pre-Trial Chamber II”⁸ (“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 ordered the extension of restrictions on Mr Ngaïssona’s contacts for the remainder of the pre-trial proceedings and ordered the Registry to submit a report every two months.⁹
12. On 17 June 2019, 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”¹⁰ (“the Fourth Report”), reporting no incident during the monitoring of Mr Ngaïssona’s contact with the outside world.¹¹
13. On 15 August 2019, the Registry filed the “Fifth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II” (“Fifth Report”),¹² in which it reported a single incident

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

⁷ ICC-01/14-01/18-125-Conf-Exp.

⁸ ICC-01/14-01/18-166-Conf-Exp.

⁹ ICC-01/14-01/18-176-Conf-Red, pp. 14-5.

¹⁰ ICC-01/14-01/18-225-Conf-Exp.

¹¹ Fourth Report, para. 1.

¹² ICC-01/14-01/18-276-Conf-Exp.

relating to a telephone call made from Mr Ngaïssona's non-privileged telephone list. The Registry further informed the Chamber that no incident was reported with respect to: 1) specific contacts identified on Mr Ngaïssona's non-privileged telephone list, 2) Mr Ngaïssona's non-privileged visits, and 3) his incoming and outgoing mail.¹³

14. On 13 September, the Registry filed its *ex parte* "Sixth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II" ("Sixth Report"), which was only made available to the Defence by way of reclassification on 17 September 2019.¹⁴

15. On 18 September 2019, the Chamber issued its "Decision Pursuant to regulation 101 of the Regulations of the Court" ("Seventh Decision"), in which the Chamber found that Mr Ngaïssona violated the restrictions regime by using coded language, and ordered *inter alia*, that all of Mr Ngaïssona's non-privileged calls, and all non-privileged and non-family visits be suspended on an interim basis.¹⁵ The Chamber ordered that Mr Ngaïssona's family visits be subject to active monitoring on an interim basis.¹⁶ The Chamber also ordered the Registry to submit its Seventh Report "containing its findings from its investigation into [Mr] Ngaïssona's calls" by 30 September 2019¹⁷, and "to the extent possible, to investigate the identity of the third party who communicated via speakerphone during the incident and report back (...) in the Seventh Registry Report."¹⁸

16. On 3 October 2019, the Chamber granted the Registry's "Request for an Extension of Time for the submission of the Seventh Report,"¹⁹ until 4

¹³ Fifth Report, paras 18, 22-4.

¹⁴ ICC-01/14-01/18-337-Conf-Exp, para. 16.

¹⁵ ICC-01/14-01/18-357-Conf-Exp, para. 18.

¹⁶ Seventh Decision, paras 48-9, 52.

¹⁷ Seventh Decision, para. 52.

¹⁸ Seventh Decision, para. 54.

¹⁹ ICC-01/14-01/18-362-Conf-Exp, para. 14.

November 2019. The Chamber extended the interim contact restrictions for Mr Ngaïssona until 11 October 2019, and ordered that as of 12 October 2019, Mr Ngaïssona shall be granted one hour per week of actively monitored telephone calls with his family only and that Mr Ngaïssona's family visits shall remain subject to active monitoring.²⁰ Given that several of Mr Ngaïssona's family members would be removed from his list of non-privileged contacts, this would in effect nearly isolate him with the outside world.

17. On 4 November 2019, the Registry submitted its "Seventh Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II" ("Seventh Report"), in which it communicated to the Chamber the outcome of its investigation into all of Mr Ngaïssona's non-privileged phone calls from the Fourth Report to 18 September 2019.²¹

18. On 8 November 2019, following a refusal by the Detention Centre to communicate the underlying transcripts to the Seventh Report via email,²² the Defence submitted its "Request to Obtain Transcripts of Phone Calls Mentioned in the "Seventh Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II".²³ On 11 November 2018, the Chamber granted the Defence's request to obtain transcripts of the conversations underlying the Registry's Seventh Report.²⁴

IV. Submissions

A. Preliminary Observations

19. *First*, at the outset, the Defence is concerned by the increasing lack of objectivity exhibited by the Registry in its reporting to the Chamber and in its decision-

²⁰ ICC-01/14-01/18-374-Conf-Exp.

²¹ ICC-01/14-01/18-390-Conf-Exp.

²² Email from [REDACTED] to [REDACTED], 07/11/2019, at 12:07.

²³ ICC-01/14-01/18-391-Conf-Exp.

²⁴ ICC-01/14-01/18-393-Conf-Exp.

making with regarding to Mr Ngaïssona's contacts with the outside world. As evidenced by the Seventh Report and based on a thorough review of the transcripts of the telephone calls upon which the Registry relies in its reporting, it is apparent that the Registry has been providing the Chamber with a biased representation of these conversations. Through a selective reading of Mr Ngaïssona's telephone conversations, the Registry attempts to convey a negative image of Mr Ngaïssona's character and it is on this basis that it has been limiting Mr Ngaïssona's rights to maintain contacts with the outside world. This approach stands contrary to the Chamber's 23 January "Decision Pursuant to Regulation 101 of the Regulations of the Court", in which the Single Judge ordered that: "Any discussion related to the present case with the individuals referred to above under (ii)²⁵ is prohibited. The use of obscure or coded language during such calls is prohibited."²⁶ The Defence submits that the episodes which are listed by the Registry in its Seventh Report do not qualify as case-related discussions or discussions where obscure or coded language was used.

20. For reasons, which will be expounded upon below, the Defence respectfully requests the Chamber to order an independent investigation into Mr Ngaïssona's calls and to lift or in the alternative, considerably alleviate, the current restrictions on Mr Ngaïssona's contacts with the outside world.

21. *Second*, Mr Ngaïssona's detention conditions have become untenable. Mr Ngaïssona finds himself in a situation whereby he is effectively isolated from the outside world, as a result of mere suggestions of impropriety reported by the Registry, which has regrettably shown partiality and a lack of due diligence in its investigation ordered by the Chamber. One such example is that Mr

²⁵ Individuals, such as family members, whose identities and contact details have been verified beforehand with the support of the Victims and Witnesses Unit. See ICC-01/14-01/18-98-Conf-Exp, para. 8.

²⁶ ICC-01/14-01/18-98-Conf-Exp, para. 8.

Ngaïssona's meaningful attempts to assist the Registry in its investigation have been entirely ignored.²⁷

22. For these reasons, which are further detailed below, Mr Ngaïssona deemed to have no choice but to halt all his communications with the exception of his legal team, and to suspend his participation in the activities at the Detention Centre. This decision by Mr Ngaïssona was not made lightly, but he deems it necessary in order to avoid any further unfounded accusations by the Registry. Until a proper and independent investigation is conducted into the Registry's allegations against Mr Ngaïssona, this is for Mr Ngaïssona the only viable solution for the time being.

B. The Registry has failed to diligently investigate the identity of the third party who communicated with Mr Ngaïssona over speakerphone on 18 July 2019

23. The Defence recalls that, in its past submissions, it had noted Mr Ngaïssona's full cooperation and willingness to assist the Registry in its investigation on the identity of [REDACTED]. This was exemplified by Mr Ngaïssona providing the Registry with [REDACTED] telephone number.²⁸ In its Seventh Report, the Registry makes no mention of this telephone number, nor does it mention any of the information communicated by the Defence to assist the Registry in its investigation. Therefore, the Registry has not engaged at all with potentially dispositive information that could have potentially ended its query regarding the identity of [REDACTED]. Any investigation conducted with due diligence on this matter would have included attempts to verify this phone number, and a written report of the results of such an inquiry. The Defence intentionally did not attempt to contact this number so as to facilitate the Registry's

²⁷ The Defence encourages the Chamber to consider the Registry's allegations in the context of the full transcripts of the conversations from which they were extracted, See Annex 1.

²⁸ ICC-01/14-01/18-373-Conf-Exp, para. 33.

investigation into the matter. As is apparent from the lack of any mention of the number in the report, the Registry has not pursued any action with respect to this information.

24. In its Seventh Report, the Registry notes that “as a result of reviewing further transcripts and conversations, the Registry informs the Chamber that the identity of the third person remains unknown.”²⁹ The Registry has misinterpreted the Chamber’s order. When ordering the Registry to inquire further on the identity of [REDACTED], the Chamber never stated that such inquiry should be limited to reviewing past transcripts of conversations.³⁰ It is therefore unclear why the Registry ignored the potential lines of inquiry proposed by the Defence, and preferred to engage in the time-consuming process of reviewing all past transcripts of conversations between Mr Ngaïssona and [REDACTED]. All the more so when such process caused the Seventh Report to be finalized with a considerable delay of more than one month.³¹

25. The Defence hereby recalls its past submissions where it noted that [REDACTED].³² [REDACTED]. [REDACTED].³³ The current restrictions upon Mr Ngaïssona’s contact with the outside world should not be maintained on the sole ground that the Registry has failed to verify the information provided by Mr Ngaïssona. It is regrettable that his efforts in assisting the Registry in its investigations, which could have dispelled the Registry’s suspicions and accelerated the investigation, have been fully ignored.

²⁹ ICC-01/14-01/18-390-Conf-Exp, para. 14.

³⁰ ICC-01/14-01/18-357-Conf-Exp, para. 54.

³¹ ICC-01/14-01/18-362-Conf-Exp, para. 14.

³² ICC-01/14-01/18-373-Conf-Exp, paras 27-32.

³³ ICC-01/14-01/18-276-Conf-Exp-Anx.

26. The Defence also submits that the speakerphone incident, by itself, is not sufficient to justify the maintaining of the current restrictions upon Mr Ngaïssona's contact with the outside world. It is evident that until 15 August, when he was provided with a memorandum³⁴ informing him of the absolute prohibition to communicate through speakerphone, Mr Ngaïssona had not clearly understood the policy towards the usage of speakerphones.³⁵ Since the circulation of the memorandum, Mr Ngaïssona has complied with this policy, as evidenced by the fact that the Registry has not reported any similar incident since 15 August 2019.

C. The Registry lacked due diligence and impartiality in conducting its expanded investigation

i. The allegation that "an arrangement was made between Mr Ngaïssona and [REDACTED] in order to intentionally mislead the Registry" finds no factual basis:

27. At the outset, the Defence notes that it was the Detention Center staff who advised Mr Ngaïssona to inform the people he wished to add to his list of contacts that the ICC would contact them to conduct a verification procedure. That is to avoid third parties who are called by the ICC to be taken by surprise. Thus, by telling [REDACTED]³⁶, Mr Ngaïssona was complying with the instructions he had been given at the Detention Center.

28. The Defence submits that [REDACTED] is [REDACTED]. [REDACTED]. As previously and extensively explained by the Defence,³⁷ the understanding of kinship in Central African culture differs significantly from the Western understanding. In CAR, [REDACTED]. This Court has confirmed in the

³⁴ ICC-01/14-01/18-276-Conf-Exp, para. 17.

³⁵ See Annex 1 [REDACTED].

³⁶ See Annex 1, [REDACTED].

³⁷ ICC-01/14-01/18-355-Conf-Exp, para. 9 ; ICC-01/14-01/18-373-Conf-Exp, para. 39.

assessment of victim applications that “family” must be understood in its proper cultural context when it determined:

The Chamber moreover recalls that the concept of “family” must be understood in relation to the relevant family and social structures. In Katanga, it therefore treated the concept of “family” with due regard for family and social structures in the DRC and in Ituri in particular.³⁸

29. Upon receipt of the Seventh Report, Mr Ngaïssona wrote an explanatory note to the Detention Center,³⁹ where he explained his relationship with [REDACTED]. [REDACTED]. Kinship terms are used differently in different cultures. It would be unreasonable to require of Mr Ngaïssona to adopt a different kinship language than the one he has been using for his entire life. The Detention Centre has a duty to adopt culturally-sensitive approaches to its interactions with the detainees,⁴⁰ including in the vetting process.

30. Moreover, as acknowledged in the Seventh Report, Mr Ngaïssona had requested that [REDACTED] be added to his list of non-privileged contacts on 7 May 2019. Had he intended to intentionally mislead the Registry, he would not have waited until the 24 June to [REDACTED]. Moreover, there would be no reason for Mr Ngaïssona to mislead the Registry into believing that someone who is [REDACTED] is actually [REDACTED]. Mr Ngaïssona’s remark: [REDACTED]⁴¹, simply aimed at achieving successful completion of the verification process. This is logical given that the Registry took almost three months in order to complete its verification procedure and so he was seeking to facilitate the process.⁴²

³⁸ ICC-01/04-01/06-3379-Red-Corr-tENG, para. 168, emphasis added.

³⁹ See Annex 2. Note that, following submission of this note, no one followed up with Mr Ngaïssona about the explanations he had provided.

⁴⁰ Regulation 91(2) of the Regulations of the Court.

⁴¹ ICC-01/14-01/18-390-Conf-Exp., para. 25.

⁴² ICC-01/14-01/18-390-Conf-Exp., para. 27

ii. The Registry has presented excerpts of Mr Ngaïssona's telephone calls which bear no relation to the Chamber's order and which were taken entirely out of context

31. The conversation excerpts provided by the Registry to the Chamber in its Seventh Report bear no relation to the restrictions on communications as ordered by the Chamber. The Defence respectfully urges the Chamber to review each transcript from which the Registry cites only certain quotes. A review of the transcripts clearly demonstrates that Mr Ngaïssona has fully complied with the Chamber's orders and that the Detention Centre's removal of Mr Ngaïssona's family members and friends from his list of contacts is completely unfounded.

32. In its Seventh Report, the Registry notes that: "On 8 July 2019, [REDACTED]." ⁴³ It is unclear how this sentence relates to Mr Ngaïssona's restrictions on communication, the preservation of the Prosecution's investigations, the protection of witnesses, or the integrity of proceedings. The Seventh Report provides no such explanation. However, the Defence notes that the Registry is suggesting that [REDACTED]. However, reading this quote within its context reveals precisely the opposite, that [REDACTED].

33. After having reviewed the transcript of the 8 July conversation, ⁴⁴ the Defence notes that Mr Ngaïssona's sentence has been taken entirely out of context. Any objective reader would come to the conclusion that Mr Ngaïssona was not [REDACTED]. The Registry lacked objectivity by choosing to include this quote in its Seventh Report. What is even more concerning is the fact that this conversation [REDACTED]. The Registry could have anticipated that the transcripts of the conversations underlying the Seventh Report would be circulated among the Defence and Chamber. In addition to lacking objectivity,

⁴³ ICC-01/14-01/18-390-Conf-Exp., para. 21.

⁴⁴ See Annex 1, [REDACTED].

the inclusion of this conversation in the Seventh Report constitutes an unnecessary intrusion into Mr Ngaïssona's intimate life.

34. Moreover, the Registry lists several conversations between Mr Ngaïssona and a friend, [REDACTED].⁴⁵ First, it should be noted that again, it is entirely unclear how [REDACTED]. The Registry appears to make this suggestion based on the fact that [REDACTED]. It is indeed normal that Mr Ngaïssona [REDACTED]. Second, upon review of the relevant transcripts, it is evident that [REDACTED]. [REDACTED].⁴⁶ [REDACTED].

35. What is even more concerning is the inclusion of a footnote by the Registry, following an excerpt about [REDACTED] between Mr Ngaïssona and [REDACTED], which notes that the two interlocutors laughed. Although the Registry does not explain the relevance of this footnote, it attempts to suggest that Mr Ngaïssona would have laughed inappropriately at a remark made by his interlocutor. The only possible explanation for the inclusion of this remark is that the Registry, after misinterpreting the content of the conversation⁴⁷, tried to use it in order to convey a negative image of Mr Ngaïssona's character to the Chamber. This constitutes a serious display of the Registry's lack of impartiality and objectivity.

36. The Defence notes that the CCO has decided to remove [REDACTED] from Mr Ngaïssona's contact list.⁴⁸ [REDACTED]. [REDACTED].⁴⁹ [REDACTED]. [REDACTED].

⁴⁵ ICC-01/14-01/18-390-Conf-Exp, para. 22.

⁴⁶ See Annex 1, [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ ICC-01/14-01/18-390-Conf-Exp, para. 29.

⁴⁹ Annex 1, [REDACTED].

D. Mr Ngaïssona's current detention conditions are in contravention of internationally recognized human rights

37. Mr Ngaïssona's fundamental right to family and private life has virtually been negated through the Detention Centre's recent approach of calling into question all of Mr Ngaïssona's communications with his non-privileged contacts, which, as detailed above and as evidenced by the transcripts, relies on mere assumptions which find no factual basis.

38. As stated by this Court, "all people – including the incarcerated - have a right to family life".⁵⁰ The right to family life is not absolute and may be interfered with if (i) in accordance with the law; (ii) necessary and (iii) proportionate.⁵¹

39. However, the interferences with Mr Ngaïssona's right to family life, do not meet these criteria.

40. First, the current regime does not meet the test of necessity as the persons removed from Mr Ngaïssona's list of non-privileged contacts bear no relation with the restrictions regime imposed by the Chamber, which aims to protect the Prosecution's investigations and witnesses and the outcome of proceedings. This is especially flagrant in the Registry's Seventh Report, in light of the full transcripts of the conversations relied on, and is only compounded by the fact

⁵⁰ ICC-02/04-01/15-1444, para 23, citing Art. 17 of the International Convention of Civil and Political Rights; art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 11(2) of the Inter-American Convention on Human Rights. See also UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 17 December 2015, A/RES/70/175 (annex), rule 106 ('Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.').

⁵¹ ICC-01/04-01/07-322, 13 March 2008, p. 9; ICC-02/04-01/15-1444, para. 24, citing Art. 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 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 case-law, 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').

that the Registry has lacked due diligence in investigating and confirming easily verifiable facts.

41. Second, the interference is disproportionate, given the debilitating impacts the current restrictions on contact, which include the Registry's recent decisions of excluding several of Mr Ngaïssona's close family members and friends from his list of contacts, have on Mr Ngaïssona's well-being and right to family life and privacy. As held consistently by this Court: "the right to privacy and family life is an internationally recognised human rights principle enshrined in a number of important human rights instruments and thus guides the Chamber's interpretation of the Statute by virtue of Article 21(3) of the Statute".⁵² The ECHR has held that it "is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family".⁵³ Mere suspicions of impropriety by the Detention Centre simply do not outweigh the effective social isolation experienced by Mr Ngaïssona.

42. It is trite law that fundamental human rights, including rights of detained persons, must not only be recognized in theory, but must also be effective, in practice. Given that several members of Mr Ngaïssona's family members – which are the only remaining persons with whom telephone communications

⁵² ICC-01/04-02/06-785-Red, para. 42.

⁵³ ICC-01/04-01/07-1709-ENG-Red, para. 22, relying *inter alia* on *Messina v. Italy*, no. 25498/94, 28 September 2000, paras. 61 to 63: "61 ; International Criminal Tribunal for Rwanda, *The Prosecutor v. Ndindiliyimana*, The President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64, Case No. ICTR-2000-56-T, 25 November 2002, para. 10; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Krajisnik*, Decision on the Defence's Request for an Order Setting Aside, in Part, the Deputy Registrar's Decision of 3 February 2004 , 14 May 2004, Case No. IT-00-39-T, para. 9; See ⁵³ See for instance, 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". 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. 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", Rules 3, 58, 43(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.

are allowed under the current regime – have been removed from his list of non-privileged contacts, his effective right to family life has in practice been almost completely nullified.

43. Since the first and single incident reported in the Fifth report, the Registry appears to have called into question all of Mr Ngaïssona's non-privileged communications and has been interpreting several benign conversations held between Mr Ngaïssona and his close family members and friends as inappropriate. In the Sixth and Seventh Report, the Registry has isolated excerpts of conversations – at times, intimate – had between Mr Ngaïssona and family members and friends, without there being a true basis for reporting. The interference with Mr Ngaïssona's right to privacy and family life, as manifested by the active monitoring of all non-privileged calls and family visits are neither necessary nor proportionate to the aim of protecting the integrity of the Prosecution's investigations and proceedings.

44. Mr Ngaïssona's fundamental human rights outweigh the maintaining of the restrictions on communications imposed by way of the Chamber's Seventh Decision and by way of the Detention Centre's decisions of excluding several individuals from Mr Ngaïssona's list of non-privileged contacts, including [REDACTED], [REDACTED], [REDACTED] and close friends. These restrictions bear disproportionate and debilitating consequences on Mr Ngaïssona's well-being and on his protected rights to have contacts with his family and have led Mr Ngaïssona to halt all non-privileged communications with the outside world.

45. The disproportionality of these measures is heightened with the passage of time,⁵⁴ given the additional time since the imposition of the restrictions over nine months ago.

⁵⁴ ICC-01/04-02/06-1817-Red, para. 72.

46. Moreover, the Chamber has ordered the Registry to set 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*” and has ordered the prohibition of the use of “obscure” and “coded” language.⁵⁵ The Registry’s decisions on removing Mr Ngaïssona’s close family members and friends from his lists of contacts, on the basis of mere suspicions or assumptions of impropriety based on conversation excerpts taken entirely out of context, goes well beyond not only the Chamber’s orders, but also the Registry’s mandate, as a neutral and impartial organ.⁵⁶ The Registry also has a duty to “organize the staff of the Registry in a manner that promotes the rights of the defence, consistent with the principal of fair trial”.⁵⁷ Moreover, the measures taken by the Detention Centre management contravene the Registry’s obligation “to protect the health and the safety of detained persons”, contrary to the requirements of Regulation 103 of the Regulations of the Court as well as the Chief Custody Officer’s responsibility for the “the safeguarding of the [detained persons’] rights”.⁵⁸

47. In sum, 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 “*[c]ould prejudice or otherwise affect the outcome of the proceedings against [him], or any other investigation*”,⁵⁹ as evidenced by the First, Second, Third and Fourth Registry Reports and the detailed explanations provided by Mr Ngaïssona and

⁵⁵ ICC-01/14-01/18-98-Conf-Exp, para. 8; ICC-01/14-01/18-114-Conf-Exp-Red, para. 12.

⁵⁶ Rule 5 of the Rules of Procedure and Evidence provides that the Registrar shall solemnly undertake to perform his or her duties “faithfully, impartially and conscientiously”.

⁵⁷ Rule 20, ICC Rules of Procedure and Evidence.

⁵⁸ Regulation 187, ICC Regulations of the Registry.

⁵⁹ Regulation 101(2)(b), Regulations of the Court.

his Defence team to dispel any doubts as to the impropriety of the conversations between Mr Ngaïssona and his non-privileged contacts.

E. At this stage, an independent investigation into Mr Ngaïssona's detention conditions is necessary

48. In light of the above, the Defence enjoins the Chamber to order an independent investigation into the Detention Centre's own investigation in relation to Mr Ngaïssona and to the Detention Centre's practices in relation to the calls, more generally, given the serious concerns of partiality raised above.⁶⁰

RELIEF SOUGHT

49. The Defence respectfully requests the Chamber to:

- **LIFT** the current restrictions on Mr Ngaïssona's contact;
- In the alternative, **REDUCE** the contact restrictions imposed on Patrice-Edouard Ngaïssona;
- **ORDER** an independent investigation into the Detention Centre's monitoring of Mr Ngaïssona's telephone calls.

Respectfully submitted,



⁶⁰ According to Article 57(1)(c) of the Rome Statute, the Pre-Trial Chamber may, where necessary, provide for the protection of persons who have been arrested. Regulation 150 of the Regulations of the Registry envisages the possibility of an inspection by an independent inspecting authority. Regulation 222 of the Regulations of the Registry notes that a detained person may raise any matter concerning his or her detention to the independent inspecting authority.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 02 March 2021,
At The Hague, the Netherlands.