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**International
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TRIAL CHAMBER V

Before: Judge Bertram 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 PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of "Registry Observations on 'Ngaïssona Defence Request on the scope of privileged telephone calls between Mr Ngaïssona and Defence team members', ICC-01/14-01/18-657-Conf" filed on 29 September 2020

Source: Registry

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 email instruction given by Trial Chamber V (“Chamber”) on 18 September 2020 (“Order”),¹ and in accordance with regulation 24 *bis* of the Regulations of the Court (“RoC”), the Registry submits its observations on the matters raised in the “Ngaïssona Defence Request on the scope of privileged telephone calls between Mr Ngaïssona and Defence team members”, filed by the defence for Mr Patrice-Edouard Ngaïssona (“Request”, “Defence” and “Mr Ngaïssona”, respectively).²
2. The Registry submits that the Request should be rejected, as privileged communication should be limited to lead counsel, co-counsel, and assistants to counsel, as defined by the legal framework of the International Criminal Court (“ICC” or “Court”). The Registry also submits that the exception previously granted to the Defence, that Mr Ngaïssona may receive privileged visits with case managers alone, should be removed.

II. Procedural history

3. On 10 April 2019, the Defence requested the Chamber to authorize case managers to have privileged visits with Mr Ngaïssona [REDACTED].³ The Defence submitted that the Detention Centre (“DC”) had refused a case manager a privileged in-person visit alone with Mr Ngaïssona as [REDACTED].⁴ [REDACTED].⁵

¹ Email from Trial Chamber V to the Registry, 18 September 2020 at 10:56.

² Defence, “Ngaïssona Defence Request on the scope of privileged telephone calls between Mr Ngaïssona and Defence team members” (“Request”), 17 September 2020, ICC-01/14-01/18-657-Conf.

³ Defence, [REDACTED] (“Defence Observations”), 10 April 2019, ICC-01/14-01/18-171-Conf-Red.

⁴ Defence Observations, para. 38.

⁵ Defence Observations, para. 39.

4. On 15 April 2019, Pre-Trial Chamber II [REDACTED] ("15 April 2019 Decision") [REDACTED],⁶ [REDACTED].
5. On 4 May 2020, the Chief Custody Officer ("CCO") communicated a memorandum ("CCO memo") to all detained persons and their counsels, exceptionally authorising conference calls for Defence teams during the implementation of the COVID-19 DC measures.⁷ The CCO memo specifies that "the incoming call must be from a singular privileged telephone number already approved, to the detained person" and that "at least one member of the defence team entitled to legal privilege (i.e. on the list of privileged telephone numbers) must be present throughout the entire conference call".⁸
6. On 8 September 2020, the Defence requested the CCO to add a case manager's ICC office telephone number to Mr Ngaïssona's list of privileged telephone numbers "in order to facilitate conference calls between Mr Ngaïssona and team members from our ICC HQ office".⁹
7. On 11 September 2020, the CCO rejected the Defence's request by email stating the following:

I am responding to your request to add you, case manager, as a separate phone contact to the privileged contact list for Mr Ngaïssona. This is not possible however as case managers are not entitled to privileged communications, following the 'privileged communication regime' established in regulation 97(1) of the RoC, or the DC policy that applies to all defence teams. We note that in the Pre-Trial Chamber's [REDACTED] (ICC-01/14-01/18-176-Conf-Red, para. 34), the case manager is entitled to privileged visits to Mr Ngaïssona for the reasons set out in that decision. However, the Chamber limited the scope to visit only. This Decision does not extend to telephone privileges and indeed it would not be consistent with the privileged communication regime in regulation 97(1) of the RoC to extend privileged telephone communications to a case manager. We suggest, as previously mentioned to you, that if you wish to call Mr Ngaïssona and help set up the conference calls then it should be

⁶ Pre-Trial Chamber II, [REDACTED] 15 April 2019, ICC-01/14-01/18-176-Conf-Red.

⁷ Registry, "Fourth Registry Update on Detention Centre COVID-19 Measures", 24 September 2020, ICC-01/14-01/18-665-Conf.

⁸ Deputy Chief Custody Officer Memo, "Exceptional Authorization for Defence Team Conference Calls", 4 May 2020, D2/2020/049/HT/mc, page 3.

⁹ Email from the Defence for Mr Ngaïssona to the Chief Custody Officer, 8 September 2020 at 11:52.

done first through a privileged team member then you may connect other calls.¹⁰

8. On 17 September 2020, the Defence submitted their Request,¹¹ asking the Chamber “to grant the Defence’s request to include the Defence case managers on the list of persons entitled to privileged telephone calls with Mr Ngaïssona”.¹² In the alternative, the Defence requests that the Chamber “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”.¹³

III. Classification

9. In accordance with regulation 23 *bis*(2) of the RoC, the present observations are classified confidential, to follow the same level of classification of the Request, and further, for security reasons as they relate to confidential detention communication procedures.

IV. Applicable law

10. For the purpose of the present observations, the Registry has considered article 67(1)(b) of the Rome Statute (“Statute”), rule 73 of the Rules of Procedure and Evidence (“Rules”), regulations 24 *bis*, 68, 97 and 100 of the RoC and regulations 124 - 127, 174 (1), 175 (2), 178 - 180, and 187 of the Regulations of the Registry (“RoR”) the Code of Professional Conduct for counsel (“CoC”) and the ICC Legal Aid Policy.

V. Submissions

¹⁰ Email from the Chief Custody Officer to the Defence for Mr Ngaïssona, 11 September 2020, 18:07 (“CCO’s email”).

¹¹ Request.

¹² *Id.*, para 18.

¹³ *Id.*

The scope of privileged communications at the ICC

11. The legal privilege regime that is maintained by all defence teams before the ICC is that legal privilege encompasses lead counsel, co-counsel and assistants to counsel, pursuant to article 67(1)(b) of the Statute, rule 73(1) of the Rules, and regulations 68, 97(1) and 97(2) of the RoC.¹⁴ Pursuant to regulation 68 of the RoC, assistants to counsel are required to have specific qualifications to be able to assist counsel in *the presentation of the case before a Chamber*. Regulation 124 of the RoR defines “assistants to counsel” as those individuals included in the Registry held list maintained by the Counsel Support Section of the Registry, upon meeting the criteria enumerated in regulations 124 and 125 of the RoR. It is because of these specific qualifications that assistants to counsel can have privileged communications alone with a suspect or an accused as opposed to case managers or other members within a defence team who are not part of this list or are not hired by counsel to assist them to plead in court (i.e. professor in law, defence expert, defence investigators, resource persons, etc).

12. To mirror this right to present the case before a Chamber, both counsel and assistants to counsel have obligations under the CoC. The CoC applies to *counsel* practicing before the ICC, and ensures accountability for, *inter alia*, misconduct and breaches of confidentiality. Regulation 126 of the RoC ensures accountability for *assistants to counsel* against, *inter alia*, offenses against the administration of justice and other misconduct. Accountability under regulation 126 is specific to those assistants to counsel who are vetted and

¹⁴ ‘Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise,’ Rule 22(1) of the Rules of Procedure and Evidence; ‘Persons assisting counsel as described in rule 22, sub-rule 1, may include persons who can assist counsel in the presentation of the case before a Chamber’ and that ‘[t]he criteria to be met by these persons shall be determined in the Regulations of the Registry’, regulation 68 of the Regulations of the Court; Assistants to counsel are required to (i) have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure, and (ii) be included on a list of persons who may assist counsel created and maintained by the Registry; Admission to the list is decided by the Registrar with the possibility to apply for review by the Presidency, regulations 124 to 127 of the Regulations of the Registry.

approved by the Registry to appear on the list of assistants to counsel. None of these accountability regimes extend to other Defence team members, such as case managers.

13. In general, case manager are administrators of the case but do not perform the same functions as counsels and assistant to counsels. Rather, case managers assist the defence team (e.g. organise, classify, deal with the Ringtail system of evidence) as oppose to developing legal arguments on how to best use evidence or present the case in court.¹⁵
14. The Registry submits that a strict interpretation of privilege is consistent with jurisprudence in other cases. Most recently in the case of the *Prosecutor vs Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ah Mahmoud*, Trial Chamber X held that “privileged communication is afforded only to: (i) counsel, whether lead counsel or co-counsel; and (ii) assistants to counsel”.¹⁶ In that case, Trial Chamber X held that “while counsel is free to employ staff of his or her choosing, that does not result in an extension of the scope of privileged communication beyond what is provided for within the Court’s statutory framework.”¹⁷ Trial Chamber X further noted “that the circumstances that warranted an expansion of privileged communications has ceased to exist”.¹⁸
15. In the case *The Prosecutor vs Jean-Pierre Bemba Gombo*, Trial Chamber III found that privilege is afforded to counsel and assistants to counsel, and that “nothing

¹⁵ See Trial Chamber VII, “The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido, “Judgement pursuant to Article 74 of the Statute”, 19 October 2016, ICC-01/05-01/13-1989-Red, footnote 1907; “[i]n the Court’s practice, a case manager is typically responsible for the administrative management of the case and supporting litigation counsel by, for example, effectuating disclosure of evidence to the Chambers and assisting in the preparation of exhibits for display in Court. It follows that the case manager facilitates in technical terms the presentation of evidence and, as a result, takes part directly in the presentation of evidence within the meaning of Article 70(1)(b) of the Statute.”

¹⁶ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ah Mahmoud*, “Decision on ‘the scope of privileged visits and phone calls to Mr Al Hassan by medical experts and members of the Defence team’”, 22 January 2020, ICC-01/12-01/18-560, paras. 14-15.

¹⁷ *Id.*, para. 18.

¹⁸ *Id.*, para. 22.

in the legal framework of the Court extends legal privilege to an accused's communication with persons who do not meet these requirements, regardless of whether they "assist" counsel in the broad sense of the word".¹⁹ Trial Chamber III further notes that

while counsel is free to employ staff of different qualifications to work under his or her direction, the fact that counsel opts to be assisted by persons other than legal assistants who meet the criteria set out in Regulations 124 to 127 does not entitle him or her to an extension of the scope of privileged communication beyond what is provided for in the Court's legal framework. Article 67 (1) (b) of the Statute only grants the accused of the right to communicate freely 'with counsel'; it does not entitle every person working in the defence team to privileged communication with the accused.²⁰

Privileged telephone calls for case managers

16. In its Request, the Defence cites the 15 April 2019 Decision that case managers "are entitled to the same privileges and subject to the same obligations as counsel" to assert that case managers should also be permitted to have privileged telephone calls with Mr Ngaïssona, without another privileged Defence member present.²¹

17. The Registry observes that under the 15 April 2019 Decision, Mr Ngaïssona Defence case managers are entitled to privileged *visits*, yet not privileged telephone communications as that was outside the scope of the Pre-Trial Chamber's decision.²² Expanding the privileged communication regime to

¹⁹ Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, "Decision on 'Defence Motion on Privileged Communications'", 3 June 2014, ICC-01/05-01/08-3080, para. 19. See also, Pre-Trial Chamber II, "Decision on the 'Prosecution's request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel'", 17 December 2013, ICC-01/05-01/13-48, para. 3: "It is beyond controversy that the Mangenda [case manager] Calls were placed on a line which was considered non-privileged by the Registry, and treated accordingly for all purposes, including, in particular, for the purposes of recording. It is also beyond controversy that the features of the line were adequately known to all the parties involved. In light of this, the Single Judge takes the view that the parties to the Mangenda Calls were not entitled to any legitimate expectation of privacy or confidentiality".

²⁰ *Id.*, para. 21.

²¹ 15 April 2019 Decision, para. 34; Request, para. 14.

²² 15 April 2019 Decision, page 15.

include case managers would be inconsistent with the ICC privileged communication regime pursuant to the statutory framework of the Court.

18. Legally privileged telephone communications are not subject to active or passive monitoring pursuant to regulations 174(1) and 175(2) of the RoR. They are therefore not recorded, and Detention Section staff is unable to verify who is on the telephone line once connected. Under normal conditions, the risk mitigating measure for unauthorized use is that only one number can be connected at a time to a detained persons' telephone at the DC, and the Registry records this through logs of telephone calls. However, at the time of the COVID-19 pandemic ("Pandemic") and the exceptional alternative use of conference calls, once the connection to the conference call is made with one defence team member, the Registry cannot verify which numbers are later connected and at what time. Given this specific circumstance, the Registry therefore always takes the precaution to connect the legally privileged call with counsel or assistant to counsel who are the only ones entitled to legal privileges.
19. Privileged conference calls are thus an exceptional temporary measure to regulation 173(1) of the RoR because of the Pandemic. It should not be considered the norm, justifying an exception to the general principle that only a limited number of persons under the ICC legal framework should be entitled to privileged calls.
20. The Registry also offers privileged video-conferencing for privileged Defence team communications under similar conditions. Despite the risks, both temporary and exceptional measures are limited to privileged communications, and were designed to offset the impact of suspended in-person legal visits and facilitate privileged Defence team communications during the COVID-19 DC measures.

21. The CCO is responsible for the good management of the DC,²³ and pursuant to this mandate has thus established certain necessary conditions that must be respected for the use of privileged conference calls and privileged video calls, some of which are articulated above.²⁴

22. Here, the Registry notes that, apart from three case managers, six other members for the defence of Mr Ngaïssona would appear to meet the requirements for legal privilege (counsel and 5 legal assistants)). Any of these six privileged Defence members could set up and coordinate conference calls themselves in full respect of the ICC legal framework. The Registry observes that adding the three case-managers to the list of privileged contacts would not only be contrary to the applicable regime of privileges but would also create, within the DC and regarding other detained persons, an exception for Mr Ngaïssona and thus an unequal privileged regime applicable within the DC.

Technical aspects of setting up conference calls at the DC

23. In its Request, the Defence asserts as an alternative that “case managers should be permitted to accede to the list of privileged contacts for the purpose of setting up, logistically speaking, the conference calls”.²⁵

24. Instructions have been given by the CCO to all Defence teams that they are responsible to organize the conference calls, provided the privileged Defence member makes the call and a privileged Defence member is on the telephone call the entire time. The privileged number is the one that is recorded in the telephone call logs. Other than this, the Registry is not involved in the details and set up of conference calls due to respect for the privileged nature of the communications.

²³ Regulation 187 of the RoR.

²⁴ *Supra* para. 5.

²⁵ Request, para 16.

25. Despite the Defence assurances,²⁶ the Registry respectfully informs the Chamber that it would be impossible for the Registry to ensure that the privileged telephone call with the case managers is limited to setting up the conference call between Mr Ngaïssona and other Defence members, and includes one member with privilege. This is the reason for the CCO's instruction that calls must emanate from a privilege team member who stays connected throughout the call. Further, in making this proposal for so-called "logistical" reasons, the Registry notes that the Defence in effect questions before the Chamber the above CCO's instruction as opposed to using the usual complaint procedure under the RoR.

26. For the reasons articulated above, the Registry is not in favour of extending the current exception to include privileged telephone calls for Ngaïssona Defence case managers.

Privileged visits from case managers

27. Incorporating its submissions on privilege as explained above, the Registry wishes to take this opportunity under regulation 24 *bis* of the RoC to make additional observations on the current exception, applicable to the Ngaïssona Defence only, whereby case managers are currently entitled to privileged visits without the presence of counsel.

28. The Registry respectfully submits that the reasons articulated in the original Defence Request of 10 April 2019 did not cover the full picture of reasons why the Registry opposed allowing case managers to have privileged visits alone with Mr Ngaïssona. The matter is not limited to a detained person [REDACTED], as presented in the Defence Request,²⁷ though this was an extra consideration in Mr Ngaïssona's case. Rather, the Registry opposes any

²⁶ Request, para. 16.

²⁷ Defence Observations, para. 38.

enlargement of the scope of privileged communications further than that envisaged in the ICC texts.

29. Each of the three regulations governing visits to detained persons at the DC explicitly refers to “counsel and assistants to counsel entitled to legal privilege”,²⁸ which should, in the Registry’s view, be strictly interpreted. Furthermore, privileged visits are monitored within the “sight but not hearing”²⁹ of DC staff and therefore not monitored.
30. Expanding the scope of legal privilege to visits by case managers has the effect of allowing them to pass documents to Mr Ngaïssona under regulation 182 of the RoR during such visits. This would contravene that regulation, which explicitly states that the passing or receiving of documents can only be done by “counsel and assistants to counsel.” As a result, the Registry cannot inspect them as it otherwise would under the regulations.³⁰
31. Furthermore, the Registry specifies that, once a visit includes one Defence team member with privilege, other Defence team members can join the visit and also enjoy privilege. The counterbalance to this “group privilege” is that privilege would include a counsel or assistant to counsel, acting within their professional obligations.
32. However, when an exception is made to allow a case manager or a non-privileged defence team member to have privileged visits, the case manager becomes the “privileged member” and other non-privileged Defence team members may thereafter join into the visit and enjoy privileged communications with a detained person (e.g. language assistants, consultants, interns and resource persons), all this without the presence of counsel who is the only one entitled to present the case before the Chamber (together with a

²⁸ Regulations 178 (2), 179 (1) and 180 (1) of the RoR.

²⁹ Regulation 183 and 184 (2) of the RoR.

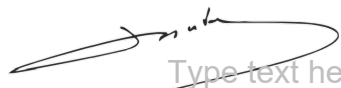
³⁰ Regulation 167 of the RoR.

co-counsel and/or legal assistant). Again, the Registry notes that such an expansion of the list of privileged contacts contradicts the limited legal privilege regime as envisaged under the ICC legal framework.

33. Finally, while an exception (i.e. allowing privileged visits with case managers on their own) may have been warranted at the beginning of the presentation of the case while the Defence was still setting up its team, the Registry notes that the reasons for such an exception no longer exist, as with the expansion of the team, there appears to be six privileged team members. Therefore, the Registry respectfully requests the Chamber to lift the exception applied to the Ngaïssona Defence only.

VI. Conclusion

34. In light of the foregoing, the Registry respectfully submits that case managers do not fall within the scope of the privileged communication regime envisaged by the ICC. As a result, the Registry requests the Chamber to deny the Request to allow Defence case managers privileged telephone calls with Mr Ngaïssona, and lift the exception applied uniquely to Mr Ngaïssona's case managers allowing them to have privileged visits with Mr Ngaïssona, without the presence of counsel or assistants to counsel.



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Marc Dubuisson
Director Division of Judicial Services
on behalf of
Mr Peter Lewis, Registrar

Dated this 30 November 2020

At The Hague, The Netherlands