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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 AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Ngaißsona Defence Request on the Scope of Privileged
Communications**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 67(1)(b) of the Rome Statute (the ‘Statute’), Rules 22(1) and (3) and 73(1) of the Rules of Procedure and Evidence (the ‘Rules’), Regulations 68, 71 and 97 of the Regulations of the Court (the ‘Regulations’), Regulations 124-127, 174-175, 178-182 of the Regulations of the Registry, and the Code of Professional Conduct for counsel (the ‘Code of Conduct’), issues this ‘Decision on the Ngaïssona Defence Request on the Scope of Privileged Communications’.

I. Procedural history and submissions

1. On 15 April 2019, Pre-Trial Chamber II (the ‘PTC II’) issued its ‘Decision Pursuant to Regulation 101 of the Regulations of the Court’ (the ‘PTC II Decision’), in which it granted the Ngaïssona Defence’s (the ‘Defence’) request to include its case manager on the list of persons entitled to privileged visits with Mr Ngaïssona (the ‘Privileged Visit Extension’). In its decision, PTC II noted that Mr Ngaïssona did not have co-counsel and considered 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’.¹
2. On 19 March 2020, the Detention Centre imposed temporary measures in light of the Coronavirus Pandemic, following the recommendations of the medical officer of the Detention Centre (the ‘Temporary Measures’). These Temporary Measures, most of which have been extended until 16 November 2020, include the suspension of all visits to the detained persons.²
3. On 4 May 2020, the Chief Custody Officer informed all detained persons and their counsel that defence team conference calls would exceptionally be authorised ‘as long as in-person legal visits are suspended’ as part of the

¹ Decision Pursuant to Regulation 101 of the Regulations of the Court, ICC-01/14-01/18-176-Conf-Exp (confidential redacted version notified the same day, ICC-01/14-01/18-176-Conf-Red), para. 34.

² See Fifth Registry Update on Detention Centre COVID-19 Measures, 23 October 2020, ICC-01/14-01/18-696-Conf, paras 3-4. The latest memorandum DS/2020/084/HT/mb was communicated to the detainees and their counsel on 15 October 2020 (see Annex to Addendum to “Fifth Registry Update on Detention Centre COVID-19 Measures”, 29 October 2020, ICC-01/14-01/18-702-Conf-Anx).

Temporary Measures.³ The memorandum clarifies that this temporary exception concerns only ‘defence team privileged communications’. Furthermore, it specifies, *inter alia*, that (i) ‘the incoming call must be from a singular privileged telephone number already approved, to the detained person’; and (ii) ‘[a]t 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’.⁴

4. On 17 September 2020, the Defence submitted a request pertaining to the scope of privileged telephone calls between Mr Ngaïssona and Defence team members (the ‘Request’).⁵ The Defence asks the Chamber (i) to extend the privilege afforded by PTC II to case managers in relation to visits also to telephone communications (the ‘Primary Request’);⁶ or (ii) in the alternative, should the Chamber find that such privilege cannot be extended, to 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’ (the ‘Alternative Request’).⁷
5. In essence, the Defence submits that case managers should be admitted to the privileged phone list, in order for them to initiate privileged conference calls with Mr Ngaïssona. According to the Defence, this is necessary because (i) ‘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’; and (ii) ‘certain privileged team members are unable to physically travel to the [office] in order to set up such calls’.⁸ Furthermore, the Defence argues that in light of the PTC II Decision, case

³ Exceptional Authorization for Defence Team Conference Calls, 4 May 2020, D2/2020/049/HT/mc. See Annex to the Addendum to “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” ICC-01/14-01/18-669-Conf dated 29 September 2020, 29 October 2020, ICC-01/14-01/18-701-Conf-Anx (the ‘Conference Call Memorandum’).

⁴ Conference Call Memorandum, ICC-01/14-01/18-701-Conf-Anx, p. 4.

⁵ Ngaïssona Defence Request on the scope of privileged telephone calls between Mr Ngaïssona and Defence team members, ICC-01/14-01/18-657-Conf.

⁶ Request, ICC-01/14-01/18-657-Conf, paras 4, 19.

⁷ Request, ICC-01/14-01/18-657-Conf, paras 5, 19.

⁸ Request, ICC-01/14-01/18-657-Conf, para. 13.

managers should be permitted to hold privileged telephone calls with Mr Ngaïssona just as they have been permitted to conduct privileged in-person visits.⁹ With respect to its Alternative Request, the Defence submits that the Chamber could ‘carv[e] 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 [REDACTED] phone line’.¹⁰

6. On 29 September 2020, as ordered by the Chamber,¹¹ the Registry submitted its observations on the Request.¹² It submits that the Request should be denied, and the Privileged Visit Extension for case managers be removed.¹³ The Registry argues, *inter alia*, that (i) legal privilege, as defined under the Court’s legal framework and interpreted under the jurisprudence of the Court, only extends to lead counsel, co-counsel and assistants to counsel;¹⁴ (ii) permitting privileged telephone communications to Mr Ngaïssona’s case managers, but not to case managers of other detainees, would result in an ‘unequal privileged regime’ within the Detention Centre;¹⁵ and (iii) the Privileged Visit Extension is no longer warranted because the Defence team now has six members who appear to meet the requirements entitling them to legal privilege.¹⁶
7. With respect to the Alternative Request, the Registry notes that it would be technically impossible for it 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 [throughout the call]’, because (i) it cannot verify which numbers connect later and at what

⁹ Request, ICC-01/14-01/18-657-Conf, paras 14-15.

¹⁰ Request, ICC-01/14-01/18-657-Conf, para. 16.

¹¹ The Chamber instructed the Registry to provide its views on the Request, in particular with regard to its ‘technical aspects’, see email from the Chamber, 18 September 2020, at 10:56.

¹² 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, ICC-01/14-01/18-669-Conf (the ‘Registry Observations’).

¹³ Registry Observations, ICC-01/14-01/18-669-Conf, paras 2, 34.

¹⁴ Registry Observations, ICC-01/14-01/18-669-Conf, paras 11-12, 14-15, 17, 29-32.

¹⁵ Registry Observations, ICC-01/14-01/18-669-Conf, para. 22.

¹⁶ Registry Observations, ICC-01/14-01/18-669-Conf, paras 22, 33.

time; and (ii) legally privileged communications are not subject to passive monitoring and are therefore not recorded.¹⁷

8. On 2 November 2020, upon the Chamber's order,¹⁸ the Registry submitted further observations (the 'Additional Registry Observations'). The Registry informs the Chamber, *inter alia*, that (i) the Detention Section is not involved in the technical aspects of how defence teams manage conference calls, but it only facilitates and logs the initial call between the accused and the privileged team member; (ii) conference calls can be set up through mobile phones; and (iii) [REDACTED]. It further emphasises that privileged video conferences, which have been offered to the Defence since 23 June 2020, are preferable to conference calls.¹⁹
9. The Registry further transmitted information provided by the Defence on its conference call management to the Chamber. The Defence explains that '[REDACTED]'. The Defence further reports technical difficulties resulting from this manner of setting up conference calls.²⁰

II. Analysis

10. At the outset, the Chamber notes the limited nature of the Request, which pertains only to privileged telephone communications. However, the Chamber considers that this request is intrinsically tied to the scope of privileged communications in general, including the question whether the Privileged Visit Extension granted in the PTC II Decision continues to be warranted. In this regard, the Chamber also takes note of the Registry's request to lift this extension.²¹

¹⁷ Registry Observations, ICC-01/14-01/18-669-Conf, paras 18, 25.

¹⁸ The Chamber instructed the Registry to provide further observations on: (i) how conference calls pursuant to memorandum D2/2020/049/HT/mc (Exceptional Authorization for Defence Team Conference Calls) are set up, in particular how defence team members join the call; (ii) whether it is possible to initiate privileged phone calls from outside the ICC office at headquarters, *i.e.* via mobile phones or non-ICC landlines; and (iii) whether it is necessary that conference calls are initiated from an ICC telephone line at headquarters in order to ensure a secure teleconference. See email from the Chamber, 30 October 2020, at 10:10.

¹⁹ Email from the Registry, 2 November 2020, at 17:45

²⁰ Email from the Defence to the Registry, 30 October 2020, at 15:14 (the 'Additional Defence Information').

²¹ Registry Observations, ICC-01/14-01/18-669-Conf, paras 2, 34.

11. In the interests of the efficiency of the proceedings, the Chamber will therefore not limit the present decision to the Request, but generally address the scope of privileged communications under Rule 73(1) of the Rules.

A. Applicable law

12. Article 67(1)(b) of the Statute provides that the accused shall be entitled to ‘communicate freely with counsel of the accused’s choosing in confidence’. Rule 73(1) of the Rules prescribes that ‘communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged’. Regulation 97(2) of the Regulations further stipulates that a detained person ‘shall be informed of his or her right to communicate fully, [...] with his or her defence counsel or assistants to his or her defence counsel as referred to in regulation 68’.
13. According to Rule 22(1) of the Rules, counsel may be assisted by other persons with relevant expertise. Regulation 68 of the Regulations clarifies that such persons ‘may include persons who can assist counsel in the presentation of the case before a Chamber. The criteria to be met by these persons shall be determined in the Regulations of the Registry’.
14. The Chamber notes that these criteria are set out in Regulation 124 of the Regulations of the Registry, which foresees that the person ‘shall have either five years of relevant experience in criminal proceedings or specific competence in international or criminal law and procedure’. The names of these individuals are on the list of assistants to counsel (the ‘List of Assistants’) which is created and maintained by the Registry.²² Pursuant to Regulation 127 of the Regulations of the Registry, counsel are obliged to appoint persons assisting them from this List of Assistants.
15. Lastly, the Chamber notes that the Code of Conduct draws a clear difference between ‘assistants’ and ‘other staff’.²³

²² See <https://www.icc-cpi.int/about/registry/pages/list-of-assistants.aspx> (last accessed on 4 November 2020).

²³ See Articles 7(4), 8(3), 24(1) and (3), and 32 of the Code of Conduct.

B. The Chamber's determination

1. *The scope of privileged communications under Rule 73(1) of the Rules*

16. The wording of the abovementioned provisions makes it clear that legal privilege is only afforded to (i) counsel, including co-counsel, and (ii) assistants to counsel, and not to 'other staff' on a defence team. This reading of the Court's legal framework is also consistent with the jurisprudence of other chambers.²⁴
17. The Chamber considers that this limitation is particularly justified by the fact that 'other staff' are not directly bound by the Code of Conduct, and that the accountability regimes under Regulation 71 of the Regulations and Regulation 126 of the Regulations of the Registry do not apply to them. Further, the Chamber notes that privileged communications are not subject to active or passive monitoring. In light of this, the Chamber is of the view that the formal requirements under Regulation 124 of the Regulations of the Registry fulfil an important filtering function. Notably, they ensure that only individuals with relevant legal background, who are bound by the Code of Conduct and the accountability regimes, are entitled to legally privileged communications under Rule 73(1) of the Rules.
18. As a matter of course, this does not preclude counsel from employing 'other staff' to work under their direction, as acknowledged in Article 7(4) of the Code of Conduct, and for this staff to 'assist counsel' in the broad sense of the word. However, the Chamber stresses that when counsel opt to be assisted by other staff, who are not admitted to the List of Assistants, they must accept the consequence that legal privilege does not apply to these team members.²⁵

²⁴ 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 (the '*Bemba* Decision'), para. 19; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag 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 (the '*Al Hassan* Decision'), paras 16-17. See further Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba et al.*, 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.

²⁵ See also *Bemba* Decision, ICC-01/05-01/08-3080, para. 21.

2. *The Request and the Privileged Visit Extension*

19. The core question in this instance is whether a case manager qualifies as an ‘assistant to counsel’ for the purposes of legal privilege. The Chamber acknowledges that while case managers traditionally fulfil administrative duties,²⁶ in practice they sometimes carry out legal tasks within their team. Accordingly, the Chamber does not consider that an assessment can be made in the abstract, solely on the basis of a defence team member’s job title. Rather, any determination as to whether a case manager qualifies as an assistant to counsel depends on the specific circumstances, namely whether this person fulfils the formal requirements under Regulation 124 of the Regulations of the Registry.
20. The Chamber notes that neither one of Mr Ngaïssona’s case managers is currently on the List of Assistants.²⁷ Consequently, legal privilege does not apply to their communications with the accused, be it in the form of a visit, call or other form of communication.
21. While specific circumstances may have previously warranted an exceptional extension of privilege to the case manager, the Chamber considers that such exception is no longer justified. As reported by the Registry, the Chamber particularly notes that the Defence team has expanded since the PTC II Decision was rendered. Notably, there are six Defence team members who appear to fulfil the requirements under Regulation 124 of the Regulations of the Registry and are thus entitled to legal privilege.²⁸
22. In light of the above, the Chamber rejects the Primary Request and lifts the Privileged Visit Extension.

3. *The Alternative Request*

²⁶ See also Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Conf (public redacted version notified the same day), para. 846, n. 1907: ‘The Chamber notes that, in 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.’

²⁷ The Chamber notes in this context that, contrary to the Defence’s submissions (see Request, ICC-01/14-01/18-657-Conf, para. 4), PTC II extended the privilege for visits only to one case manager.

²⁸ See Registry Observations, ICC-01/14-01/18-669-Conf, para. 22.

23. In its Alternative Request, the Defence asks the Chamber to exceptionally 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’.
24. The Chamber is mindful that calls are essential to the Defence’s preparation for trial in the present circumstances under the Coronavirus Pandemic, and particularly in view of the suspension of legally privileged visits. Nonetheless, the Chamber does not consider that an exceptional authorisation for case managers to initiate conference calls is warranted in the current specific circumstances.
25. First, the Chamber recalls that six other Defence team members appear to be entitled to legal privilege under Rule 73(1) of the Rules²⁹ and can therefore initiate conference calls. Second, the defence team members are not required to go to their ICC offices or use the ICC office phone in order to initiate conference calls to the accused. In this regard, the Chamber notes the Additional Registry Observations, which clarify that conference calls can be initiated from outside the Court’s premises through any mobile phone. The Chamber further observes that, in fact, the Defence has already done so in the past.³⁰
26. Insofar as the Defence seeks to ensure [REDACTED] conference calls by initiating the call from an ICC office phone,³¹ [REDACTED]. [REDACTED].³² [REDACTED].³³
27. Third, the Chamber notes that an alternate option of communication, namely the privileged video conference calls, remains available to the Defence. In view of the Registry’s submissions in this regard, the Chamber notes that this avenue

²⁹ See Registry Observations, ICC-01/14-01/18-669-Conf, para. 22.

³⁰ [REDACTED].

³¹ The Chamber notes the Defence’s submission that 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’, see Request, ICC-01/14-01/18-657-Conf, para. 13.

³² See Additional Registry Observations, paragraph 9 above.

³³ The Chamber notes the following information provided in the Additional Defence Information: [REDACTED].

might alleviate [REDACTED]³⁴ and technical issues faced by the Defence during conference calls.³⁵ The Defence is encouraged to seek the Registry's guidance in this regard, as needed.

28. In light of the above, the Alternative Request is rejected.

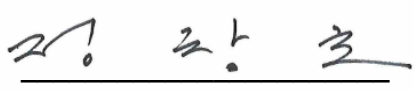
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

LIFTS the Privileged Visit Extension; and

ORDERS the Defence and the Registry to file public redacted versions or request the reclassification of filings ICC-01/14-01/18-657-Conf and ICC-01/14-01/18-669-Conf, within a week of notification of the present decision.

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

 Judge Péter Kovács	 Judge Bertram Schmitt Presiding Judge	 Judge Chang-ho Chung
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Dated 16 February 2021

At The Hague, The Netherlands

³⁴ See 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”, 24 June 2020, ICC-01/14-01/18-568-Conf-Exp (with confidential *ex parte* Annexes I and II, only available to the Defence and the Registry) (confidential redacted version filed on 6 July 2020), para. 33.

³⁵ See Additional Registry Observations, paragraph 9 above.