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No.: **ICC-01/14-01/18**
Date: **22 October 2020**

THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-*
EDOUARD NGAÏSSONA

Public

Prosecution's Request for the Designation of an Alternate Judge

Source: Office of the Prosecutor

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

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Other: Trial Chamber V

Judge Bertram Schmitt, Presiding Judge

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests that the Presidency designate an Alternate Judge in this case (“Request”). An alternate designation is justified by the ongoing COVID-19 global pandemic, the uncertainty of its course, and the inherent risks to the proceedings should an incumbent judge of Trial Chamber V fall seriously ill or otherwise be unable to attend the proceedings for any extended period of time. Additionally, the proceedings are expected to be lengthy, given the nature and number of the charges, and that the case involves two Accused.

2. In the circumstances, the designation of an Alternate Judge is justified, prudent, and would best insulate the trial from the inability to undertake a late substitution or replacement of a judge, and thus preserve not only the fairness and integrity of the proceedings, but their viability.

II. SUBMISSIONS

A. Designating an Alternate Judge is justified

i. Article 74 permits the designation of an Alternate Judge

3. The President’s discretion to designate an Alternate Judge in proceedings before the Court is express. Article 74 (1) provides that the President may, “on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial”.¹ Rule 39 of the Rules of Procedure and Evidence (“Rules”) likewise contemplates the assignment of an Alternate Judge to a Trial Chamber, specifying their role and function in that capacity.²

¹ See article 74(1) (granting the President authority to, “on a case-by-case basis, designate, as available, one or more Alternate Judges to be present at each stage of the trial”).

² See rule 39 of the Rules.

ii. *The exercise of discretion favours the designation of an Alternate Judge*

4. Although no such designation has yet been made at the Court, consideration of a similar matter in the *Lubanga* case suggests that the Presidency's determination of the issue devolves upon two principal considerations: "i) the Court has the resources for this purpose, particularly in terms of a judge who is available to attend the entirety of the trial; and ii) there is an identifiable risk that for reasons such as the length of the trial, or the personal circumstances of one or more of the judges, a member of the bench may not be able to complete the trial."³

5. It is unclear whether an application for the designation of an Alternate Judge must be filed before a Trial Chamber as opposed to the Presidency. For this reason, the Prosecution has sought to engage the Presidency directly, since the matter is one ultimately for its determination. Moreover, the criteria laid out in the *Lubanga* case, resulted from Trial Chamber I's interpretation of the Prosecution's submission on the designation of an Alternate Judge⁴ as requiring a decision on whether to recommend such assignment to the Presidency.⁵ By contrast, this filing comprises a specific request for such relief.⁶

6. Regardless of the procedural mechanism applied, the *Lubanga* Test, albeit not binding, nevertheless appears to reasonably guide the determination of whether an Alternate Judge should be assigned in a given circumstance.

³ See ICC-01/04-01/06-1349, para. 17 ("*Lubanga* Test"); see also ICC-01/04-01/06-1246, para. 7 (citing F. Terrier, "The Procedure before the Trial Chamber", in A. Cassese et al. (eds.), *Rome Statute of the International Criminal Court* (Cambridge, 2002), at 1313, and O. Triffterer, "Article 74: Requirements for the decision", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos (1999) p. 958, § 14.

⁴ ICC-01/04-01/06-1246.

⁵ See ICC-01/04-01/06-1349, p. 1 and para. 10.

⁶ *Contra* ICC-01/04-01/06-1246, para. 10 (noting the Prosecution's "opinion to consider the possibility to designate one alternate judge pursuant to Article 74(1), second sentence").

a. Available Resources

7. The Prosecution is not in a position to determine whether and to what extent the Court's current resources allow for the designation of an Alternate Judge who may be available to attend the entirety of the prospective trial.

8. Although the Prosecution is constrained to defer to the Presidency and the Registry in this respect, it must be underscored that the institution as a whole has a vested interest in prioritising the safety, fairness, and integrity of trial proceedings. Expediency should not supersede or risk these critical interests in the long-term. Thus, there is a categorical imperative for the Court to ensure (as is reasonably feasible) the necessary and proper allocation of its admittedly limited resources to achieve these ends, and in this situation, having due regard to the unprecedented and prevailing circumstances in which the case intends to proceed.

b. Identifiable Risks

9. *First*, as noted, one of the salient circumstances attending the proceedings in this case is novel. The risks of a potentially serious interruption or even termination of the prospective trial — should a member of Trial Chamber V be affected by COVID-19 — are concrete. While there is no absolute certainty that they will materialise — as is the case with any risk — they are clearly identifiable. The numerous public health measures undertaken in the Host State and indeed in countries around the world underscore the seriousness of the situation and that of the attendant risks. Importantly, neither the Court nor its personnel are exempt from the ongoing public health crisis or its consequences, direct or collateral.

10. While the identified health risk does not pertain to the 'personal circumstances of one or more of the judges', such as whether a member of the Chamber falls into a given risk-group for contracting COVID-19 or as regards the potential severity of its

consequences, the risk substantially affects each member. The overall risk to the discontinuity of the trial should *any* member of the Chamber be seriously affected remains very real and unfortunately, clearly foreseeable.

11. *Second*, despite the Prosecution's intention to invoke as many mechanisms as available within the contemplation of the statutory framework to ensure the expedition of the proceedings, the reality is that the trial in this case is likely to be lengthy even if it is conducted highly efficiently.⁷ For instance, the Prosecution intends to call over 40% more witnesses in this case than in the *Ongwen* case within the same allotment of time.⁸ Nevertheless, the case still involves two Accused, an intricate and complicated factual narrative and legal basis, and some 51 charges of crimes against humanity and war crimes occurring within a broad geographical and temporal context.

B. The Potential Consequences of Failing to Designate an Alternate Judge before the Start of Trial are Serious

12. In the best of circumstances, losing a judge during a lengthy trial for any number of reasons is far from improbable. As past experience has shown at other international courts,⁹ and very nearly at this one,¹⁰ the risk is palpable. Given the

⁷ See Evidence Matters in ICC Trials, An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice, August 2016, p. (noting, "[t]he length of the ICC's first trials has varied, with the period of time between the opening statements and final trial judgment lasting approximately three years and two months in the Lubanga case, four years and three months in the Katanga case and three years and one month in the Ngudjolo cases, and five years and four months in the Bemba case") <https://www.ibanet.org/Document/Default.aspx?DocumentUid=864B7FC6-0E93-4B2B-A63C-D22FBAB6F3D6>. The more recent cases of *Ntaganda* and *Ongwen* have fared no better. See Case Information Sheet The Prosecutor v. Bosco Ntaganda ICC-01/04-02/06, p. 1 (noting that the trial commenced on 2 November 2015 and the Judgement issued on 8 July 2018) <https://www.icc-cpi.int/CaseInformationSheets/NtagandaEng.pdf>; and Case Information Sheet, The Prosecutor v. Dominic Ongwen ICC-02/04-01/15, p. 2 (noting that the trial commenced on 6 December 2016) <https://www.icc-cpi.int/CaseInformationSheets/ongwenEng.pdf>.

⁸ ICC-02/04-01/15-497, paras. 11-12 (allotting the Prosecution 400 hours to present 115 witnesses, with 65 witnesses to be called in the *Ongwen* case); compare ICC-01/14-01/18-631, paras. 21-22 (allotting the Prosecution 400 hours to present 152 witnesses (currently 145), with 109 witnesses to be called in the *Yekatom and Ngaissona* case).

⁹ For instance, in the ICTY's *Milosevic* trial, Judge Richard May resigned mid-trial due to ill health, see <https://www.icty.org/en/press/statement-judge-theodor-meron-president-icty-upon-resignation-judge-richard->

Court's statutory framework, the consequences to the proceedings if such a risk is realised are uncertain at best. They are very serious at worst.

13. Because the Statute precludes the possibility of assigning a new judge in replacement of sitting Trial Judge mid-trial,¹¹ it is incumbent that an alternate be designated *before* the trial proceedings are properly underway. Article 39(2)(b)(ii) provides that "[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division",¹² and article 74(1) provides that "[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations". In addition, the latter provision requires that, if designated, an Alternate Judge is required "to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending."¹³ Thus, by implication and in the absence of any mitigating or contrary statutory authority, these provisions compel the conclusion that a trial "can, consequently, not be completed if one of the members falls out and no Alternate Judge has been designated."¹⁴

14. Failing to designate an Alternate Judge in this case risks delay in the proceedings, as no provision allows for their continuation in the absence of any member of the Trial Chamber.¹⁵ It is notable that a 2014 proposed addition to rule

[george-may](https://www.icty.org/fr/press/death-judge-la%C3%AFty-kama-icty); in the ICTR's *Kahamunda* and *Kajelijeli* trials, Judge Laity Kama died, *see*, <https://www.icty.org/fr/press/death-judge-la%C3%AFty-kama-icty>; in the ICTY's *Šešelj* trial, Judge Frederik Harhoff was disqualified mid-trial, *see* <https://www.icty.org/en/press/judge-harhoff-disqualified-%C5%A1e%C5%A1elj-case>.

¹⁰ *See* ICC-01/04-01/07-1086 (replacing deceased Judge Fumiko Saiga shortly after the constitution of Trial Chamber II in the *Katanga* case).

¹¹ *See* article 74(1) (requiring that "[a]ll the judges of the Trial Chamber *shall be present at each stage of the trial* and throughout their deliberations") (emphasis added).

¹² *See* article 39(2)(b)(ii).

¹³ *See* article 74(1); *see also* rule 39 of the Rules requiring that an Alternate Judge shall also sit through the deliberations on the case although he or she may not take part unless and until required to serve as a replacement.

¹⁴ Hakan Friman, *Procedural Law of the Criminal Court - An Introduction*, in 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 201, 226 (Flavia Lattanzi and William A. Schabas eds., 2003).

¹⁵ *See e.g.*, Rule 15*bis* of the ICTY and ICTR Rules of Procedure and Evidence (permitting proceedings in the absence of a judge of the Chamber, and the substitution of judges).

140 — *i.e.*, rule 140bis¹⁶ — was scuttled before the Assembly of States Parties,¹⁷ which would have permitted Chambers to proceed in the temporary absence of a Trial Judge for a limited period and regarding specific matters. Thus, there is no present exception to the requirements of article 74(1).

15. As noted in the *Lubanga* case, the “availability of resources within the Court to appoint an alternate judge is a consideration which *is only engaged if there is a risk of a judge becoming permanently unavailable prior to the conclusion of the case*”.¹⁸ It is hard to imagine a circumstance wherein such a risk could be more apparent than in the case of an ongoing, in many cases intensifying, global pandemic which has claimed over a million lives to date and now reached over 40 million cases, of which many have resulted in serious illness. Likewise, it is incumbent on the Presidency to consider and to carefully weigh the necessary resources, financial, human, and logistical, that would be required for a re-trial if the identified risks materialise particularly at an advanced stage. These costs concern not only the Parties and Participants in the proceedings but also the victims, the institution, and even the international community as a stakeholder in the Court. Thus, although resources and costs associated with designating an Alternate Judge are significant considerations, failing to do so on that basis in view of the substantial countervailing long-term interests would be improvident. It unjustifiably tempts fate, given the seriousness of the prevailing circumstances.

16. Under the statutory framework, should a member of the Trial Chamber be unable to be present throughout the trial, either limitedly or over an extended period, the trial proceedings would come to an abrupt halt. The Court, Parties, and Participants, would be left scrambling in an attempt latently to salvage a potentially

¹⁶ See ICC-ASP/13/2 Thirteenth session, 8-17 December 2014, Appendix II, p.18 *et seq.*, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-28-ENG.pdf.

¹⁷ See Report of the Advisory Committee on Legal Texts, pp. 3-4 (noting, “[t]he Assembly of States Parties did not adopt these amendment proposals in its Thirteenth Session, held between 8 and 17 December 2014) https://www.icc-cpi.int/iccdocs/other/2015.03.26_ACLT_Report_2014-Eng.pdf.

¹⁸ ICC-01/04-01/06-1349, para. 22.

years-long process — all in light of circumstances that are clearly apparent and avoidable – albeit, with some effort and foresight.

III. CONCLUSION

17. For the above reasons, the Prosecution requests that the Presidency designate an Alternate Judge for the trial of this case.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart, Deputy Prosecutor

Dated this 22nd day of October 2020
At The Hague, The Netherlands