

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 November 2020

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-EDOUARD
NGAISSONA

PUBLIC

**Ngaïssona Defence Response to “Prosecution’s Request for the Designation of an
Alternate Judge,” ICC-01/14-01/18-695**

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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Other: Trial Chamber V

Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Chang-ho Chung

I. Introduction

1. On 22 October 2020, the Prosecution requested the Presidency to designate an Alternate Judge in this case. In the “Prosecution’s Request for the Designation of an Alternate Judge,”¹ (“Prosecution Request”), the Prosecution advances two arguments for such a designation, namely the COVID-19 pandemic presenting an inherent risk to the proceedings should one of the judges of Trial Chamber V fall ill or otherwise become unavailable due to the pandemic, and the anticipated long duration of the present proceedings.
2. The Defence for Mr Patrice-Edouard Ngaïssona (“the Defence”) hereby responds to the Prosecution’s Request. The Defence does not, in principle, oppose such an appointment, and defers to the Presidency’s discretion. However, the Defence wishes to make the following submissions. First, the Prosecution’s arguments do not sit comfortably with the only guidance that the Court has provided on this issue, which stems from *The Prosecutor v. Lubanga*, “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,”² (“the *Lubanga* Considerations”). Second, the Defence strongly opposes the Prosecution argument that the instant proceedings are different in terms of length and complexity than any recent Article 5 case before this Court. Lastly, the Defence submits that the matter raised by the Prosecution falls within the discretionary and professional ambit of the Chamber itself to give an opinion on the feasibility of the appointment of an alternate judge. In fact, no request of the Prosecution is required for the Chamber to make such assessment as it pertains to the internal functioning of the judiciary.

¹ ICC-01/14-01/18-695.

² ICC-01/04-01/06-1349.

II. Submissions

3. Article 74 of the Statute states in relevant part that “[t]he 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.” Further, under Rule 39 of the Rules of Procedure, “[a]lternate judges shall be designated in accordance with a procedure pre-established by the Court.” Such a procedure has yet to be established. In *The Prosecutor v. Lubanga*, Trial Chamber I expressed its opinion on the approach to be adopted to the designation of Alternate Judges in that case. The Trial Chamber outlined two principle considerations that must be taken into account namely:

- (1) whether the Court has the resources for this purpose, particularly in terms of a judge who is available to attend the entirety of the trial; and
- (2) there is an identifiable risk that for reasons such as the length of trial, or the personal circumstances of one or more of the judges, a member of the bench may not be able to complete the trial.³

Moreover, the first consideration of Court resources only becomes engaged “if there is a risk of a judge becoming permanently unavailable prior to the conclusion of the case.”⁴ Since the Chamber found that there were “no known personal circumstances relating to any of the judges of the Chamber which raise any concerns that one of more of them will be unable to complete this trial,” it did not recommend appointing an alternate judge.⁵

4. Here, the Prosecution readily admits that the health risk posed by the COVID-19 pandemic does not constitute “a personal circumstance of one or more of

³ *Lubanga* Considerations, para. 17.

⁴ *Ibid.*, para. 22.

⁵ *Ibid.*

the judges.”⁶ Therefore, this risk, while concrete and identifiable, does not satisfy the *Lubanga* Considerations.

5. However, Trial Chamber I did leave open the possibility that other considerations, other than the length of the trial and personal circumstances of the judge may constitute a consideration.⁷ The Defence submits that the COVID-19 pandemic and the exponential rise in cases in the Host State may constitute such a consideration, since all three judges are required to be present in the Host State, and to date no vaccine has been developed and deployed, which can curb the rapid spread of SARS-CoV-2.
6. This in turn, engages the second consideration, namely whether the Court has the resources to designate an alternate judge. Since the health risks posed by COVID-19 are general in nature, the designation of an alternate judge would be appropriate in every case that is in the trial phase before this Court. In the *Al-Hassan* case, evidentiary hearings have commenced, and no alternate judge has been designated. Additionally, it must also be envisaged that the *Abd-Al-Rahman* case, which is currently at the confirmation stage could be confirmed to trial, and thus the same considerations as in this case would militate in favor of designating an alternate judge in that case. This could strain the Court’s already limited resources.
7. The Defence agrees with the Prosecution’s submission that the Court’s limited resources, and specifically interests of expediency should not supersede or risk the safety, fairness and integrity of the proceedings. However, it must be emphasized that the potential disastrous consequences of the COVID-19 pandemic on the fairness and integrity of the proceedings cannot be remedied by simply designating an alternate judge under Article 74.

⁶ Prosecution Request, para. 10.

⁷ *Lubanga* Considerations, para. 18.

8. It would be remiss of the Defence not to mention that there are already serious and growing concerns of the fairness of the present proceedings being preserved in the context of the pandemic. The Appeals Chamber has determined that the right to a fair trial in criminal proceedings “first and foremost, inures to the benefit of the accused. Indeed, the specific rights entrenched in article 67 (1) of the Statute are specifically tailored to the needs of the accused person.”⁸

9. As a result of the COVID-19 measures in the Detention Centre, the Defence has not been able to physically consult with Mr Ngaïssona for the last seven months. Given the rise of cases, these measures are likely to be extended, with no end in sight. As rightly noted by the Prosecution, this is an “ongoing, in many cases intensifying, global pandemic.”⁹ This has had a serious impact on the Defence’s right under Article 67(1)(b) “to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence.” Further, Mr Ngaïssona who is in pre-trial detention and presumed innocent has a right to be tried without undue delay under Article 67(1)(c). Given that the current guidelines¹⁰ only allow for one hearing consisting of three (3) sessions of one (1) hour and the uncertainty of the availability of witnesses due to either travel restrictions or other in country measures that do not allow for the organization of video-link testimony, there is a very real risk that Mr Ngaïssona will spend an inordinate amount of time in pre-trial detention before a judgment is rendered. This is especially true in light of the Prosecution, despite repeated invitations of the Trial Chamber, not meaningfully reducing its list of witnesses.

⁸ ICC-01/04-02/12-271-Corr, para. 255.

⁹ Prosecution Request, para. 15.

¹⁰ Guidelines for the Judiciary Concerning the Holding of Court Hearings during the COVID-19 pandemic available at <https://www.icc-cpi.int/itemsDocuments/200623-guidelines-for-court-proceedings-covid-19-eng.pdf>, page 3.

10. In these circumstances where hearings and travel are so limited, and legal visits are disallowed unless exceptional circumstances are shown, it may be appropriate that countervailing measures be envisaged such as non-custodial solutions for detainees who are facing trial at the ICC.
11. While the Prosecution's primary arguments for designating an alternate judge relate to the COVID-19 pandemic, the Prosecution also refers to the anticipated length of these proceedings. The Prosecution submits that this trial is likely to be lengthy because of the unprecedented amount of witnesses that it will call to testify.¹¹ Additionally, it argues that the case involves two accused, an intricate and complicated factual narrative, legal basis and over 51 charges of war crimes and crimes against humanity.
12. The Defence submits that the Prosecution is not obliged to call so many witnesses. While Trial Chamber V did not order the Prosecution to reduce its number of witnesses, it did encourage the Prosecution to focus its presentation of evidence to the crimes charged, and reminded the Prosecution that it reserves the right to limit the Prosecution's list of witnesses, and amount of time allocated for the questioning of witnesses.¹² With respect to the complexity of the case, the Defence submits that the present case is not unprecedented both in terms of charges and geographic and temporal scope.¹³

¹¹ Prosecution Request, para. 11.

¹² See ICC-01/14-01/18-703, para. 53 *citing* Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 30, line 24 to p. 31, line 3; Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, paras 22- 23; Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, ICC-01/14-01/18-685, para. 38.

¹³ *The Prosecutor v. Ongwen*, ICC-02/04-01/15-422-Red, pp. 71-104(The Pre-Trial Chamber confirmed over 70 charges.). In *The Prosecutor v. Bemba*, the crimes extended over the entirety of CAR's territory. The Trial Chamber affirmed that the confirmed charges included acts of murder, rape, and pillaging committed on CAR territory, including in Bangui, PK12, Mongoumba, Bossangoa, Damara, Sibut, and PK22, from on or about 26 October 2002 to 15 March 2003. Conviction Decision, ICC-01/05-01/08-3343, para. 42.

Its complexity mirrors the complexity of the recent Article 5 cases that have come before this Court.

13. The Defence submits that the opinion of Trial Chamber V on whether an alternate judge is necessary on the basis of the arguments of the Prosecution would greatly assist the Presidency in determining whether such a designation should be made. The Trial Chamber is well apprised of the parties' arguments regarding the complexity of this case and is also able to best ascertain whether the COVID-19 pandemic presents a real risk to the continuation of these proceedings due to the unavailability of one of its members. Therefore, the Defence respectfully submits that the Presidency could be assisted by receiving the opinion of Trial Chamber V on this matter.

III. Relief Sought

14. The Defence respectfully requests that the Presidency invite Trial Chamber V to provide its opinion with respect to the appointment of an alternate judge.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 2 November 2020

At The Hague, the Netherlands.