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**International
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Court**

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Date: **31 March 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)", ICC-01/14-01/18-300-Conf-Exp, 29 August 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 “Fifth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by the Pre-Trial Chamber II” (“Fifth Report”) dated 15 August 2019, and pursuant to the Pre-Trial Chamber’s (“Chamber”) “Decision Pursuant to Regulation 101 of the Regulations of the Court”¹ dated 15 April 2019, the Defence of Mr Patrice-Edouard Ngaïssona (“Defence”) hereby respectfully requests the Chamber to lift the restrictions on contact imposed on Mr Ngaïssona and reverse the CCO’s decision to temporarily suspend [REDACTED] from his non-privileged telephone contact list.

II. Confidentiality

2. In accordance with Regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), these submissions are filed “confidential redacted EX PARTE, only available to the Registry, Prosecution and the Ngaïssona Defence” as they concern documents of the same classification, as well as sensitive information regarding Mr Ngaïssona’s private life and detention-related matters.

III. Procedural history

3. On 23 January 2019, Mr Patrice-Edouard Ngaïssona was transferred to the ICC Detention Centre where he is currently held in pre-trial detention.
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”² (“First Decision”), directing the Registry to put in place several measures to restrict Mr Ngaïssona’s contact with the outside world through written

¹ ICC-01/14-01/18-176-Conf-Red.

² ICC-01/14-01/18-98-Conf-Exp.

correspondence, non-privileged telephone calls and family visits.³

5. On 6 February 2019, the Registry submitted the “Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge” (“First Report”).⁴ 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”*.⁵
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”).⁶ 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 requested the extension of the contact restrictions for an additional 30 days beyond 1 March 2019.⁷
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 2019.⁸

³ ICC-01/14-02/18-11-Conf-Exp.

⁴ ICC-01/14-02/18-115-Conf-Exp.

⁵ ICC-01/14-01/18-114-Conf-Exp-Red, para. 12.

⁶ ICC-01/14-01/18-125-Conf-Exp.

⁷ ICC-01/14-01/18-131-Conf-Exp, para. 2.

⁸ ICC-01/14-01/18-137-Conf-Exp.

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”⁹ (“Third Report”), in which it reported no incident 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.¹⁰
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”¹¹ (“the Fourth Report”). In this report, the Registry informed the Chamber that no incident during the monitoring of Mr Ngaïssona’s contact with the outside world has been reported.¹²
13. On 9 July 2019, the Chamber issued the “Decision Pursuant to Regulation 101 of the Regulations of the Court” (“Sixth Decision”), in which it ordered, *inter alia*, the Registry to “*substantially increase the random monitoring of Ngaïssona’s telephone calls with [REDACTED]*”.¹³
14. On 15 August 2019, the Registry filed the Fifth Report, in which it reported a single incident relating to a telephone call made from Mr Ngaïssona’s non-privileged telephone list. As elaborated below, this incident does not warrant the maintaining of the current stringent restrictions regime imposed on Mr Ngaïssona. In the Fifth Report, the Registry further informed the Chamber

⁹ ICC-01/14-01/18-166-Conf-Exp.

¹⁰ ICC-01/14-01/18-176-Conf-Red, pp. 14-15.

¹¹ ICC-01/14-01/18-225-Conf-Exp.

¹² ICC-01/14-01/18-225-Conf-Exp, para. 1.

¹³ ICC-01/14-01/18-240-Conf-Exp.

that in implementing the Chamber's Sixth Decision, no incident was reported with respect to specific contacts identified on Mr Ngaïssona's non-privileged telephone list, that no incident had been reported with respect to Mr Ngaïssona's non-privileged visits, and that no incident was reported with respect to his incoming and outgoing mail.¹⁴

15. On 26 August 2019, the Prosecution filed its "Observations Pursuant to the "Decision Pursuant to Regulation 101 of the Regulations of the Court" ("Prosecution's Request"), in which it requested the Chamber to "order active monitoring of all of the Suspect's non-privileged telephone calls", or in the alternative, that current restrictions on communications be "at a minimum, maintained and fully implemented through the conclusion of the confirmation proceedings."¹⁵ Moreover, the Prosecution requested that the identity of the third party who communicated with Mr Ngaïssona during the purported incident be disclosed to the Prosecution.¹⁶

IV. Submissions

- A. The single "incident" mentioned in the Fifth Report does not warrant the maintaining of the strict restrictions on contacts regime imposed on Mr Ngaïssona

16. The Defence submits that the purported incident described by the Registry in the Fifth Report does not warrant the maintaining of the restrictions on contacts regime, which has now been in place for over seven months.¹⁷ To the contrary, the circumstances of the alleged incident and the principles of necessity of proportionality strongly support the lifting of the restrictions regime.

¹⁴ Fifth Report, paras 18, 22-24.

¹⁵ ICC-01/14-01/18-289-Conf-Exp, paras 2-3.

¹⁶ Prosecution's Request, para. 16.

¹⁷ First Decision.

17. On 14 August 2018, the Commanding Custody Officer (“CCO”) notified Mr Ngaïssona and the Defence of his decision (“CCO decision”)¹⁸ to temporarily remove Mr Ngaïssona’s [REDACTED] from his list of telephone contacts following a purported breach of the Chamber’s First Decision, one month prior, on 18 July 2019. The CCO informed the Defence that the decision was based on the fact that Mr Ngaïssona had spoken with a third person while on speakerphone who was not on his list of non-privileged contacts and that he allegedly used “obscure” or “coded” language.¹⁹

18. This incident was reported by the Registry in the Fifth Report, together with an Annex containing a transcript of a portion of the telephone call in question, which was originally in Sango.²⁰

19. *Firstly*, with regard to the claim that Mr Ngaïssona spoke with a third person who does not appear on his non-privileged telephone list, it is clear from the transcript transmitted by the Registry in the Annex to the Fifth Report,²¹ that Mr Ngaïssona did not intend to violate the Chamber’s First Decision. The transcript indicates that it is [REDACTED] who first tried to convince him to speak with a third person by putting her on speakerphone [REDACTED].²² Mr Ngaïssona refused [REDACTED] request and told [REDACTED] clearly that he did not want to be put on speakerphone (“*non je ne veux pas*”).²³ At the insistence of [REDACTED], Mr Ngaïssona then agrees to be put on speakerphone.²⁴ He then exchanged a few words with his interlocutor, before speaking again with [REDACTED]. The telephone calls ended normally.²⁵

¹⁸ “Décision sur le non-respect des mesures restrictives relatives à vos communications téléphoniques non-couvertes par le secret professionnel”, DS/2019/059/PC/ml.

¹⁹ CCO Decision, DS/2019/059/PC/ml.

²⁰ ICC-01/14-01/18-276-Conf-Exp-Anx.

²¹ ICC-01/14-01/18-276-Conf-Exp-Anx.

²² ICC-01/14-01/18-276-Conf-Exp-Anx, p. 1.

²³ ICC-01/14-01/18-276-Conf-Exp-Anx, p. 1.

²⁴ ICC-01/14-01/18-276-Conf-Exp-Anx, p.2.

²⁵ ICC-01/14-01/18-276-Conf-Exp-Anx, p. 2.

20. The transcript of the conversation does not sustain the conclusion that Mr Ngaïssona intended to violate the Chamber's First Decision. To the contrary, the language used by Mr Ngaïssona, as evidenced by the transcript, shows that he is very mindful of the restrictions on contacts regime; he encouraged his interlocutor to "slow down and so speak slowly" as to "avoid any problems here" (*"et pardon recule et parle doucement pour ne pas que j'ai des problèmes ici"*).²⁶
21. *Secondly*, in the Fifth Report, the Registry indicates that it had issued a memorandum to all detained persons *"reminding them that their telephone contacts are not allowed to switch their phones to speakerphone at any time."*²⁷ However, this memorandum was only provided to Mr Ngaïssona on 15 August 2019 – the day of the filing of the Fifth Report – and therefore more than one month after the purported incident and after Mr Ngaïssona was notified of the temporary suspension of his [REDACTED] from his non-privileged contact list. As such, Mr Ngaïssona was not informed of the prohibition for contacts to switch their phones to speakerphone.
22. Mr Ngaïssona sincerely was not aware that this potentially would violate the Chamber's First Decision. The transcript evidences, by the language he used while speaking with his interlocutor, asking [REDACTED] to slow down and speak clearly as to avoid any issue with the interpretation,²⁸ that he was conscious that he must act in conformity with the restrictions regime. Now that Mr Ngaïssona is aware of the prohibition, he will not repeat what was patently an honest mistake on his part.
23. Therefore, this honest mistake on Mr Ngaïssona's part does not warrant the measure imposed by the CCO, namely, the removal of [REDACTED] from his

²⁶ ICC-01/14-01/18-276-Conf-Exp-Anx, p. 2.

²⁷ Fifth Report, para. 17.

²⁸ ICC-01/14-01/18-276-Conf-Exp-Anx, p. 2.

list of non-privileged contacts.

24. The CCO's Decision to temporarily remove Mr Ngaïssona's [REDACTED] from his non-privileged telephone list two weeks ago appears to be, for the time being, indefinite.
25. In light of these circumstances, the Defence respectfully requests that the Chamber order the lifting of the sanction imposed by the CCO and restore Mr Ngaïssona's [REDACTED] on his non-privilege telephone list.
26. *Thirdly*, the CCO's assertion that Mr Ngaïssona used speech that was "obscure or coded"²⁹ is unfounded. In its Fifth Report, the Registry asserts that the language used by Mr Ngaïssona was "obscure or coded", without however, directing the Chamber and parties to the relevant portion or words which are, in its view, allegedly "obscure" or "coded" or providing any further explanation for the allegation. A thorough analysis of the transcript provided by the Registry in its Annex to the Fifth Report clearly shows that no such language was used by Mr Ngaïssona. Similarly, the Prosecution quotes the Registry's Fifth Report in support of its Request, stating that use of "obscure" or "coded" speech contravened the Chamber's First Decision, which does not, however, find any basis.³⁰
27. To the contrary, the transcript of the brief telephone exchange in question shows that the conversation uniquely concerned personal of family matters. There is no indication that the brief exchange between Mr Ngaïssona and his interlocutor was in any way "coded" or "obscure".
28. Neither the Registry nor the Prosecution have attempted to explain in which way this would have been the case or how the reported incident corresponds to *"any relevant information relating to [Mr] Ngaïssona's behaviour on*

²⁹ Fifth Report, para. 16; CCO Decision.

³⁰ ICC-01/14-01/18-289-Conf-Exp, paras 6-7.

*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".*³¹

29. In the absence of any incident reported by the Registry in its First, Second, Third and Fourth Reports, and in light of the circumstances surrounding the purported incident described above, the single incident does not warrant the maintaining of the restrictions on contacts regime imposed on Mr Ngaïssona.

B. The Prosecution fails to raise concrete grounds to substantiate its Request for maintaining the restrictions on contacts regime

30. 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 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".³²

31. In its Request, similar to its previous submissions,³³ the Prosecution relies on general, vague and speculative statements, while incorporating by reference previous observations, without providing any concrete facts, which would allow the restrictions on contact regime to be "(re-) assessed in light of concrete, specific and up-to-date information, contrary to the statutory requirement of Regulation 101(3) of the Regulations. The Prosecution simply relies *inter alia*, on general and vague notion such as that: "[w]itnesses' security in this case is precarious and the Prosecution remains in the process of investigating recurrent

³¹ ICC-01/14-01/18-114-Conf-Exp-Red, para. 12.

³² ICC-01/14-01/18-176-Conf-Red, para. 29; ICC-01/14-01/18-137-Conf-Exp, para. 18.

³³ ICC-01/14-01/18-98-Conf-Exp, para. 1.

security incidents concerning its witnesses”,³⁴ “[t]here has been no abatement in the prevailing security situation in the Central African Republic (“CAR”) since the Chamber’s 9 July 2019 Decision”³⁵, and that “[Mr] NGAISSONA is well informed of the nature and extent of the case against him [...] and [g]iven his history, as spelt out in previous Prosecution filings, [Mr] NGAISSONA, his current and former associates, and supporters, continue to present a genuine risk to Prosecution Witnesses”.³⁶

32. However, no concrete, specific and up-to-date information as to Mr Ngaïssona’s “history”, the “genuine risk” he poses to Prosecution Witnesses, the “precarious nature” of witness security in this case or “recurrent security incidents concerning its witnesses” is provided. Therefore, the Prosecution has failed to discharge its duty to demonstrate that circumstances have not changed and that restrictions on Mr Ngaïssona’s contacts with the outside world continue to be warranted.³⁷

33. Moreover, the redactions applied by the Prosecution in its previous observations, which it incorporates by reference in its Request,³⁸ prevent the Defence from making concrete, specific and up-to-date observations on the Prosecution’s Request. Without access to the alleged factual basis and underlying reasoning which support the Prosecution’s Request to maintain the current restrictions regime, the Defence is not in a position to present full and informed observations and therefore, to exercise its full right to be heard. This not only places the Defence at a considerable disadvantage but also breaches the Defence’s right to be informed and to be heard, contrary to

³⁴ Prosecution’s Request, para. 10.

³⁵ Prosecution’s Request, para. 11.

³⁶ Prosecution’s Request, para. 12.

³⁷ The onus lies on the Prosecution 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.

³⁸ Prosecution’s Request, paras 4, 12.

Regulation 101(3) and basic internationally recognized human rights, as enshrined in Regulation 24(1) and Article 21(3) of the Rome Statute.

34. Moreover, the Prosecution's approach is incompatible with the purpose of the review process, whose goal is to assess on a punctual basis whether restrictions on contacts continue to be warranted in light of up-to-date information and in light of contemporaneous facts.³⁹

35. In light of the above, compounded by the significant time elapsed since the imposition of the restrictions regime on 23 January 2019, the Prosecution's Request should be rejected and the restrictions on Mr Ngaïssona's contacts, lifted.

36. Furthermore, the Prosecution has failed to substantiate the basis upon which it requests for the "*purported identities and contacts of the individuals who spoke to [Mr] NGAISSONA during the incident mentioned*", other than the speculative suggestion that this would "*allow [it] better to determine the risks posed to witnesses and to act, as appropriate*".⁴⁰ This information is of a sensitive nature as it relates to Mr Ngaïssona's private life and detention-related matters and cannot be disclosed. This request should therefore be rejected.

C. The restrictions on contacts regime imposed on Mr Ngaïssona do not meet the requirements of necessity and proportionality

37. The current restrictions imposed on Mr Ngaïssona's contact with the outside world, and in particular, the restrictions on his telephone communications are unnecessary, disproportionate, and difficult to reconcile with Mr Ngaïssona's fundamental and internationally recognized human rights.

³⁹ ICC-01/14-01/18-176-Conf-Red, para. 29; ICC-01/14-01/18-137-Conf-Exp, para. 18.

⁴⁰ Prosecution's Request, para. 8.

38. As expressed in the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (“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”*.⁴¹ The Mandela Rules provide, 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”*.⁴² These human rights standards have been endorsed in the Court’s jurisprudence, which identifies the principles of necessity and proportionality as required in order for restrictive measures to be imposed.⁴³ The disproportionality of these measures is heightened with the passage of time.⁴⁴

39. With the confirmation of charges hearing approaching in less than one month, family contacts are a vital means of moral support in times of hardship relating to prolonged pre-trial detention, which even more applies in circumstances where most of Mr Ngaïssona’s family members – who live more than 5,000 kilometers from the seat of the Court – [REDACTED], and are especially important. As a result, telephone calls are Mr Ngaïssona’s main method of communication with his family – including with [REDACTED]– and to an extent, his lifeline.

⁴¹ 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.

⁴² Rule 43(3), *Ibid.*

⁴³ ICC-01/04-01/07-322, p. 9.

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

RELIEF SOUGHT

40. The Defence respectfully requests the Chamber to:

- **REVERSE** the CCO's Decision suspending Mr Ngaïssona's [REDACTED] from his non-privileged telephone contact list;
- **LIFT** the contact restrictions imposed on Mr Ngaïssona;
- **DENY** the OTP request to provide the purported identity of persons who spoke to Mr Ngaïssona during the incident;
- In the alternative, significantly **REDUCE** the contact restrictions imposed on Mr Ngaïssona.

Respectfully submitted,



Mr Geert-Jan Alexander Knoops,
Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 31 March 2021
At The Hague, the Netherlands.