



Original: **English**

No.: **ICC-01/14-01/18**
Date: **10 February 2021**

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
*THE PROSECUTOR V. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the ‘Prosecution’s Request for the Designation of an Alternate Judge’ dated
22 October 2020 (ICC-01/14-01/18-695)**

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

The Office of the Prosecutor

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Mr Kweku Vanderpuye

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Legal Representatives of the Victims

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Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witness Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Trial Chamber V**

The Presidency of the International Criminal Court (the ‘Court’) has before it the request filed by the Office of the Prosecutor (the ‘Prosecution’) on 22 October 2020, referring to article 74(1) of the Rome Statute (the ‘Statute’) and rule 39 of the Rules of Procedure and Evidence (the ‘Rules’), requesting that the Presidency designate an alternate judge in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* (the ‘Request’).¹

I. THE REQUEST

1. The Request seeks the designation of an alternate judge for the trial of the case,² submitting that such designation is justified in the context of the ongoing COVID-19 global pandemic, referring to the inherent risk to the proceedings should an incumbent judge of Trial Chamber V fall seriously ill, as well as noting the expected length of proceedings.³ The Request submits that the designation of an alternate judge is expressly permitted, pursuant to article 74(1) of the Statute and rule 39 of the Rules,⁴ submitting, with reference to a decision taken by the majority of Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo*,⁵ that the consideration of whether to do so should depend on two principal considerations: the availability of resources and whether there is an identifiable risk of a member of the bench not being able to complete the trial.⁶ The Request notes that because the Statute precludes the possibility of assigning a judge to replace a judge mid-trial, a failure to designate an alternate judge could have considerable consequences for the proceedings in the event that a sitting judge is unable to continue.⁷
2. On 27 October 2020, Mr Yekatom responded to the Request,⁸ submitting that he did not oppose it⁹ but requesting that, in the event that the Request is granted, the Presidency should clarify that any alternate judge cannot participate in the

¹ Prosecution, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Prosecution’s Request for the Designation of an Alternate Judge, 22 October 2020, ICC-01/14-01/18-695 (‘Request’), paras 1, 17.

² Request, ICC-01/14-01/18-695, para. 17.

³ Request, ICC-01/14-01/18-695, para. 1.

⁴ Request, ICC-01/14-01/18-695, para. 3.

⁵ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, 22 May 2008, ICC-01/04-01/06-1349.

⁶ Request, ICC-01/14-01/18-695, paras 4-11.

⁷ Request, ICC-01/14-01/18-695, paras 12-16.

⁸ Defence for Mr Yekatom, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Yekatom Defence Response to the Prosecution’s Request for the Designation of an Alternate Judge, 27 October 2020, ICC-01/14-01/18-700 (‘Yekatom Response’).

⁹ Yekatom Response, ICC-01/14-01/18-700, para. 1.

proceedings or deliberations and that the presence of an alternate judge does not permit the temporary absence of any member of the Trial Chamber.¹⁰

3. On 30 October 2020, the Common Legal Representatives for Victims (the ‘CLRv’) provided a joint response in support of the Request.¹¹ The CLRv considered that the appropriateness of the allocation of resources for the designation of an alternate judge should be weighed against the measures and costs which would be incurred at a later stage to remedy the disruption to proceedings in the event of the permanent unavailability of a judge.¹² The CLRv supported the Request’s submissions concerning COVID-19 constituting an identifiable risk personal to all three members of the Trial Chamber,¹³ emphasising further the location of the Court in a highly infectious region and the unprecedented nature of a global pandemic.¹⁴
4. On 2 November 2020, Mr Ngaïssona filed his response to the Request, indicating that he does not, in principle oppose the appointment of an alternate judge and indicating that he defers to the Presidency’s discretion in this regard.¹⁵ He submitted, however, that the Request does not sit comfortably with the *Lubanga* decision referred to therein and he opposes the Request’s argument that the proceedings are different in terms of length or complexity than any other recent article 5 case before the Court.¹⁶ On the specific question of resource availability, the Defence for Mr Ngaïssona observes that the present risk of COVID-19 is no different to that in other cases which have already commenced or may soon commence at the Court, indicating that the assigning of alternate judges in all such cases could strain the Court’s already limited resources.¹⁷ Mr Ngaïssona also submits that the potential impact of COVID-19 on the fairness of the proceedings against him cannot be remedied by simply designating an alternate judge.¹⁸ Finally, he respectfully submits that the Presidency would be

¹⁰ Yekatom Response, ICC-01/14-01/18-700, paras 4-9.

¹¹ CLRv, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Common Legal Representatives’ Joint Response to the “Prosecution’s Request for the Designation of an Alternate Judge”, 30 October 2020, ICC-01/14-01/18-705 (‘CLRv Response’).

¹² CLRv Response, ICC-01/14-01/18-705, para. 10.

¹³ CLRv Response, ICC-01/14-01/18-705, paras 11-12.

¹⁴ CLRv Response, ICC-01/14-01/18-705, para. 13.

¹⁵ Defence for Mr Ngaïssona, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Ngaïsson Defence Response to ‘Prosecution’s Request for the Designation of an Alternate Judge’, 2 November 2020, ICC-01/14-01/18-709 (‘Ngaïssona Response’), para. 2.

¹⁶ Ngaïssona Response, ICC-01/14-01/18-709, paras 2-5.

¹⁷ Ngaïssona Response, ICC-01/14-01/18-709, para. 6.

¹⁸ Ngaïssona Response, ICC-01/14-01/18-709, paras 7-12.

assisted by Trial Chamber V's opinion on the necessity of the appointment of an assisting judge.¹⁹

II. DETERMINATION OF THE PRESIDENCY

5. Article 74(1) of the Statute refers to the designation of alternate judges 'as available'. Rule 39 of the Rules indicates that '[a]lternate judges shall be designated in accordance with a procedure pre-established by the Court'. Such procedure is pre-established by regulation 16 of the Regulations of the Court ('Regulations'), which provides that 'alternate judges may be designated by the Presidency on a case-by-case basis, first taking into account the availability of judges from the Trial Division and thereafter from the Pre-Trial Division'. In the present situation, article 35 of the Statute, pertaining to the procedures for the calling to service of judges on a full-time basis, is also pertinent.
6. The Presidency notes that the opening of the trial in the present case is scheduled for 16 February 2021,²⁰ with the Prosecution's presentation of evidence scheduled to commence from 15 March 2021.²¹
7. The Presidency notes that the Court's proposed budget for 2021 makes no allocation for the assignment of alternate judges and that the provision made for the remuneration of judges in 2021 is limited.²² Further, noting that it would be inappropriate to assign a judge whose mandate is about to be completed as an alternate judge and further considering the full workload of the available existing judges whose mandates will continue, the Presidency observes that, practically speaking, any alternate judge would need to be identified from amongst the newly-elected judges of the Court. The Presidency considers that although opening statements in the case are scheduled to occur on 16 February 2021, the presentation of evidence does not commence until 15 March 2021 and therefore it would be possible to appoint an alternate judge, if desired, in the present case at least until the latter date.

¹⁹ Ngaïssona Response, ICC-01/14-01/18-709, paras 13-14.

²⁰ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Order Rescheduling the Commencement Date of the Trial, 8 February 2021, ICC-01/14-01/18-875.

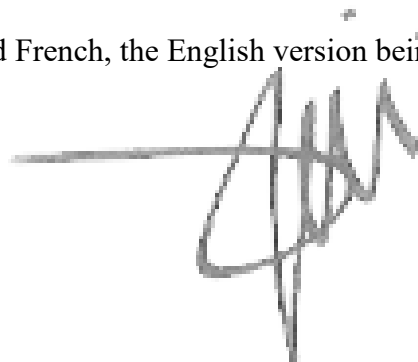
²¹ Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Order Setting the Commencement Date of the Prosecution's Presentation of Evidence, 13 January 2021, ICC-01/14-01/18-817.

²² Proposed Programme Budget for 2021 of the International Criminal Court, 10 September 2020, ICC-ASP/19/10, para. 72.

8. As the Presidency considers that the appointment of any alternate judge in the present case would necessitate the calling to full-time service of a newly-elected judge, it further considers that the proper authority to engage in the necessary consultations with judges in respect of such calling to full-time service in accordance with article 35 of the Rome Statute would be the Presidency in its composition to be elected on 11 March 2021.
9. For this reason, the Presidency considers that if the Prosecution wishes to pursue the Request, it should file it before the newly elected Presidency on or after 11 March 2021 for consideration on an urgent basis, so that the latter may consider its merits and, if necessary, consult with the judges in connection with decisions concerning calling to full-time service.
10. In the meantime, if Trial Chamber V has any views as to whether the appointment of an alternate judge is warranted which it wishes to communicate to the Presidency, it should feel free to do so in any format it considers appropriate, so that this information will be readily available to the newly elected Presidency in the event that the latter is asked to consider the present Request or a variation thereof.

The Presidency hereby dismisses the Request, without prejudice to its merits and without prejudice to the Prosecution placing it anew before the Presidency on or after 11 March 2021.

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



Judge Chile Eboe-Osuji
President

Dated this 10 February 2021

At The Hague, The Netherlands