

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 2 February 2021

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 AND PATRICE-EDOUARD
NGAISSONA***

Public

With Confidential Annex

**Public Redacted Version of “Ngaïssona Defence Request to allow in-person visits
between Mr Ngaïssona and his Defence in order to prepare for Trial”, 18 January
2021, ICC-01/14-01/18-833-Conf-Exp**

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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I. INTRODUCTION

1. The Defence for Mr Ngaïssona (“Ngaïssona Defence” or “Defence”) hereby presents its Request to allow in person visits between Mr Ngaïssona and his Defence to prepare for trial. The Defence take notes and fully supports the Request for authorization of in-person legal visits with Mr Yekatom,¹ submitted by the Defence for Mr Yekatom (“Yekatom Defence”) on 12 January 2021.
2. The Defence has not been able to physically meet with Mr Ngaïssona since March 2020, ten months ago. The case has now reached a pivotal stage whereby the trial will commence and the Prosecution will begin its presentation of evidence. Meeting with Mr Ngaïssona few days before the Opening Statement, scheduled on 9 February 2021, will allow the Defence to meaningfully engage with him in the preparation of his defence, specifically working on the presentation of the oral submissions and the upcoming presentation of the Prosecution’s evidence. Furthermore, such contact will restore the connection between counsel and his client and support Mr Ngaïssona in facing the opening of his trial before this Court. Finally, allowing in-person visits will also offer Mr Ngaïssona the chance to meet his Associate Counsel that joined the Defence team recently.

II. CONFIDENTIALITY

3. The present request is filed on a confidential *ex parte* basis, only available to the Defence, the Chamber, the Registry and the Detention Section pursuant to Regulation 23bis(1) of the Regulations of the Court as it refers to the content of documents of the same classification and to information on internal management of the team.

¹ Request for authorization of in-person legal visits with Mr. Yekatom, ICC-01/14-01/18-816-Conf, 12 January 2021.

III. PROCEDURAL HISTORY

4. On 23 January 2018, Mr Ngaïssona was transferred to the ICC Detention Centre (“Detention Centre”) where he is currently detained.
5. On 19 March 2020, pursuant to the “URGENT New Detention Centre Temporary Measures Regarding COVID-19” (“COVID-19 measures”)², all visits to detained persons at the ICC detention centre were suspended, including legal visits.³ These measures remain in place to this day.⁴
6. On 29 June 2020, in its “Decision on the Defence Request for In-Person Visit to Mr Ngaïssona to Prepare for First Status Conference”, the Single Judge encouraged the Registry “to reconsider measures relating to privileged visits by counsel as a matter of priority during its next review” and to consider options such as “installing glass or plastic shields”.⁵
7. On 12 August 2020, in its “Decision on Mr Ngaïssona’s Complaint to the Registrar dated 29 July 2020”, [REDACTED].⁶
8. On 15 September 2020, Defence Counsels for Messrs. Ngaïssona, Yekatom, and Ntaganda, addressed a letter to the Presidency (“Counsel’s letter”) bringing to its attention the issues originating from the ban imposed on in-person legal visits. Counsels underlined the impact of the restrictions on their client’s well-being, their consequence on their ability to fulfil their duties as Counsels and the restrictions’

² URGENT New Detention Centre Temporary Measures Regarding COVID-19, DS/2020/023/PC/mc, 19 March 2020.

³ CCO Memo, URGENT New Detention Centre Temporary Measures Regarding COVID-19, DS/2020/23/PC/mc, notified to the Defence on 19 March 2020, p. 3.

⁴ On 15 January 2021, pursuant to regulation 96(2) of the RoC, the Presidency approved an extension of the DC COVID-19 measures until 18 February 2021 (inclusive). See CCO Memo, DS/2020/005/HT/mb, Notice of extension of Detention Centre COVID-19 Temporary Measures until 18 February 2021.

⁵ Decision on the Defence Request for In-Person Visit to Mr Ngaïssona to Prepare for First Status Conference, ICC-01/14-01/18-575-Conf, p. 10, para. 26.

⁶ Decision on Mr Ngaïssona’s Complaint to the Registrar dated 29 July 2020, 20 August 2020, p. 8, para 24.

potential impact on the fairness of the proceedings. Counsels presented a list of measures they were willing to abide by in order to find an appropriate balance between health imperatives and protection of detainees' fundamental rights and psychological well-being.⁷

9. On 30 September 2020, the Presidency replied to Counsels' letter ("Presidency letter") and recalled that "[REDACTED]".⁸ On the same day, the Presidency [REDACTED].⁹
10. On 9 November 2020, the Prosecution filed its Trial Brief¹⁰ and its List of Witnesses and Evidence.¹¹
11. On 12 January 2021, the Defence for Mr Alfred Yekatom filed its Request for authorization of in-person legal visits with Mr Yekatom.
12. On 15 January 2021, the Defence was put on notice of the extension of the COVID-19 measures until 18 February 2021. The extension applies to legal visits.¹²

IV. APPLICABLE LAW

13. Pursuant to Article 67(1)(b) of the Rome Statute, the accused shall be entitled "[t]o have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence".

⁷ Annex A to the Yekatom's Request "15 September 2020 letter sent to the Presidency regarding in-person legal visits at the Detention Centre.", ICC-01/14-01/18-816-Conf-AnxA, 12 January 2021.

⁸ Annex A to the Yekatom's Request : "30 September 2020 letter sent by the Presidency, reference 2020/PRES/00140-2", ICC-01/14-01/18-816-Conf-AnxA, 12 January 2021.

⁹ Decision on the 'Application for Judicial Review of the "Decision on Mr Ngaïssona's Complaint to the Registrar dated 29 July 2020"' dated 20 August 2020 (ICC-RoR220-03/20-1-Conf), ICC-RoR220-03/20-6-Conf, 30 September 2020, page 10, para. 19.

¹⁰ Prosecution's Trial Brief, ICC-01/14-01/18-723-Conf, 9 November 2020.

¹¹ Prosecution's List of Witnesses and Evidence, ICC-01/14-01/18-724, 9 November 2020.

¹² DS/2020/005/HT/mb, Notice of extension of Detention Centre COVID-19 Temporary Measures until 18 February 2021.

14. Pursuant to Article 64(2) of the Statute “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.
15. Pursuant to Regulation 178(1) of the Regulations of the Registry “[t]he Registrar shall issue counsel with a permit for regular visits as soon as such counsel is appointed [...]”.
16. Pursuant to Regulation 96(2) of the Regulations of the Court, “the Registrar, [...] may, with the approval of the Presidency, temporarily suspend the operation of all or part of these Regulations or the Regulations of the Registry relevant to detention matters to the extent necessary to restore the security and good order of the detention centre”.

V. SUBMISSIONS

a. Admissibility of the present request

17. Pursuant to Article 64(2), it is the Chamber’s duty to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused. The Defence submits that the present Request is admissible as it relates to the fairness of this trial and is therefore within the Chamber’s purview.
18. While the request is interrelated with the COVID-19 measures, which are decided between the Registrar and the Presidency and with the advice of the medical officer, the present request does not seek to contest the application of the COVID-19 measures, which request would justify the use of the complaint procedure. Instead, the substance of the present request relates to the impact of the measures on the fairness of these proceedings, namely that the accused’s right to consult

freely and in confidence with his counsel be safeguarded, pursuant to Article 67(1)(b) of the Statute.

19. In accordance with the trial chamber's duties, the Presidency clearly stated, [REDACTED]¹³ and in the Presidency letter that "[REDACTED]".¹⁴
20. Accordingly, Trial Chamber X recognized the power of the trial chamber to issue orders or instructions necessary to safeguard the fairness of the proceedings and stated that "it is ultimately the Chamber's responsibility under Article 64(2) of the Statute to ensure that the proceedings are conducted in a fair and expeditious manner with full respect for the rights of the accused."¹⁵
21. The Defence submits that the inability of the Defence to consult physically with Mr Ngaïssona has a direct impact on the fairness of the proceedings and therefore submits that the Chamber is the appropriate forum to determine the merits of the present request.

b. In person legal visits are necessary and justified

22. In the Presidency letter, the Presidency specified that "[REDACTED]".¹⁶ The Defence submits that this standard is met. Exceptional circumstances justifying the deviation from the ban on legal visits exists and in-person visits are necessary to prepare for trial and therefore safeguard Mr Ngaïssona's right to a fair trial.
23. *First*, the stage of the proceedings is a key factor that warrants granting exceptions to the COVID-19 measures. The significance of this factor was acknowledged by

¹³ ICC-RoR220-03/20-6-Conf, p. 10, para. 19.

¹⁴ ICC-01/14-01/18-816-Conf-AnxA, p. 4.

¹⁵ Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, ICC-01/12-01/18-925, 3 November 2020, p. 4, para. 8.

¹⁶ ICC-01/14-01/18-816-Conf-AnxA.

Trial Chamber X.¹⁷ Accordingly, on 3 July 2020, Trial Chamber X stated that the fact that trial is due to commence soon was a key factor in granting an exception to the prohibition on in-person visits. In light of this consideration, it instructed the Registry to allow, on an exceptional basis, the Defence to physically meet with Mr Al Hassan as soon as possible and no later than 8 July 2020.¹⁸ The Defence for Mr Al Hassan was able to physically consult with Mr Al Hassan at least one week before the commencement of trial, and seven weeks before the start of the evidence in the trial.¹⁹

24. The Defence submits that the present trial is due to commence on 9 February 2021, namely three weeks from the filing of the present request and 8 weeks before the start of the Prosecution's presentation of evidence. The Defence is therefore at almost exactly the same stage as when Trial Chamber X decided the timing to be opportune to allow physical visits between Mr Al Hassan and his Defence.

25. Those few weeks before the commencement of trial are of utmost importance as the Defence will have to discuss and present the Opening Statement to Mr Ngaïssona, which includes analysing the content of the Opening Statement in light of the overall defence case strategy. These discussions are particularly important since it will be the first time that the defence case strategy will be made public by means of an Opening Statement. The Defence will also have to discuss extensively the List of Witnesses and Evidence disclosed by the Prosecutor and the schedule of their testimony. Meeting with Mr Ngaïssona physically would allow the Defence to meaningfully discuss the evidence disclosed by the Prosecution during the past months and specifically the significant amount of evidence disclosed right before the 9 November 2020 disclosure deadline.²⁰ The Detention Centre

¹⁷ ICC-01/12-01/18-925, 3 November 2020, p. 4, para. 8.

¹⁸ ICC-01/12-01/18-925, 3 November 2020, p. 5, para. 9.

¹⁹ Decision on Defence Adjournment Request, ICC-01/14-01/18-940-Red, 8 July, 2020, p. 7 para 15.

²⁰ Between 7 October 2020 and 9 November 2020, within a month of time, the Prosecutor disclosed [REDACTED] pieces of evidence to the Defence, among which [REDACTED] and [REDACTED].

Collaboration System (“DCCS”) improved Mr Ngaïssona’s ability to contribute and to engage with the proceedings; however, it will never replace the efficiency of face-to-face discussions, especially when it comes to discussing the exhibits. The amount of work that needs to be performed before 9 February 2021 would benefit from this efficiency.

26. *Second*, the date of 9 February 2021 marks an important juncture of the case as it sets the beginning of a long trial that will be faced by Mr Ngaïssona. This step gives rise to legitimate apprehension and nervousness on his part. In the context of the COVID-19 pandemic, Mr Ngaïssona’s family will not be able to be present to accompany him through this experience and to show their support. It is therefore all the more important that his Defence team be able to support Mr Ngaïssona by its presence.

27. *Finally*, allowing a meeting between Mr Ngaïssona and his Defence is further warranted by the recent appointment of Mr Omissé-Namkeamaï as Associate Counsel, to represent Mr Ngaïssona. The Defence is organizing the upcoming arrival of Associate Counsel Omissé-Namkeamaï to The Hague in order to attend the hearings. Mr Ngaïssona has never physically met Counsel Omissé-Namkeamaï. As of the date of this filing, they have not been able to speak over the phone since each time an attempt is made, there are technical issues preventing Mr Ngaïssona from being able to establish a phone connection with Counsel Omissé-Namkeamaï. The Defence is in contact with the Detention Centre about this issue and hopes that a solution will be found soon and hopefully on 27 January 2021.²¹ In light of this situation, the Defence submits that meeting Counsel for the first time should not take place few minutes before the opening of the trial but rather in an intimate space where the two could exchange in confidence. A visit between

²¹ Annex to the Request, Emails between [REDACTED] and [REDACTED], dated 24 December 2020, at 16h18 and related answers.

Associate Counsel and Mr Ngaïssona is also warranted as Counsel Omissé-Namkeamaï [REDACTED]. Arranging travels from CAR during the pandemic is challenging as several measures have been instated in order to reduce the risk of spreading COVID-19. Therefore, Counsel Omissé-Namkeamaï's presence in The Hague for the Opening Statement is an opportunity that will not present itself again easily. Allowing him to meet Mr Ngaïssona before the commencement of trial is therefore a special opportunity.

28. Visits at the Detention Centre resumed for the Defence for Mr Al Hassan on 8 July 2020. Trial Chamber X specified that "with respect to physical visits by the Defence team, the Registry has indicated that it expects this will in any case be available for all detainees shortly after 13 July 2020".²² Six months after the first visit of the Defence for Mr Al Hassan and the expected deadline by the Registry to allow visits to all detainees, steps have been taken by the Registry to abide by sanitary precautions, to create a safe environment for the detainees, the Defence team and the Detention Centre guards. Such environment has been extensively described by the Defence for Mr Yekatom in its Request for authorization of in-person legal visits with Mr Yekatom.²³ The Defence stands ready to abide by similar sanitary precautions.

29. It is obvious that team members who will be travelling from abroad will abide by all the sanitary precautions instated by the Netherlands and the ICC namely presenting a negative PCR test before their arrival in the Netherlands, quarantining for ten days before entering the ICC and observing any measures necessary to reduce the risk of contamination.

²² Order instructing the Registry to lift certain measures imposed on Mr Al Hassan, ICC-01/12-01/18-925, 3 November 2020, pp 4-5, para. 8.

²³ Request for authorization of in-person legal visits with Mr. Yekatom, ICC-01/14-01/18-816-Conf, 12 January 2021, p. 8, paras 25-26.

VI.RELIEF SOUGHT

In light of the above, the Defence respectfully requests the Chamber to :

- **GRANT** the Request and allow the Defence to physically meet with Mr Ngaïssona at the Detention Centre at least one week before the scheduled Opening Statement, on 9 February 2021;
- **INSTRUCT** the Registry to facilitate in-person visits between Mr Ngaïssona and his Defence team.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 2 February 2021

At The Hague, the Netherlands.