

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No: ICC-01/14-01/18

Date: 9 November 2020

**TRIAL CHAMBER V**

**Before:** Judge Betram 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  
NGAISSONA***

**Public**

**Public Redacted Version of “Ngaïssona Defence Request on the scope of  
privileged telephone calls between Mr Ngaïssona and Defence team members”,  
ICC-01/14-01/18-657-Conf**

**Source: Defence of Patrice-Edouard Ngaïssona**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

**Counsel for the Defence of Mr Ngaïssona**

Mr Geert-Jan Alexander Knoops

Ms Sara Pedroso

**Counsel for the Defence of Mr Yekatom**

Ms Mylène Dimitri

Mr Thomas Hannis

**Legal Representatives of the Victims**

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

Mr Dmytro Suprun

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

Mr Paddy Craig

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction and background to the request

1. On 15 April 2019, Pre-Trial Chamber II held that the case manager on the Defence team of Mr Ngaïssona (“Defence”) shall be included on the list of persons entitled to privileged visits with Mr Ngaïssona. The Pre-Trial Chamber held that “the case manager forms part of the Defence team and is, as such, entitled to the same privileges and subject to the same obligations as counsel”.<sup>1</sup>
2. On 8 September 2020, the Defence sent a request to the Chief Custody Officer (“CCO”) requesting that a case manager’s ICC office telephone number be added to the list of privileged telephone numbers, so that the case manager could facilitate weekly conference calls between Counsel, Mr Ngaïssona and Defence team members, including team members located in Bangui.<sup>2</sup> Although the CCO exceptional authorised conference calls in response to the Covid-19 pandemic,<sup>3</sup> Counsel’s and other privileged team members’ mobile phones cannot accommodate teleconferencing.<sup>4</sup> Therefore, the Defence sought to have one of its case managers facilitate such calls from their secure ICC telephone line at the Court.
3. On 11 September 2020, the CCO rejected the Defence’s request. The CCO reasoned that the request could not be accommodated because “[REDACTED]”.<sup>5</sup> The CCO acknowledged, however, the Pre-Trial Chamber’s explicit finding that the case manager is entitled to privileged visits, but found that this decision did “[REDACTED]”.<sup>6</sup>

---

<sup>1</sup> Emphasis added. ICC-01/14-01/18-176-Conf-Red, para. 34.

<sup>2</sup> Email from [REDACTED] to [REDACTED], 8 September 2020, 11:52.

<sup>3</sup> Deputy Chief Custody Officer Memo titled [REDACTED], 4 May 2020, D2/2020/049/HT/mc.

<sup>4</sup> [REDACTED].

<sup>5</sup> Email from [REDACTED] to [REDACTED], 11 September 2020, 18:07.

<sup>6</sup> Email from [REDACTED] to [REDACTED], 11 September 2020, 18:07.

4. The Defence respectfully requests Trial Chamber V (“Chamber”) to extend the legal privilege afforded to case managers for legal visits to telephone communications.
5. In the alternative, should the Chamber find that such privilege cannot be extended, it is requested that a narrow exception be made, which would allow case managers to set up the conference calls between Mr Ngaïssona, privileged team members and, as the case may be, other team members. In practice, this would mean that there would be a few seconds, in the very beginning of the conference calls, where only the case manager would be connected. Then, a privileged team member would immediately be connected and would remain on the line for the remainder of the call.<sup>7</sup>

## **II. Confidentiality**

6. Pursuant to regulation 23*bis* of the Regulations of the Court (“RoC”), the Defence requests that this filing be received by the Chamber as “confidential” as it refers to confidential information.

## **III. Legal basis**

7. The following provisions form the legal basis for the Defence’s present request:
8. Article 67(1) of the Rome Statute provides that the accused shall be entitled to “communicate freely with counsel of the accused’s choosing in confidence”.
9. Rule 73(1) of the Rules of Procedure and Evidence provides that “communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged”.

---

<sup>7</sup> Deputy Chief Custody Officer Memo titled [REDACTED], 4 May 2020, D2/2020/049/HT/mc, page 3.

10. Regulation 97 of the Regulations of the Court provides:

1. A detained person shall be informed of his or her right to communicate fully, where necessary with the assistance of an interpreter, with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68.
2. All communication between a detained person and his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68 and interpreters shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre.

11. The Detention Centre Memorandum dated 4 May 2020 temporarily authorised conference calls between detained persons and defence team members, in the context of the pandemic, within the following parameters:

- [REDACTED];
- [REDACTED];
- [REDACTED].<sup>8</sup>

#### **IV. Submissions**

12. The Detention Centre Memorandum dated 4 May 2020 temporarily authorises defence team conference calls in “order to facilitate the communication between detained persons and defence teams during the COVID-19 pandemic”.<sup>9</sup>

13. However, the ICC office telephone is currently the only viable telephone line available to the Defence which can accommodate secure teleconferencing between Mr Ngaïssona and Defence team members.<sup>10</sup> Because of travel restrictions and other limitations relating to the Covid-19 pandemic, certain privileged team members are unable to physically travel to the Court in order

---

<sup>8</sup> Deputy Chief Custody Officer Memo titled [REDACTED], 4 May 2020, D2/2020/049/HT/mc, page 3.

<sup>9</sup> Deputy Chief Custody Officer Memo titled [REDACTED], 4 May 2020, D2/2020/049/HT/, page 3.

<sup>10</sup> As the Chamber is aware, in light of the Detention Centre COVID-19 Temporary Measures, which have been in place since March 2020, the only meaningful method of communication between Mr Ngaïssona and the Defence team, in order to prepare for the trial, is via telephone or video conferencing. The measures have been extended most recently by the Detention Centre Memorandum dated 18 August 2020, DS/2020/071/PC/MC.

to set up such calls from the ICC headquarters, prompting the need for case managers to be admitted on the Detention Centre privileged telephone list. This would allow case managers to connect Mr Ngaïssona and other team members from their secure office telephone line, assuming they fulfil the necessary health and notice requirements allowing them to be physically present at the Court.

14. It is undisputed that case managers and non-privileged team members are authorised to participate in conference calls with Mr Ngaïssona, under the conditions mentioned above.<sup>11</sup> What appears to be in dispute is whether case managers *in the present case* may be added to the list of privileged contacts. The Pre-Trial Chamber's finding is, however, clear. It explicitly found that case managers are "*entitled to the same privileges and subject to the same obligations as counsel*".<sup>12</sup> In the same way a case manager may effectuate a privileged visit with Mr Ngaïssona, without other (privileged) team member present, a case manager should also be permitted to call Mr Ngaïssona, without another team member present.

15. This interpretation is coherent with the CCO's recognition that the rule that at least one privileged team member must be present during the entirety of the conference call is [REDACTED], referring to the rule that [REDACTED].<sup>13</sup> In the present circumstances, the standard rule for legal visits does not apply: Defence case managers are not required to have another privileged team

---

<sup>11</sup> See above, paras 11-12.

<sup>12</sup> ICC-01/14-01/18-176-Conf-Red, para. 34. The Defence had argued that the fact that case managers were not permitted to visit Mr Ngaïssona alone unjustifiably limited Mr Ngaïssona's access to his Defence team and curtailed his right to have adequate time and facilities for the preparation of his defence, ICC-01/14-01/18-171-Conf-Red, paras 35-39.

<sup>13</sup> Emphasis added. Deputy Chief Custody Officer Memo titled [REDACTED], 4 May 2020, D2/2020/049/HT/mc, page 3.

member present during legal visits.<sup>14</sup> The same logic therefore should apply for telephone communications.<sup>15</sup>

16. In the alternative, case managers should be permitted to accede to the list of privileged contacts for the purpose of setting up, logistically speaking, the conference calls. This goal can be achieved by carving out a narrow exception which would recognise a case manager's legal privilege with Mr Ngaïssona, at a minimum, for the few seconds it takes for the case manager to connect Mr Ngaïssona with privileged and other team members from their ICC secure phone line. Should the Chamber deem it necessary, the Defence is ready to provide assurances that no substantive conversation would be had during these first few seconds required to set up the conference call.

17. Moreover, conference calls are only authorised for as long as the Detention Centre COVID-19 Temporary Measures are in place, further narrowing the Defence's present alternative request.<sup>16</sup>

18. Finally, the Defence wishes to reiterate the vital importance of Defence team telephone calls with Mr Ngaïssona, in order to organise its investigations and to prepare for trial, in a situation where no legal visits are permitted.

## **V. Relief Sought**

19. In light of the foregoing, the Defence respectfully requests the Chamber to:

---

<sup>14</sup> ICC-01/14-01/18-176-Conf-Red.

<sup>15</sup> Moreover, case managers would be bound by the Detention Centre's "Policy on the Use of Laptops and Phones for Members of the Defence Team Entitled to Privileged Communications" as well as the "Agreement on the use of Laptops and Phones for Members of the Defence Team Entitled to Privileged Communications at the ICC DC.

<sup>16</sup> Deputy Chief Custody Officer Memo titled [REDACTED], 4 May 2020, D2/2020/049/HT/mc.

- **GRANT** the Defence's request to include the Defence case managers on the list of persons entitled to privileged telephone calls with Mr Ngaïssona;
- In the alternative, **AUTHORISE** the Defence case managers to accede to the list of privileged contacts for the specific purpose of setting up conference calls with privileged (and other) team members.

Respectfully submitted,



---

Mr. Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this

9 November 2020

At The Hague, the Netherlands