

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **23 June 2020**

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 “Request to allow Defence team in-person visit to Mr Ngaißsona in order to prepare for the Status Conference of 9 July 2020”, ICC-01/14-01/18-564-Conf, 22 June 2020

Source: Defence of Patrice-Edouard Ngaißsona

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

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I. Introduction

1. Pursuant to articles 67(1)(b) and 67(1)(e), Mr Ngaissona's fair trial rights encompass the right to prepare his defence and to communicate freely with his counsel as well as the right to examine the witnesses against him. The Defence for Mr Patrice-Edouard Ngaissona ("Defence") respectfully requests that visits between Mr Ngaissona and privileged members of his Defence team be resumed in order to prepare for the upcoming Status Conference, scheduled on 9 July 2020. This would enable the Defence to prepare meaningful submissions and contribute to advancing the trial against Mr Ngaissona.

II. Confidentiality

2. The Defence files the present submissions confidentially pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC") since they relate to personal and confidential detention-related administrative matters.

III. Procedural History

3. On 19 March 2020, pursuant to the "URGENT New Detention Centre Temporary Measures Regarding COVID-19" ("Urgent Measures"), all visits to detained persons at the ICC detention centre ("Detention Centre") were suspended.¹ These measures remain in place to this day.²

¹ Decision DS/2020/023/PC/mc, notified to the Defence on 19 March 2020, p. 3.

² Urgent measures prolonged up to 29 June 2020 through decision DS/2020/061/PC/mc, notified on 17 June 2020 as an annex to the "Registry Observations on "Defence Request to [REDACTED] and to Allow In-Person Visits" filed the same day.

4. On 22 May 2020, Trial Chamber V filed its “Order to Provide a Preliminary Witness List”, directing the Prosecutor to file the Preliminary Witness List no later than 15 June 2020.³
5. On 4 June 2020, Trial Chamber V filed its Second Order Scheduling First Status Conference (“Second Order”) setting up the First Status Conference to take place on 9 July 2020.⁴
6. On 15 June 2020, pursuant to the Order to Provide a Preliminary Witness List, the Prosecutor filed its “list of (i) the witnesses that it is already certain it will call to testify (“Preliminary Witness List”) ; and (ii) the witnesses that it is certain not to call to testify”.⁵
7. On 16 June 2020, the CCO issued its “Notice of Extension of Detention Centre COVID-19 Temporary Measures until 29 June 2020” (“CCO Notice of Extension”).⁶ The CCO Notice of Extension came to the Defence’s knowledge the following day, as an Annex to the “Registry Observations on “Defence Request to [REDACTED] and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp” (“Registry Observations”).
8. On 17 June 2020, the Registry filed the abovementioned Registry Observations and submitted that “[REDACTED]” and “[REDACTED]”.
9. On 18 June 2020, Mr Ngaiissona received the visit of a pedicurist. The visit was initially scheduled to take place after the confirmation of charges hearing, held on 19-25 September and 11 October 2019; however, the visit

³ Order to Provide a Preliminary Witness List, 22 May 2020, ICC-01/14-01/18-528.

⁴ Second Order Scheduling First Status Conference, 4 June 2020, ICC-01/14-01/18-543, p. 5, para. 7.

⁵ Prosecution’s Submission in Compliance of the Single Judge’s “Order to provide a Preliminary Witness List”, ICC-01/14-01/18-528, 15 June 2020, ICC-01/14-01/18-553, p. 3 para. 1.

⁶ Notice of Extension of Detention Centre COVID-19 Temporary Measures until 29 June 2020, 16 June 2020, DS/2020/061/PC/mc.

did not take place and was eventually postponed. The pedicurist was, despite the measures in place, permitted to resume visits to detainees this Thursday, 18 June 2020.

IV. Applicable Law

10. Pursuant to article 67(1)(b) of the Rome Statute, the accused shall be entitled to “[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”.

V. Submissions

11. On 4 June 2020, Trial Chamber V filed its Second Order scheduling the First Status Conference to take place on 9 July 2020. On 15 June 2020, the Prosecutor submitted the Preliminary Witness List it intends to call during trial.⁷ The Preliminary Witness List provided by the Prosecutor contains 152 witnesses that the Prosecutor is certain to call during the trial. The Prosecutor submitted that, out of these 152 witnesses, 90 relate to Mr Ngaïssona. The Defence submits that discussing this extensive list and the upcoming hearing in person is paramount to a meaningful preparation of the Status Conference.

12. The right to have adequate means to engage in the preparation of the defence is a right that has been infringed since the implementation of the Urgent Measures on 16 March 2020 and the suspension of all in-person

⁷ Second Order Scheduling First Status Conference, 4 June 2020, ICC-01/14-01/18-543, p. 5, para. 7.

visits to the Detention Centre. This suspension indeed applies, *inter alia*, to Defence team visits.⁸

13. So far, the Defence has relied on the available alternative measures to ensure the preparation of Mr Ngaïssona's defence which, in Mr Ngaïssona's case, comes down to telephone communications. This situation has prevailed for the last three months. The Defence used the alternative means at its disposal as much as it could, but those cannot replace an in-person privileged meeting with Mr Ngaïssona. *First*, point 3(a) of the Urgent Measures specifies that "[REDACTED]".⁹ Mr Ngaïssona tried to communicate unsuccessfully through [REDACTED] before the Pandemic. The [REDACTED] and therefore it cannot be deemed a viable alternative for the exchange of case-related material for the time being. *Second*, while, the phone is good enough to keep Mr Ngaïssona apprised of the overall advancement of the proceedings, it does not allow in-depth and informed discussions about the substance of the case. The poor quality of the phone line with certain Defence team members is an additional factor that affects the efficiency and quality of the discussions. Moreover, sensitive subjects cannot be touched upon over the phone. The CCO notably reminds this in his memo by saying that "[REDACTED]".¹⁰ In addition, the fact that Mr Ngaïssona does not have the documents being discussed in front of him during his communications with the Defence or has not had the opportunity to review them beforehand, only allows for a very superficial discussion of the matters at hand. Significantly, the Defence was not able to hand over to Mr Ngaïssona one single case-related document since the implementation of the Urgent Measures, and this

⁸ CCO Urgent Measure, p. 2, point 1, a).

⁹ CCO Urgent Measure, p. 2, point 3, a).

¹⁰ CCO Urgent Measure, p. 2, point 3, a) (emphasis added).

despite the numerous attempts of the Defence to this effect.¹¹ *Third*, the fact that the Video Conferencing System is slowly being implemented will not cure three months of distanced contact between Mr Ngaïssona and his Defence team and the impossibility to hand over documents. The system has not been tested yet by any Defence team member and its reliability is uncertain. Therefore, the imminence of the First Status Conference calls for an in-person visit instead of a video call.

14. The complexity and the significance of the proceedings in Mr Ngaïssona's case should forbid any form of alteration of his fair trial rights. The Defence is currently not in a position to perform its core professional duties towards Mr Ngaïssona and to act towards the preservation of the integrity of the proceedings. Moving forward with the proceedings without giving Mr Ngaïssona the chance to properly prepare this First Status Conference will affect the rest of the trial, especially since this First Status Conference aims at addressing key topics such as issues relevant to the commencement date of the trial or anticipated evidence.¹²

15. The merits of the Defence's present request also rest in the fact that less detrimental measures could be implemented as it has been done in other prisons in the Host State. The prorogation of the Urgent Measures does not provide any substantial justification as to why in-person visits could not be resumed, while the Host State started resuming individual non-legal visits in its prisons on 2 June 2010, where the number of detainees is considerably higher than the number of detainees at the ICC Detention

¹¹ See Detained Person's Complaint to the Chief Custody Officer, 23 March 2020; Request for review to the Registrar of CCO's decision, 4 May 2020.

¹² Second Order Scheduling First Status Conference, 4 June 2020, ICC-01/14-01/18-543, p. 5, para. 7.

Centre.¹³ This stark contrast between the measures applied within the Detention Centre and the Host State prisons is even more blatant when it appears that legal visits have never been totally suspended in the Netherlands¹⁴ and the rights of the defence were safeguarded by postponing hearings when privileged consultations between the lawyer and the client were not possible.¹⁵

16. Lead counsel's personal experience reflects the gap between the measures taken by the Detention Center and those implemented in the Netherlands, in so far as he has been given the opportunity to conduct a two hour visit in a prison detaining more than 600 inmates.¹⁶ He was able to speak freely with his client and exchange documents, inside a conference room where masks and gloves were not required, and a plastic screen between the detainee and the counsel was set up as a protective shield. The Defence is more than ready to comply with similar requirements, such as wearing gloves or masks and maintaining secured distance to avoid any risk of contamination. These measures are reasonable and easily implementable.

17. The continuous postponement of the Urgent Measures within the Detention Centre is disruptive to the proper and effective preparation of the upcoming hearing and should no longer serve as a ground to refuse to

¹³ <https://www.dji.nl/> : "Corona measures prevented individuals from receiving visitors until early June 2020. Small-scale visits were permitted again on 2 June 2020" and "As of June 16, 2020, detainees in all correctional institutions who have been able to take the necessary measures to permit visits in a responsible manner may receive one visitor for a maximum of one hour per week. As of that date, visitors may also bring one child aged up to and including 4, who will remain on their lap during the visit."

¹⁴ <https://www.dji.nl/over-dji/coronavirus/index.aspx> : "Visits that are necessary in the context of legal proceedings, such as a visit by a lawyer, and which visits cannot take place with, for example, digital tools, can continue. If you are a lawyer and you want to meet your client in the judicial institution, you must make an appointment in advance. You can call the general number of the judicial institution where your client is staying. You will find the telephone numbers of our penitentiaries on www.dji.nl . Please indicate that you are a lawyer and want to schedule a visiting appointment with your client."

¹⁵ https://nos.nl/artikel/2333507-advocaten-weigeren-naar-zitting-ridouan-taghi-tekomen.html?fbclid=IwAR3tsBl_JbrKB0k7a_45ixg0vnmFZoOAZUDQPzKQbiRTs6YOayPbiGGCXDU.

¹⁶ The Penitentiary Institution (PI) Vught.

uphold the most elementary defence rights. The uncertainty as to when counsel and accused will be able to meet again does not allow to elaborate any plan to prepare the Status Conference. This places Mr Ngaïssona in a situation of distress. Such stretching of the deadlines combined with the absence of reasonable alternatives has a detrimental effect on Mr Ngaïssona's ability to focus on the preparation of the upcoming hearing. In addition, the Defence cannot rely on the announced end date of the prolonged Urgent Measures to organise a visit since such date has been already postponed many times and the CCO Notice of Extension specifies that the temporary measures could be renewed after 29 June 2020.¹⁷ The safeguard of Mr Ngaïssona's right to prepare for trial should be given priority by investigating any possibility for him to meet his Defence team and should not rely on the mere possibility that the measures might be lifted on 29 June 2020.

18. Finally, the lack of a proper justification for the extended suspension of Defence team visits is even more striking considering that on 18 June 2020, a pedicurist visited Mr Ngaïssona in the Detention Centre.¹⁸ The Defence was informed by Mr Ngaïssona that the pedicurist initially entered the Detention Centre without any protection. Also, because of the nature of the treatment, and even though she was wearing a mask, she did not maintain a secured distance of 1,5 meters. The Defence is grateful that Mr Ngaïssona's well-being is taken into account during the Pandemic. However, the Defence would like to understand why non-essential visits are prioritized over Defence team visits. Once one permits such visits to

¹⁷ Notice of Extension of Detention Centre COVID-19 Temporary Measures until 29 June 2020, p. 2.

¹⁸ Mr Ngaïssona informed Lead counsel that the visit took place on 18 June 2020, two days after the official postponement of the Covid-19 measures.

take place, it is not comprehensible that Defence team visits, which are vital for the preparation of the trial, remain unauthorized.

19. In light of the fact that non-essential visits have resumed, the Defence respectfully requests in-person visits to Mr Ngaïssona to be resumed, effective as of next week. In the alternative, in order to respect the abovementioned rights and for the Defence team to consult with Mr Ngaïssona to prepare the First Status Conference, the Defence respectfully requests to be granted in-person visit to the Detention Centre in order to prepare for the First Status Conference. A first visit would take place preferably before 26 June 2020, date of the time-limit for the Defence's response to the Prosecutor's submissions in relation to the Preliminary Witness List. This would enable the Defence to make a proper analysis of the witnesses appearing on this list, with the benefit of Mr Ngaïssona's meaningful insights. In the alternative and in any event, the Defence would like to visit Mr Ngaïssona at a date prior to the First Status Conference.

RELIEF SOUGHT

The Defence respectfully requests the Trial Chamber to:

- **GRANT** the Defence's present request and:

- (i) **ORDER** the CCO to resume in-person visits between Mr Ngaïssona and his Defence team, or in the alternative;
- (ii) **ORDER** the CCO to allow the Defence team to conduct an in-person visit to the Detention Centre, preferably before 26 June 2020, or in the alternative;

(iii) **ORDER** the CCO to allow the Defence team to conduct an in-person visit to the Detention Centre before the First Status Conference scheduled on 9 July 2020.

Respectfully submitted on 23 June 2020,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona
At The Hague, the Netherlands.