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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Defence Request for In-Person Visit to Mr Ngaïssona to Prepare
for First Status Conference**

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and 67(1)(b) of the Rome Statute (the ‘Statute’), Regulations 90, 96, 97 and 103 of the Regulations of the Court (the ‘Regulations’) and Regulation 178 of the Regulations of the Registry, issues this ‘Decision on the Defence Request for In-Person Visit to Mr Ngaïssona to Prepare for First Status Conference’.

I. Procedural history and submissions

1. On 19 March 2020, the Detention Centre imposed temporary measures in light of the Coronavirus Pandemic, following recommendations by the medical officer of the Detention Centre (the ‘Temporary Measures’ and the ‘Medical Officer’, respectively).¹ These Temporary Measures, which have been extended until 29 June 2020,² include the suspension of all visits to the detained persons, including by Defence teams.³
2. On 2 June 2020, the Ngaïssona Defence (the ‘Defence’) requested the Chamber to ‘order that Mr Ngaïssona’s detention conditions comply with the minimum

¹ Memorandum DS/2020/023/PC/mc, Annex to the Registry Observations on “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf-Exp-Anx, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (the ‘Annex to the Registry Observations on the [REDACTED] Evaluation Request’), pp 2-7. *See also* Registry Observations on “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry, para. 17; Registry Observations on “Defence Observations to the “Ninth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II” (ICC-01/14-01/18-444-Conf-Exp)”, ICC-01/14-01/18-460-Conf-Exp, 6 April 2020, ICC-01/14-01/18-469-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (confidential *ex parte* redacted version, only available to the Ngaïssona Defence, the Prosecution and the Registry, notified the same day), paras 18, 26-27.

² Memorandum DS/2020/046/HT/mc, 24 April 2020; Memorandum DS/2020/061/PC/mc, 16 June 2020. *See* Annex to the Registry Observations on the [REDACTED] Evaluation Request, ICC-01/14-01/18-557-Conf-Exp-Anx, pp 8-16.

³ Memorandum DS/2020/023/PC/mc, 19 March 2020; Memorandum DS/2020/046/HT/mc, 24 April 2020, Memorandum DS/2020/061/PC/mc, 16 June 2020. *See* Annex to the Registry Observations on the [REDACTED] Evaluation Request, ICC-01/14-01/18-557-Conf-Exp-Anx, pp 3, 12, 16.

standards provided by the RoR and the RoC, in order to ensure Mr Ngaïssona's fair trial rights' (the 'Redress Request').⁴

3. On 4 June 2020, the Chamber convened the first status conference (the 'Status Conference') for 9 July 2020,⁵ after deferring it in light of the Coronavirus Pandemic and the Temporary Measures.⁶
4. On 5 June 2020, the Defence requested the Chamber to, *inter alia*, grant [REDACTED] privileged communications with Mr Ngaïssona and order the Detention Centre to 'exceptionally facilitate in-person meetings between Mr Ngaïssona and [REDACTED] for [REDACTED] evaluation' (the '[REDACTED] Evaluation Request').⁷ The Single Judge recalls the procedural history in his decision on the [REDACTED] Evaluation Request.⁸
5. On 17 June 2020, following an order by the Chamber,⁹ the Registry filed its observations to the [REDACTED] Evaluation Request (the 'Registry Observations on the [REDACTED] Evaluation Request').¹⁰ In essence, the Registry submitted that in-person visits were not possible until 29 June 2020,¹¹

⁴ Defence Request to Redress the Violations of Mr Ngaïssona's Rights in Detention, ICC-01/14-01/18-541-Conf (with confidential *ex parte* Annexes 1-5, only available to the Ngaïssona Defence and the Registry) (public redacted version of the filing notified on 3 June 2020), para. 2.

⁵ Second Order Scheduling First Status Conference, ICC-01/14-01/18-543, para. 7, p. 6.

⁶ Order Deferring the First Status Conference, 26 March 2020, ICC-01/14-01/18-464, paras 2-3, p. 4, whereby the Chamber deferred the Status Conference and stressed that it would be held 'as soon as feasible'. *See also* Order Scheduling First Status Conference, 19 March 2020, ICC-01/14-01/18-459, para. 1, p. 5, whereby the Chamber initially convened the Status Conference on 21 April 2020.

⁷ Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits, ICC-01/14-01/18-544-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry, paras 1, 9.

⁸ Decision on the Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits, 24 June 2020, ICC-01/14-01/18-567-Conf.

⁹ Email from the Chamber to the Registry and the Ngaïssona Defence, 8 June 2020, at 11:38. *See also* email from the Chamber to the Registry and the Ngaïssona Defence, 15 June 2020, at 15:35, whereby the initial deadline of 15 June 2020 was subsequently extended upon the Registry's request.

¹⁰ Registry Observations on "Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits", ICC-01/14-01/18-544-Conf-Exp, ICC-01/14-01/18-557-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (with Annex to the Registry Observations on the [REDACTED] Evaluation, ICC-01/14-01/18-557-Conf-Exp-Anx).

¹¹ Registry Observations on the [REDACTED] Evaluation Request, ICC-01/14-01/18-557-Conf-Exp, para. 19.

and recommended that [REDACTED]' visit either be postponed, or arranged via 'privileged video conference' (the 'PVC').¹²

6. On 18 June 2020, the Defence requested leave to reply to the Registry Observations on the issue of 'whether the Medical Officer's advice is a sufficient basis to extend restrictive measures [...], when similar restrictive measures have already been lifted by the Host State's prison authorities, allowing lawyers and experts to enter the Host State's prisons' (the 'Request for Leave to Reply').¹³
7. On the same day, the Single Judge, noting that the [REDACTED] Evaluation Request related to an in-person visit by [REDACTED] on 22 June 2020, rejected the request for such a visit and further rejected the Request for Leave to Reply, with full reasons to follow.¹⁴ On 24 June 2020, the Single Judge issued his fully reasoned decision (the 'Decision on the [REDACTED] Evaluation Request').¹⁵
8. On 22 June 2020, the Single Judge rejected the Redress Request, finding, *inter alia*, that (i) the Defence had not made use of the judicial review procedure available under Regulation 220 of the Regulations of the Registry, and that (ii) a number of systematic management matters were currently under consideration by the Registrar.¹⁶
9. On the same day, the Defence requested the Chamber to order the Chief Custody Officer (the 'Request'):
 - i. to resume in-person visits between Mr Ngaïssona and his Defence team (the 'Sub-request (i)') or, in the alternative,

¹² Registry Observations on the [REDACTED] Evaluation Request, ICC-01/14-01/18-557-Conf-Exp, paras 2, 20-23.

¹³ Request for Leave to Reply to "Registry Observations on 'Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits', ICC-01/14-01/18-544-Conf-Exp", ICC-01/14-01/18-557-Conf-Exp, 17 June 2020, ICC-01/14-01/18-558-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry.

¹⁴ Email from the Chamber to the Ngaïssona Defence and the Registry, 18 June 2020, at 16:20.

¹⁵ Decision on the Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits, ICC-01/14-01/18-567-Conf.

¹⁶ Decision on the Ngaïssona Defence Request to Redress Violations in Detention, 22 June 2020, ICC-01/14-01/18-563, paras 7-13.

- ii. to allow the Defence team to conduct an in-person visit to the Detention Centre, ‘preferably before 26 June 2020’ (the ‘Sub-request (ii)’ or, in the alternative,
 - iii. to allow the Defence team to conduct an in-person visit to the Detention Centre before the Status Conference scheduled on 9 July 2020 (the ‘Sub-request (iii)’).¹⁷
10. The Defence submits that Mr Ngaïssona’s right to have adequate means to engage in the preparation of the defence under Article 67(1)(b) of the Statute has been infringed since the implementation of the Temporary Measures and the suspension of all in-person visits to the Detention Centre.¹⁸ In particular, the Defence submits that, for the past three months, it has relied on the only available alternative measure to it (phone communications), which has proven ineffective for several reasons, and that it has not been able to hand over any documents to Mr Ngaïssona.¹⁹ The Defence further submits, regarding the possibility to use the PVC system, that this measure is [REDACTED] and that it cannot ‘cure three months of distanced contact [...] and the impossibility to hand over documents’.²⁰ In this regard, the Defence contends that ‘the imminence of the [...] Status Conference calls for an in-person visit instead of a video call’,²¹ and that a discussion in person ‘is paramount to a meaningful preparation of the Status Conference’.²²
11. Furthermore, the Defence submits that the continuous extension of the Temporary Measures is ‘disruptive to the proper and effective preparation of the upcoming hearing’ and that this uncertainty, *inter alia*, places Mr Ngaïssona ‘in a situation of distress’.²³ The Defence also submits that, by contrast, ‘less detrimental measures’ have been implemented in other detention centres in the host State and

¹⁷ Request to allow Defence team in-person visit to Mr Ngaïssona in order to prepare for the Status Conference of 9 July 2020, ICC-01/14-01/18-564-Conf (public redacted version dated 23 June 2020 and notified on 24 June 2020, ICC-01/14-01/18-564-Red), para. 1, pp 10-11.

¹⁸ Request, ICC-01/14-01/18-564-Red, para. 12.

¹⁹ Request, ICC-01/14-01/18-564-Red, para. 13.

²⁰ Request, ICC-01/14-01/18-564-Red, para. 13.

²¹ Request, ICC-01/14-01/18-564-Red, para. 13.

²² Request, ICC-01/14-01/18-564-Red, para. 11.

²³ Request, ICC-01/14-01/18-564-Red, para. 17.

that this State ‘started resuming individual non-legal visits in its prisons on 2 June 2010’.²⁴

12. Finally, noting that Mr Ngaïssona was visited by a pedicurist on 18 June 2020, the Defence asserts that since such non-essential visits are allowed, ‘it is not comprehensible that Defence team visits, which are vital for the preparation of the trial, remain unauthorized’.²⁵
13. On the same day, and in response to the Chamber’s order shortening the response deadlines,²⁶ the Yekatom Defence supported the Request and requested the Chamber to extend the requested relief to it, should it be granted.²⁷
14. On 23 June 2020, the Common Legal Representative of Victims of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly, the ‘CLRv’) informed the Chamber that they will not file a response to the Request.²⁸
15. On 24 June 2020, the Registry filed its observations to the Request (the ‘Registry Observations’).²⁹ Essentially, the Registry recommends that, in light of the Temporary Measures prohibiting in-person visits,³⁰ the Defence preparation be conducted via privileged telephone and video conferencing.³¹ In this regard, the Registry submits that (i) the PVC has now been established at the Detention Centre, that (ii) it is ready to address any challenges that may arise in this respect and that, (iii) contrary to the Defence’s submissions, ‘several Defence teams, on multiple occasions, have [...] been using [it] with success’.³² The Registry further

²⁴ Request, ICC-01/14-01/18-564-Red, paras 15-16.

²⁵ Request, ICC-01/14-01/18-564-Red, para. 18.

²⁶ Email from the Chamber, 22 June 2020, at 15:02, shortening the response deadline to 24 June 2020, pursuant to Regulation 34 of the Regulations.

²⁷ Email from the Yekatom Defence to the Chamber, 22 June 2020, at 16:22.

²⁸ Email from the CLRv to the Chamber, 23 June 2020, at 11:18.

²⁹ Registry Observations on “Request to allow Defence team in-person visit to Mr Ngaïssona in order to prepare for the Status Conference of 9 July 2020”, ICC-01/14-01/18-564-Conf, ICC-01/14-01/18-568-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (confidential *ex parte* Annexes I and II, only available to the Ngaïssona Defence and the Registry, ICC-01/14-01/18-568-Conf-Exp-AnxI and ICC-01/14-01/18-568-Conf-Exp-AnxII).

³⁰ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, paras 12, 18.

³¹ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 2.

³² Registry Observations, ICC-01/14-01/18-568-Conf-Exp, paras 32-33.

submits that on 17 June 2020, the Counsel Support Section (the ‘CSS’) [REDACTED].³³ At the time of filing its observations, the Registry had not yet received [REDACTED] by Mr Ngaïssona’s Lead Counsel nor any request to use the PVC system.³⁴

16. In relation to Mr Ngaïssona’s pedicurist appointment on 18 June 2020, the Registry clarifies that [REDACTED] it was thus permitted as ‘acute medical care’.³⁵ The Registry further submits that [REDACTED] confirmed to the Registry that, during the visit, [REDACTED].³⁶
17. The Registry further indicates that the Temporary Measures are currently in place until 29 June 2020, but that the Registrar and the Presidency will shortly decide on the Medical Officer’s recent recommendations regarding an extension of the measures past 29 June 2020.³⁷ As to the resumption of in-person legal visits, the Registry submits that this possibility is ‘difficult to predict’ and that the Medical Officer is in regular contact with the host State custodial authorities but must also take into account ‘the particular circumstances and vulnerabilities of the detained persons of the ICC, which are unique from the general prison population of The Netherlands’.³⁸
18. On 25 June 2020, the Chamber, in light of the Registry Observations, rejected the Defence’s request to conduct an in-person visit to the Detention Centre before 26 June 2020, further noting that the fully reasoned decision on the Request would be issued in due course.³⁹
19. On 26 June 2020, the Registry informed the Chamber that it had received the [REDACTED] for Mr Ngaïssona on that day, which allows him to begin scheduling privileged video communication sessions.⁴⁰

³³ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 28.

³⁴ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, paras 29-31. *See also* Annex II to the Registry Observations, ICC-01/14-01/18-568-Conf-Exp-AnxII, pp 8-9.

³⁵ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 15.

³⁶ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 17.

³⁷ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 20.

³⁸ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 20.

³⁹ Email from the Chamber to the Ngaïssona Defence, the Yekatom Defence, the Prosecution and CLRV, 25 June 2020, at 12:30; email from the Chamber to the Registry, 25 June 2020, at 15:23.

⁴⁰ Email from the Registry to the Chamber and the Defence, 26 June 2020, at 20:09.

II. Analysis

20. In this decision, the Single Judge provides his full reasons for rejecting Sub-request (ii) and further decides on Sub-requests (i) and (iii).
21. The Single Judge notes at the outset that Article 67(1)(b) of the Statute provides the accused with the right 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’. Furthermore, Rule 132(1) of the Rules of Procedure and Evidence stipulates that promptly after its constitution, a trial chamber ‘shall hold a status conference in order to set the date of the trial’.
22. This first status conference presents an important step in the preparation for trial. Accordingly, the Single Judge considers it crucial that an accused is afforded with adequate facilities to consult with his or her counsel, in order to prepare for it. Ideally, such consultations take place in person. This is particularly so in circumstances such as those at the Court, where the communication between the accused and counsel may be further aggravated by linguistic and cultural barriers.
23. However, the Single Judge notes that the current exceptional circumstances due to the Coronavirus Pandemic necessitate measures by competent authorities to ensure everyone’s health and safety. Correspondingly, the Court must exercise its duty of care towards the detainees in its custody by imposing such temporary measures in the Detention Centre.
24. In this regard, the Single Judge recalls his findings in the Decision on the [REDACTED] Evaluation Request. Notably, the Single Judge recalls that it is the Registrar’s obligation to care for the health and well-being of the accused, pursuant to Regulation 103 of the Regulations.⁴¹ Accordingly, the Single Judge does not consider it to be his place or role to override the Temporary Measures decided by the Registrar and the Presidency, following the advice of the Medical

⁴¹ See Decision on the [REDACTED] Evaluation Request, ICC-01/14-01/18-567-Conf, para. 14.

Officer,⁴² who is best placed to assess the particular health risks to the accused in the Court's custody.⁴³ The Single Judge will make his decisions within this framework.⁴⁴

25. Consequently, noting that in-person visits cannot be facilitated until at least 29 June 2020 pursuant to the Temporary Measures, the Single Judge thus rejected the Defence's Sub-request (ii). For the same reason, the Single Judge also rejects Sub-requests (i) and (iii).
26. Nonetheless, the Single Judge observes that measures in response to the Coronavirus Pandemic have been eased in the host State, including in domestic detention facilities, and that accused persons in the host State have been able to consult with their counsels in person, albeit with protective measures.⁴⁵ Although acknowledging that the vulnerability of prison populations might differ and that it is heightened at the Detention Centre,⁴⁶ the Single Judge encourages the Registry to reconsider measures relating to privileged visits by counsel as a matter of priority during its next review. For instance, the Single Judge hopes that the option of installing glass or plastic shields is being given serious consideration.
27. For the time being, and in light of the persisting health risks to the detainees and those charged with their care, the Single Judge considers the PVC to be a viable alternative, which safeguards the accused's rights under Article 67(1)(b) of the Statute, whilst also minimising risks to the accused's health. As reported by the Registry, the PVC has been tested and is being used successfully by several Defence teams,⁴⁷ including the Yekatom Defence.⁴⁸ The Defence is therefore encouraged to make use of this option.

⁴² It is noted that the Medical Officer also advises the Registrars of the IRMCT and the KSC. Restrictions on visits equally apply to the detainees in the IRMCT and the KSC's custody. *See* Annex I to the Registry Observations, ICC-01/14-01/18-568-Conf-Exp-AnxI, p. 2.

⁴³ *See also* Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 20.

⁴⁴ *See* Decision on the [REDACTED] Evaluation Request, ICC-01/14-01/18-567-Conf, para. 33.

⁴⁵ *See* Annex I to the Registry Observations, ICC-01/14-01/18-568-Conf-Exp-AnxI, p. 3; Request, ICC-01/14-01/18-564-Red, paras 15-16.

⁴⁶ *See* Annex I to the Registry Observations, ICC-01/14-01/18-568-Conf-Exp-AnxI, p. 3.

⁴⁷ Registry Observations, ICC-01/14-01/18-568-Conf-Exp, para. 32.

⁴⁸ Information provided to the Chamber by way of a phone call from the Registry on 25 June 2020.

28. Noting the [REDACTED],⁴⁹ the Single Judge trusts that the PVC is intended as a *temporary* measure only, and that all efforts are made to make less restrictive means available, as soon as possible.
29. Lastly, the Single Judge notes that the information provided in the Registry Observations (and particularly its annexes) with regard to the [REDACTED] evaluation recently requested by the Defence has unfortunately not been included in the previous Registry Observations on the [REDACTED] Evaluation Request. While of limited relevance to the present Request, the Single Judge considers that this information would have been valuable for his determination on the [REDACTED] Evaluation Request. Although noting that the outcome of this decision would have been the same, the Single Judge expects that relevant information is brought to the Chamber's attention in a more timely matter in similar situations in the future.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request, and

ORDERS the Registry to file a confidential version of ICC-01/14-01/18-568-Conf-Exp within seven days of notification of this decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Single Judge

Dated 26 January 2021

At The Hague, The Netherlands

⁴⁹ Annex I to the Registry Observations, ICC-01/14-01/18-568-Conf-Exp-AnxI, p. 2.