

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **5 January 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**

**Public redacted version of “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf, 5 June 2020**

**Source:** Defence of Patrice-Edouard Ngaiissona

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

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**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

Mr Harry Tjonk

**Victims Participation and Reparations Section**

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## **I. Introduction**

1. The Defence, confronted with the rapid deterioration of Mr Ngaïssona's mental well-being and its consequent impact on his ability to face trial, decided to request a [REDACTED] of Mr Ngaïssona. After having successfully sought the appointment of [REDACTED] on the ICC List of Experts, the Defence now respectfully requests that [REDACTED] be granted privileged communications with Mr Ngaïssona. Moreover, the Defence respectfully requests the Trial Chamber (hereinafter "Chamber") to order the Detention Centre to exceptionally facilitate in-person meetings between Mr Ngaïssona and [REDACTED] for the duration of the evaluation.

## **I. Confidentiality**

2. In accordance with Regulation 23bis(1) of the Regulations of the Court ("Regulations" or "RoC"), these submissions are filed "confidential, EX PARTE, only available to the Registrar, Detention Section, and the Ngaïssona Defence" as they concern information regarding Mr Ngaïssona's private life and detention-related matters.

## **II. Procedural History**

3. On 13 March 2020, [REDACTED] was provisionally added as an expert in [REDACTED] to the List of Experts maintained by the Registrar of the ICC, pursuant to Regulation 44 of the RoC.<sup>1</sup>

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<sup>1</sup> Regulation 44 of the Regulations states that '*The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.*'

4. On 13 March 2020, pursuant to the “[REDACTED]” (hereinafter “Urgent Measures”), all visits to detained persons at the ICC Detention Centre were suspended. All “non-acute” medical appointments were also suspended.<sup>2</sup> These measures remain in place as of today.<sup>3</sup>
5. On [REDACTED], [REDACTED] was officially added to the List of Experts maintained by the Registrar of the ICC, pursuant to Regulation 44 of the RoC, with the qualification of [REDACTED].
6. On 27 March 2020, the Registry approved the temporary appointment of [REDACTED] as a [REDACTED] for the Defence.
7. On 26 May 2020, the Defence enquired with the Detention Centre about the possibility of allowing [REDACTED] to conduct an in-person [REDACTED] of Mr Ngaïssona after 8 June 2020, which is the day the ICC headquarters building is expected to partially reopen. On the following day, the Defence was informed by the Chief Custody Officer of the Detention Centre (hereinafter “CCO”) that a physical visit could not be facilitated. The CCO informed the Defence that [REDACTED].<sup>4</sup> He therefore advised the Defence to make use of this system, once available, to conduct the evaluation.

### III. Submissions

- a. [REDACTED] should be granted privileged communications and visits

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<sup>2</sup> Decision [REDACTED], notified to the Defence on 19 March 2020, p. 3

<sup>3</sup> Prolonged up to 19 May 2020 through decision [REDACTED], notified on 24 April 2020.

<sup>4</sup> Email of CCO to Defence team member of 27 May 2020, at 2:56 pm.

8. On 16 March 2020, the Defence requested the temporary appointment of [REDACTED] , in order to assess the extent to which Mr Ngaïssona’s well-being is affected by his detention conditions.
9. As already submitted by the Defence,<sup>5</sup> Mr Ngaïssona's detention conditions seriously affect his psychological well-being and, consequently, his ability to effectively engage in the preparation of trial pursuant to Article 67(1).<sup>6</sup> These concerns prompted the decision to request an independent expert to conduct a [REDACTED]. In order to be able to conduct this evaluation, the Defence respectfully requests the Chamber to grant [REDACTED] privileged communications with Mr Ngaïssona as well as limited access to confidential information required in the conduct of his evaluation pursuant to Rule 73(2) of the Rules of Procedure and Evidence (hereinafter “Rules”).
10. Pursuant to Rule 73(2) of the Rules, “communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure, under the same terms as in sub-rules 1 (a) and 1 (b) if a Chamber decides in respect of that class that: (a) Communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure; (b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and (c) Recognition of the privilege would further the objectives of the Statute and the Rules.”
11. Pursuant to Rule 73(3) of the Rules, “[i]n making a decision under sub-rule 2, the Court shall give particular regard to recognizing as privileged those

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<sup>5</sup> Defence Request to Redress the Violations of Mr Ngaïssona’s Rights in Detention, 2 June 2020, ICC-01/14-01/18-541-Conf.

<sup>6</sup> Ibid, paras 32-34.

communications made in the context of the professional relationship between a person and his or her medical doctor, psychiatrist, psychologist or counsellor”.

12. *First*, given that the information shared with [REDACTED] is inherently sensitive and confidential, the communications between [REDACTED] and Mr Ngaïssona should be seen as “producing a reasonable expectation of privacy and non-disclosure” pursuant to Rule 73(2)(a).<sup>7</sup>
  
13. *Second*, the topics that will be touched upon during the meetings between [REDACTED] and Mr Ngaïssona will cover very personal aspects of his life in detention, his psychology and his well-being. The intimacy of their exchanges should be covered by the seal of confidentiality or else it would not allow Mr Ngaïssona to speak freely and in confidence with [REDACTED], and therefore, would prevent the appropriate assessment of Mr Ngaïssona pursuant to Rule 73(2)(b).
  
14. *Third*, Mr Ngaïssona’s current mental and physical well-being is seriously impaired by his detention conditions, which is hampering his ability to fully engage with his Defence team and focus on the preparation of trial, all of which was illustrated in the Defence’s Request of 2 June 2020 to redress the violations of Mr Ngaïssona’s rights in detention. Granting privilege to [REDACTED] would allow a fair and independent assessment of Mr Ngaïssona’s well-being and of the extent to which his detention conditions have an impact on his capacity to engage with the Defence and with the current proceedings. Such an assessment is essential in order to ensure Mr

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<sup>7</sup> *The Prosecutor v. Al Hassan 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, p. 5, para 8 : “*the professional relationship between a medical expert and a patient produces ‘a reasonable expectation of privacy and non-disclosure’ which is ‘essential to the nature and type of relationship’, within the meaning of Rule 73(2).*”

Ngaiissona's fair trial rights, pursuant to Article 67(1), and to ensure the continuity of the trial proceedings.

15. Moreover, as recently noted by the Single Judge in the *Al Hassan* case “[w]hile noting the intention of drafters, as reflected in Rule 73(2), to avoid absolutely declaring privileges for any relationship apart from that between a legal counsel and a client, the Single Judge also notes that the explicit listing of medical doctors, psychiatrists and psychologists in Rule 73(3) signals a strong preference on the drafters (sic) part to recognise the relationship with individuals belonging to these categories as privileged.”<sup>8</sup> Therefore, granting privileged communications and access to confidential information to [REDACTED] “would further the objectives of the Statute and the Rules” pursuant to Rule 73(2)(c).
16. [REDACTED],<sup>9</sup> [REDACTED]. Before being appointed onto the List of Experts, [REDACTED] was subject to a vetting process conducted by the Registry, pursuant to Regulation 44 of the RoC and Regulation 56 of the Regulations of the Registry. The confirmation of his appointment onto the List of Experts on [REDACTED] should be seen as a guarantee of his professional integrity, independence and respect for confidentiality. The Defence respectfully submits that privileged contact between Mr Ngaiissona and [REDACTED].<sup>10</sup>

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<sup>8</sup> *The Prosecutor v. Al Hassan 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, p. 5, para 8 : “*the professional relationship between a medical expert and a patient produces ‘a reasonable expectation of privacy and non-disclosure’ which is ‘essential to the nature and type of relationship’, within the meaning of Rule 73(2).*”

<sup>9</sup> [REDACTED]

<sup>10</sup> *See The Prosecutor v. Al Hassan 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, p. 6, para. 11.

**b. [REDACTED] should be allowed to conduct in-person visits at the Detention Centre for the duration of Mr Ngaïssona's evaluation**

17. On 26 May 2020, the Defence enquired with the Detention Centre about the feasibility of an in-person meeting between [REDACTED] and Mr Ngaïssona after 8 June 2020, subject to any security measure the CCO may wish to impose to protect the health and safety of the detainees and the Detention Centre's staff. The CCO responded that all visits were suspended pursuant to the Urgent Measures, and that a physical meeting could not be facilitated. The CCO informed the Defence that the Detention Centre and the Registry were currently working on a system of videoconferencing between detained persons and defence teams and advised the Defence to make use of this system, once available, to conduct the evaluation.

18. The Defence intended to launch [REDACTED] evaluation as of March 2020. However, the Urgent Measures made visits to Mr Ngaïssona at the Detention Centre impossible. Since then, Mr Ngaïssona's well-being has considerably worsened, requiring an immediate evaluation. The Defence reiterates its concerns about the deterioration of Mr Ngaïssona's well-being already raised in previous submissions.<sup>11</sup>

19. The solution suggested by the CCO is not suitable to [REDACTED]. The Defence therefore requests that [REDACTED] be granted, on an exceptional basis, physical access to the Detention Center urgently. *First*, while the CCO informed the Defence that the Detention Centre and the Registry were currently working on setting up a videoconferencing system, there is no

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<sup>11</sup> ICC-01/14-01/18-541-Conf, paras 1,32,34; ICC-01/14-01/18-527, para 8; ICC-01/14-01/18-496-Conf, paras 25, 36; ICC-01/14-01/18-460-Conf, paras 11, 24, 30; ICC-01/14-01/18-435-Conf-Exp; ICC-01/14-01/18-426-Conf-Corr, para 25; ICC-01/14-01/18-420-Conf, paras 32-26; ICC-01/14-01/18-420-Conf-Exp-AnxI.



indication as to when this system will be effective, since “[REDACTED]”.<sup>12</sup> *Second*, even assuming the system would be available shortly, it is not appropriate to a [REDACTED]. The process of [REDACTED] cannot be conducted properly through a video system. This system would only increase the distance that is necessarily already present when meeting with [REDACTED] for the first time. In addition, a proper [REDACTED], which can only be performed in the physical presence of the accused. Moreover, the main reason for conducting this evaluation is the depersonalization and the lack of human contact induced by Mr Ngaïssona's detention conditions. Conducting this [REDACTED] remotely would only add distress to an already humanly untenable situation.

20. *Finally*, pursuant to point 6(b) of the Urgent Measures, “[a]ll essential medical appointments and diagnostic care will remain”.<sup>13</sup> The assessment of the physical and psychological well-being of Mr Ngaïssona should therefore be regarded as an essential medical appointment pursuant to the Urgent Measures, due to the urgency of the situation and its impact on Mr Ngaïssona's fair trial rights.

21. [REDACTED]<sup>14</sup>

## RELIEF SOUGHT

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

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<sup>12</sup> Email of CCO to Defence team member of 27 May 2020, at 2:56 pm.

<sup>13</sup> Decision [REDACTED], notified to the Defence on 19 March 2020, p. 3

<sup>14</sup> [REDACTED].

- **GRANT** [REDACTED] privileged communications with Mr Ngaïssona and access to confidential information, pursuant to Rule 73(2);
- **ORDER** the CCO to allow [REDACTED] to conduct in-person visits to Mr Ngaïssona at the Detention Centre, accompanied by an interpreter, for the duration of the [REDACTED].

Respectfully submitted,



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Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 5 January 2021

At The Hague, the Netherlands.