

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA***

Public

**Common Legal Representatives' Joint Response
to the "Prosecution's Request for the Designation of an Alternate Judge"**

Source: Common Legal Representatives of Victims

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

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Other: Trial Chamber V

Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives” or “CLR/V”) hereby file their joint response to the “Prosecution’s Request for the Designation of an Alternate Judge” (the “Prosecution’s Request” or the “Request”).¹

2. The Common Legal Representatives support the Prosecution’s Request and wholly agree that the unprecedented situation created by the COVID-19 global pandemic, with its unforeseen effects and inherent risks to the proceedings, justifies the designation of an alternate judge as a measure to preserve the continuity of the proceedings. This is further supported by the fact that the seat of the Court is located in a highly infectious region that has consistently demonstrated a dramatic increase in COVID-19 positive cases, which is an important factor in assessing whether the inherent risks will effectively materialise. At this stage, the appropriateness of the allocation of resources for the designation of an alternate judge should be weighed against measures and costs which will have to be incurred at a later stage to remedy the disruption to the proceedings in case of permanent unavailability of a judge.

II. PROCEDURAL BACKGROUND

3. On 11 December 2019, Pre-Trial Chamber II issued the Decision Confirming the Charges.²

¹ See the “Prosecution’s Request for the Designation of an Alternate Judge”, [No. ICC-01/14-01/18-695](#), 22 October 2020 (the “Prosecution’s Request” or the “Request”).

² See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), No. ICC-01/14-01/18-403-Conf, 11 December 2019. A public redacted version was issued on 20 December 2019 as [No. ICC-01/14-01/18-403-Red](#). A corrected confidential and corrected public redacted version were issued on 14 May 2020 as [No. ICC-01/14-01/18-403-Conf-Corr](#) and [No. ICC-01/14-01/18-403-Red-Corr](#) respectively.

4. On 16 July 2020, Trial Chamber V issued the “Decision Setting the Commencement Date of the Trial”, deciding that the trial will commence on 9 February 2021.³

5. On 22 October 2020, the Prosecution filed its Request.⁴

6. On 27 October 2020, the Defence for Mr Yekatom filed its “[...] Response to the Prosecution’s Request for the Designation of an Alternate Judge”.⁵

III. SUBMISSIONS

7. Article 74(1) of the Rome Statute (the “Statute”) provides that:

“All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending”.

8. Rule 39 of the Rules of Procedure and Evidence (the “Rules”) further provides that:

“Where an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court”.

³ See the “Decision Setting the Commencement Date of the Trial” (Trial Chamber V), [No. ICC-01/14-01/18-589](#), 16 July 2020.

⁴ See the Prosecution’s Request, *supra* note 1.

⁵ See the “Yekatom Defence Response to the Prosecution’s Request for the Designation of an Alternate Judge”, [No. ICC-01/14-01/18-700](#), 27 October 2020.

9. The Common Legal Representatives concur with the Prosecution that the possibility to designate an alternate judge is explicitly provided in the legal texts of the Court and that the *Lubanga* two-prong test⁶ on whether an alternate judge should be designated is applicable in the present case⁷ and is effectively met in light of the current circumstances.⁸

10. As remarked by the Prosecution,⁹ the CLRV are equally not in a position to determine whether there are sufficient resources available to designate an alternate judge. However, what is certain is that, if a judge were to become unavailable with no previously designated alternate judge, the cost of disruptions to the proceedings would have a devastating effect on the already thinning budget of the Court. More importantly, there will be a considerable delay in dispensing justice to the detriment of the Victims' rights to pursue their quest for justice. Therefore, it is submitted that at this stage, the appropriateness of the allocation of resources for the designation of an alternate judge should be weighed against measures and costs which will have to be incurred at a later stage to remedy the disruption to the proceedings in case of permanent unavailability of a judge and against the possibility of an inevitable period of stay of the proceedings until a new judge is eventually designated.

11. Furthermore, the CLRV concur with the Prosecution that the identifiable risk of contracting COVID-19 is a circumstance that is not personal to one but all three judges of the Trial Chamber.¹⁰ Indeed, the effects of COVID-19 on particular persons and their duration are not foreseeable, so the Presidency should adopt a prudent approach and take the measures necessary to ensure the proper administration of justice and prevent disruptions to the proceedings.

⁶ See the "Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial" (Trial Chamber I), [No. ICC-01/04-01/06-1349](#), 22 May 2008, para. 17.

⁷ See the Prosecution's Request, *supra* note 1, para. 6.

⁸ *Idem*, paras. 7-11.

⁹ *Idem*, para. 7.

¹⁰ *Idem*, para. 10.

12. The Common Legal Representatives remark that the Trial Chamber in the *Lubanga* case did not explain what is meant by the “*personal circumstances of one or more of the judges*” nor are the reasons underlying a judge’s inability to “*continue attending*” trial defined in the Statute or the Rules. Some authors argue that this omission in the legal texts is deliberate and that a flexible approach in this respect seems apposite.¹¹ In fact, “*although the inability need not necessarily presuppose a permanent obstacle, it should be serious enough to justify losing the possibility for a later replacement in the event of a second judge becomes unable to continue.*”¹²

13. It is further submitted that the fact that the seat of the Court is located in a highly infectious region that has consistently demonstrated a dramatic increase in COVID-19 positive cases,¹³ is an important factor in assessing whether the inherent risks deriving from the pandemic will effectively materialise, thus justifying the need for the designation of an alternate judge. While it is true that the Presidency has, thus far, never designated an alternate judge, it is also true that the Court has never faced a global pandemic before.

14. Finally, the Common Legal Representatives would like to stress that, in the event the Presidency refuses to designate an alternate judge and a judge becomes temporarily unavailable, the only available option would be to suspend the proceedings¹⁴ as the Trial Chamber cannot sit in the absence of one of its members.¹⁵

¹¹ See TRIFFTERER (O.) and KISS (A.), “Article 74: Requirements for the decision”, in AMBOS (K.) and TRIFFTERER (O.) (Eds.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos, 2016, p. 1836, para. 24.

¹² *Ibid.*

¹³ See the latest statistics related to COVID-19 in the Netherlands by the National Institute for Public Health and the Environment (RIVM): <https://www.rivm.nl/en/novel-coronavirus-covid-19/current-information> (last visited on 28/10/2020).

¹⁴ See the “Memo from OPCV to the Victims Representatives with the subject: ‘Sur la question de savoir si une chambre de première instance peut tenir une audience en l’absence de l’un de ses membres’”, [No. ICC-01/04-01/06-1193-Anx](#), 27 February 2008, para. 18. See also TRIFFTERER (O.), “Article 74. Requirements for the decision”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 960.

¹⁵ See the “Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial”, *supra* note 6, para. 15.

However, if a judge were to be permanently unavailable, a re-trial would then be the only outcome, which is an unbearable thought for the Victims who wish nothing but an expeditious and effective trial with no delay and disruptions.

IV. CONCLUSION

15. For the foregoing reasons, the Common Legal Representatives respectfully request the Presidency to grant the Prosecution's Request for the designation of an alternate judge.



Dmytro Suprun

Common Legal Representative of the
Former Child Soldiers



Paolina Massidda

Common Legal Representative of the
Victims of other crimes

Dated this 30th day of October 2020

At The Hague, The Netherlands