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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

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 Defence Request to Grant Privileged Status to Medical Expert
and to Allow In-Person Visits**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamaï

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and 67(1) of the Rome Statute (the ‘Statute’), Rules 73(2), (3) and 135 of the Rules of Procedure and Evidence (the ‘Rules’), Regulation 103 of the Regulations of the Court (the ‘Regulations’) and Regulation 157 of the Regulations of the Registry, issues this ‘Decision on the Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits’.

I. Procedural history and submissions

1. On 19 March 2020, the Detention Centre imposed temporary measures in light of the Coronavirus Pandemic, following recommendations by the medical officer of the Detention Centre (the ‘Temporary Measures’ and the ‘Medical Officer’, respectively).¹ These Temporary Measures, which have been extended until 29 June 2020,² include the suspension of non-acute medical appointments.³

¹ Memorandum DS/2020/023/PC/mc. See Annex to the Registry Observations on “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf-Exp-Anx, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (the ‘Annex to the Registry Observations’), pp 2-7. See also Registry Observations on the “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry, para. 17; Registry Observations on “Defence Observations to the “Ninth Registry Report on the Implementation of the Restrictions on Contact of Mr Ngaïssona Ordered by Pre-Trial Chamber II” (ICC-01/14-01/18-444-Conf-Exp)”, ICC-01/14-01/18-460-Conf-Exp, 6 April 2020, ICC-01/14-01/18-469-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry (confidential *ex parte* redacted version, only available to the Ngaïssona Defence, the Prosecution and the Registry, notified the same day), paras 18, 26-27.

² Memorandum DS/2020/046/HT/mc, 24 April 2020; Memorandum DS/2020/061/PC/mc, 16 June 2020. See Annex to the Registry Observations, ICC-01/14-01/18-557-Conf-Exp-Anx, pp 8-16.

³ Memorandum DS/2020/023/PC/mc, 19 March 2020; Memorandum DS/2020/046/HT/mc, 24 April 2020; Memorandum DS/2020/061/PC/mc, 16 June 2020. See Annex to the Registry Observations, ICC-01/14-01/18-557-Conf-Exp-Anx, p. 4, Temporary Measure 6; p. 13, Temporary Measure 6; p. 16.

2. On 27 March 2020, the Registry appointed ‘as part of Mr Ngaïssona's Defence team, [REDACTED],⁴ who has been added to the Registry’s list of experts before the Court (the ‘List of Experts’).⁵
3. On 2 June 2020, the Ngaïssona Defence (the ‘Defence’) filed its ‘Defence Request to Redress the Violations of Mr Ngaïssona's Rights in Detention’, requesting that the Chamber ‘order that Mr Ngaïssona's detention conditions comply with the minimum standards provided by the RoR and the RoC, in order to ensure Mr Ngaïssona's fair trial rights’ (the ‘Redress Request’).⁶
4. On 5 June 2020, the Defence requested the Chamber to (i) grant [REDACTED] privileged communications with Mr Ngaïssona as well as limited access to confidential information required in the conduct of his evaluation, and (ii) order the Detention Centre to ‘exceptionally facilitate in-person meetings between Mr Ngaïssona and the Defence Expert for the duration of a [REDACTED] evaluation’ (the ‘Request’).⁷ The Defence submits that ‘confronted with the rapid deterioration of Mr Ngaïssona’s mental well-being and its consequent impact on his ability to face trial, [it] decided to request a [REDACTED] evaluation of Mr Ngaïssona’.⁸ According to the Defence, Mr Ngaïssona’s detention conditions ‘seriously affect his psychological well-being and, consequently, his ability to effectively engage in the preparation of trial’.⁹
5. In the Defence’s submission, the requirements under Rule 73(2) of the Rules are fulfilled¹⁰ and the [REDACTED] evaluation is ‘essential in order to ensure

⁴ See Registry Observations on the “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, 17 June 2020, ICC-01/14-01/18-557-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry, ICC-01/14-01/18-557-Conf-Exp, para. 10.

⁵ List of Experts before the ICC as of 26 May 2020, <https://www.icc-cpi.int/get-involved/Documents/2020-05-26-List-of-Experts-eng.pdf> (last accessed on 24 June 2020).

⁶ Defence Request to Redress the Violations of Mr Ngaïssona's Rights in Detention, ICC-01/14-01/18-541-Conf (with confidential Annexes 1-4 and confidential *ex parte* Annex 5, only available to the Ngaïssona Defence and the Registry) (public redacted version notified on 3 June 2020), para. 2.

⁷ Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits, ICC-01/14-01/18-544-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry, paras 1, 9.

⁸ Request, ICC-01/14-01/18-544-Conf-Exp, para. 1.

⁹ Request, ICC-01/14-01/18-544-Conf-Exp, paras 8-9, 14.

¹⁰ Request, ICC-01/14-01/18-544-Conf-Exp, paras 10-15.

Mr Ngaïssona’s fair trial rights, pursuant to Article 67(1) [of the Statute], and to ensure the continuity of the trial proceedings’.¹¹ The Defence further submits that an in-person visit should be allowed because (i) the restrictions imposed under Regulation 101(2) of the Regulations should not prevent Mr Ngaïssona’s privileged contact with [REDACTED];¹² (ii) a [REDACTED] evaluation via video-conference would not be suitable in the current circumstances;¹³ and (iii) the [REDACTED] evaluation should be regarded as an ‘essential medical appointment’ under the Temporary Measures.¹⁴ Lastly, the Defence submits that it has arranged a first appointment for the [REDACTED] evaluation on 22 June 2020 and that the assistance of a Registry interpreter has been secured.¹⁵

6. On 17 June 2020, following an order by the Chamber,¹⁶ the Registry filed its observations to the Request (the ‘Registry Observations’).¹⁷ In essence, the Registry submits that in-person visits are not possible until 29 June 2020,¹⁸ and recommends that [REDACTED] visit either be postponed, or arranged via ‘privileged video conference’.¹⁹ The Registry further notes that (i) the medical services available at the Detention Centre offer [REDACTED] care to all detainees; (ii) all essential medical appointments and diagnostic care, including [REDACTED], remain in place despite the Temporary Measures;²⁰ and (iii) Mr Ngaïssona has refused to make use of the medical care.²¹
7. The Registry considers that [REDACTED] will conduct an ‘external medical evaluation’ under Regulation 157 of the Regulations of the Registry,²² but also indicates that it is the ‘Registry’s understanding that [REDACTED] would be in

¹¹ Request, ICC-01/14-01/18-544-Conf-Exp, para. 14.

¹² Request, ICC-01/14-01/18-544-Conf-Exp, para. 16.

¹³ Request, ICC-01/14-01/18-544-Conf-Exp, paras 17-19.

¹⁴ Request, ICC-01/14-01/18-544-Conf-Exp, para. 20.

¹⁵ Request, ICC-01/14-01/18-544-Conf-Exp, para. 21.

¹⁶ Email from the Chamber to the Registry and the Ngaïssona Defence, 8 June 2020, at 11:38. The initial deadline of 15 June 2020 was subsequently extended, upon request by the Registry, *see* email from the Chamber to the Registry and the Ngaïssona Defence, 15 June 2020, at 15:35.

¹⁷ Registry Observations on the “Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits”, ICC-01/14-01/18-544-Conf-Exp, ICC-01/14-01/18-557-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry.

¹⁸ Registry Observations, ICC-01/14-01/18-557-Conf-Exp, paras 2, 19.

¹⁹ Registry Observations, ICC-01/14-01/18-557-Conf-Exp, paras 20-23.

²⁰ Registry Observations, ICC-01/14-01/18-557-Conf-Exp, paras 14-15.

²¹ Registry Observations, ICC-01/14-01/18-557-Conf-Exp, para. 14.

²² Registry Observations, ICC-01/14-01/18-557-Conf-Exp, para. 12.

contact with Mr Ngaïssona *as a member of the Defence team*'.²³ The Registry seeks the Chamber's guidance as to 'whether granting privileged communication to [REDACTED] would be compatible with Mr Ngaïssona's current active monitoring regime'.²⁴

8. On 18 June 2020, the Defence requested leave to reply to the Registry Observations on the issue of 'whether the Medical Officer's advice is a sufficient basis to extend restrictive measures which are highly prejudicial to the well-being of Mr Ngaïssona and the preparation of his defence, when similar restrictive measures have already been lifted by the Host State's prison authorities, allowing lawyers and experts to enter the Host State's prisons' (the 'Request for Leave to Reply').²⁵
9. On the same day, the Single Judge, noting that the Request relates to an appointment with [REDACTED] on 22 June 2020, partially decided on the Request, with reasons to follow. Specifically, the Single Judge rejected the request for an in-person visit by [REDACTED] on 22 June 2020. The Single Judge further rejected the Request for Leave to Reply, since he did not consider that further submissions by the Defence were needed to rule on the Request, and noted that the fully reasoned decision on the Request would be issued in due course.²⁶
10. On 22 June 2020, the Single Judge rejected the Redress Request.²⁷ Noting, *inter alia*, that the Defence had not made use of the judicial review procedure available under Regulation 220 of the Regulations of the Registry and that a number of systematic management matters were currently under consideration by the Registrar, the Single Judge found that the Chamber cannot determine detention related complaints in these concrete circumstances.²⁸

²³ Registry Observations, ICC-01/14-01/18-557-Conf-Exp, para. 13 (emphasis added).

²⁴ Registry Observations, ICC-01/14-01/18-557-Conf-Exp, para. 10.

²⁵ Request for Leave to Reply to "Registry Observations on 'Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits', ICC-01/14-01/18-544-Conf-Exp", ICC-01/14-01/18-557-Conf-Exp, 17 June 2020, ICC-01/14-01/18-558-Conf-Exp, confidential *ex parte*, only available to the Ngaïssona Defence and the Registry, para. 3.

²⁶ Email from the Chamber to the Ngaïssona Defence and the Registry, 18 June 2020, at 16:20.

²⁷ Decision on the Ngaïssona Defence Request to Redress Violations in Detention, ICC-01/14-01/18-563.

²⁸ Decision on the Ngaïssona Defence Request to Redress Violations in Detention, ICC-01/14-01/18-563, paras 7-13.

II. Analysis

11. In this decision, the Single Judge provides his full reasons for rejecting the in-person visit by [REDACTED] on 22 June 2020, and decides on the remainder of the Request.
12. The Single Judge notes at the outset that the Request's legal basis is unclear. While the Defence does not make reference to Rule 135 of the Rules as such, it submits that the state of Mr Ngaïssona's mental well-being and its impact on his ability to 'effectively engage in the preparation of trial' and to 'face trial' prompted the Defence to 'request a [REDACTED] evaluation of Mr Ngaïssona'.²⁹ On the other hand, the Defence appears to be of the view that [REDACTED] would function as a 'Defence medical expert'³⁰ and that a right to a [REDACTED] evaluation flows from Article 67(1) of the Statute.³¹ Further, the Defence does not mention Regulation 103(4) of the Regulations of the Court or Regulation 157 of the Regulations of the Registry.

A. Applicable Law

13. In light of these submissions, the Single Judge considers it necessary to elaborate on the different obligations between chambers and the Registry concerning the health of the accused, as well as the purpose and scope of Rule 135 of the Rules, Regulation 103(4) of the Regulations and Regulation 157 of the Regulations of the Registry.
14. First, the Single Judge recalls that ensuring the health and safety of detained persons generally falls within the purview of the Registrar, pursuant to Regulation 103 of the Regulations.³² Notably, the first sentence of Regulation 103(4) of the

²⁹ Request, ICC-01/14-01/18-544-Conf-Exp, paras 1, 8-9, 14.

³⁰ Request, ICC-01/14-01/18-544-Conf-Exp, paras 6, 8.

³¹ Request, ICC-01/14-01/18-544-Conf-Exp, paras 9, 14.

³² See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen, 16 December 2016, ICC-02/04-01/15-637-Red (the 'Ongwen Decision'), para. 32; transcript of hearing, 19 February 2019, ICC-02/04-01/15-T-199-Red2-ENG, p. 3, lines 1-9; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence request for interim release, 5 May 2020, ICC-01/12-01/18-786-Conf (public redacted version notified on 29 May 2020, ICC-01/12-01/18-786-Red), para. 37. See further Regulation 90 of the Regulations: '[T]he Registrar shall have overall responsibility for all aspects of management of the detention centre [...]'.

Regulations prescribes that [REDACTED].³³ Regulation 103(6) of the Regulations further mandates the Registrar to [REDACTED].

15. In addition, a detainee ‘may be visited by and consult’ an external medical practitioner/doctor of his or her choice, at his or her own expense, pursuant to Regulation 103(4) of the Regulations and Regulation 157(1) of the Regulations of the Registry. However, it must be noted that the second sentence of Regulation 157(1) of the Regulations of the Registry stipulates that ‘[t]he Registrar may request that the detained person be first examined by the medical officer at the Detention Centre to diagnose his or her condition’.
16. Second, the Single Judge notes that a chamber’s responsibility with regard to the health of the accused derives from its obligations under Article 64(2) of the Statute to ensure a fair trial, and is thus limited in its scope. Notably, a chamber’s obligation under Article 64(2) of the Statute encompasses an obligation to ensure that the accused is fit to stand trial and able to meaningfully exercise his or her fair trial rights under Article 67(1) of the Statute.³⁴ These fair trial rights include, *inter alia*, the capacities to understand the charges and the conduct, purpose and possible consequences of the proceedings, as well as the capacity to instruct counsel in the preparation and conduct of his or her defence.³⁵
17. The Single Judge understands that Rule 135 of the Rules was drafted against this background.³⁶ Rule 135(1) of the Rules stipulates the following: ‘The Trial Chamber may, for the purpose of discharging its obligations under article 64,

³³ See further Regulation 155 of the Regulations of the Registry.

³⁴ See also *Ongwen* Decision, ICC-02/04-01/15-637-Red, paras 7, 11; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Gbagbo Defence (public redacted version notified the same day, ICC-02/11-01/11-286-Red) (the ‘*Gbagbo* November 2012 Decision’), paras 43, 46; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the fitness of Laurent Gbagbo to stand trial, 27 November 2015, ICC-02/11-01/15-349 (the ‘*Gbagbo* November 2015 Decision’), paras 32-33. See further ICTY Trial Chamber I, *Prosecutor v. Ratko Mladic*, Order for a medical examination of the accused pursuant to rule 74 *bis*, 16 November 2011, Case No. IT-09-92-PT, para. 5, interpreting Article 20 of the ICTY Statute which contains language similar to Article 64(2) of the Statute.

³⁵ *Ongwen* Decision, ICC-02/04-01/15-637-Red, para. 8; *Gbagbo* November 2012 Decision, ICC-02/11-01/11-286-Red, para. 50; *Gbagbo* November 2015 Decision, ICC-02/11-01/15-349, para. 35.

³⁶ See also *Gbagbo* November 2012 Decision, ICC-02/11-01/11-286-Red, para. 56: ‘[T]he primary purpose of rule 135 of the Rules is to enable the Chamber to “discharg[e] its obligations” in relation to ensuring that the accused understands the charges and ultimately that proceedings are fair’.

paragraph 8 (a), or for any other reasons, or at the request of a party, order a medical, psychiatric or psychological examination of the accused, under the conditions set forth in rule 113'. The Single Judge considers that this provision is thus intended to ensure that the determination of the fitness of the person to participate in proceedings is made following an impartial procedure resorting to approved experts and with proper oversight by the Chamber and the parties.³⁷ Similarly, the Single Judge considers that an examination ordered for 'any other reasons' must also follow this framework. An expert solely chosen by the Defence, notwithstanding whether this expert has been accepted to the List of Experts, does not fulfil these requirements.³⁸

18. Finally, the Single Judge emphasises the different objectives underlying Rule 135 of the Rules, as opposed to Regulation 103(4) of the Regulations of the Court and Regulation 157 of the Regulations of the Registry. These objectives not only become clear from the wording of these provisions, but also from the systematic interpretation of the legal texts and chapters these provisions are placed in. Rule 135 of the Rules talks about 'examination' and is placed in the chapter on 'Trial Procedure' rules. This provision thus addresses, as indicated above, medical examinations for the purpose of determining that there are no impediments on account of the accused's health to the proceedings. In order to make such determination, a medical expert needs to be appointed by the Chamber, pursuant to Rule 135(3) of the Rules.
19. Regulation 103(4) of the Regulations and Regulation 157 of the Regulations of the Registry, on the other hand, speak about 'visits' and 'consultations' by an external practitioner/doctor. Moreover, Regulation 103 of the Regulations is entitled '[h]ealth and safety of detained persons' and Regulation 157 is located in chapter 5, section 2 of the Regulations of the Registry, which deals with the 'rights of detained persons and conditions of detention'. The Single Judge

³⁷ See also Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012", 12 June 2012, ICC-02/11-01/11-152-Conf (public redacted version notified the same day, ICC-02/11-01/11-152-Red) (the 'Gbagbo June 2012 Decision'), para. 26; Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing, 2 August 2012, ICC-02/11-01/11-201, para. 15.

³⁸ See also *Gbagbo* June 2012 Decision, ICC-02/11-01/11-152-Red, para. 28.

therefore considers that the objective of these provisions is to ensure – as part of the Registry’s general obligation under Regulation 103 of the Regulations, and subsidiary to complying with this obligation through its own medical services – that detainees have the (additional) medical care they wish to receive. These provisions do not concern the issue of an accused’s ability to effectively participate in the proceedings.

20. This access to an external medical practitioner is a *supplementary* right of the accused to medical care other than those medical services provided by the Registry at the Detention Centre, pursuant to Regulation 103 of the Regulations.³⁹ However, the Single Judge stresses that this right is not without limits and subject to the restrictions set out in the Regulations of the Registry, as further illustrated below.

B. Assessment of the Request under Rule 135 of the Rules

21. Turning to the Request at hand, the Single Judge notes that while the Request does not allege Mr Ngaiissona’s unfitness to stand trial, the Defence does submit that he is not able to meaningfully exercise his fair trial rights and that his deteriorated mental well-being impacts on ‘his capacity to engage in the preparation of trial’ and on ‘his ability to face trial’.⁴⁰ The Single Judge considers that these arguments substantively touch upon core matters regulated by Rule 135 of the Rules.
22. To the extent that this was the Defence’s intention, the Single Judge considers that the Request circumvents the impartial and *inter partes* nature of the procedure under Rule 135 of the Rules, by seeking an evaluation by a defence-selected expert and – noting the *ex parte* classification of the Request – without the parties and participants’ awareness or opportunity to make submissions.
23. Noting the potential impact on the starting date of trial, the Single Judge stresses that, should the Defence intend to file an actual motion under Rule 135 of the Rules, he expects the process to be transparent to all parties and participants. The

³⁹ In this regard, the Single Judge also notes Regulation 103(4) of the Regulations, Regulation 157(1), (7), (8) and (9) of the Regulations of the Registry.

⁴⁰ Request, ICC-01/14-01/18-544-Conf-Exp, paras 1, 9, 14.

Single Judge will not accept *ex parte* submissions on this matter and notes that underlying material will be subject to disclosure.

24. In the same spirit, the Single Judge also considers that none of the information in the Request, the Registry Observations and the Request for Leave to Reply warrants an *ex parte* classification. The Defence and the Registry are therefore ordered to either request reclassification or file redacted versions of these filings, within seven days of notification of this decision.
25. By the same token, the Single Judge will also not consider an examination for ‘any other reasons’, pursuant to Rule 135 of the Rules, in the absence of a transparent *inter partes* process.
26. Finally, the Single Judge is alarmed about Mr Ngaïssona’s decision not to make use of the medical care available to him at the Detention Centre⁴¹ and feels obliged to remind the Defence and Mr Ngaïssona again of the Registry’s neutrality, which includes the Medical Officer. The Single Judge trusts that the Registry, as the neutral entity dealing with all matters relating to the accused’s health in detention, will duly exercise its duty of care and will provide Mr Ngaïssona with any medical care as and when needed.

C. Assessment of the Request under Article 67(1) of the Statute, Regulation 103(4) of the Regulations and Regulation 157 of the Regulations of the Registry

27. The Single Judge is of the view that Rule 135 of the Rules exclusively regulates medical examinations of accused for the purposes described in paras 16-18 above. Neither Article 67(1) of the Statute⁴² nor Regulation 103(4) of the Regulations and Regulation 157 of the Regulations of the Registry⁴³ provide the accused with a separate right to such examination by a defence-selected expert.
28. Nonetheless, insofar as the Request’s goal was to merely arrange a consultation visit with [REDACTED] as an external practitioner, the Single Judge notes that the Defence is free to do so under Regulation 103(4) of the Regulations and

⁴¹ See Registry Observations, ICC-01/14-01/18-557-Conf-Exp, para. 14.

⁴² See Request, ICC-01/14-01/18-544-Conf-Exp, paras 9, 14.

⁴³ See Registry Observations, ICC-01/14-01/18-557-Conf-Exp, para. 12.

Regulation 157 of the Regulations of the Registry, with the caveat that the Registrar may require that Mr Ngaïssona first consult the Medical Officer. The decision whether or not a consultation visit with [REDACTED] is permitted, therefore ultimately lies with the Registrar.

D. Privileged communications and confidentiality of the medical record

29. Should a consultation visit with [REDACTED] pursuant to Regulation 103(4) of the Regulations and Regulation 157 of the Regulations of the Registry be permitted by the Registrar, the communications made in this context between the accused and [REDACTED] will be privileged under Rule 73(2) and (3) of the Rules.⁴⁴ The Single Judge finds that these communications produce a reasonable expectation of privacy and that non-disclosure and confidentiality of these communications is essential to the nature and type of the relationship. Moreover, the Single Judge considers that recognising the privileged nature of these communications furthers the objectives of the Statute and the Rules, by ensuring the accused's well-being.
30. In this context, the Single Judge further observes that the Registry conflates various issues related to [REDACTED] potential role and privileged communications and sees the need to provide the following clarifications. First, the imposed restrictions on contact apply only to non-privileged visits.⁴⁵ Second, [REDACTED], as a [REDACTED] expert, cannot be considered part of the 'Defence team' in the sense that it would enable him to privileged communications under Rule 73(1) of the Rules. In this regard, the Chamber recalls that Rule 73(1) of the Rules is confined to 'communications made in the context of the professional relationship between a person and his or her *legal counsel*'.⁴⁶ This interpretation is further supported by Article 67(1)(b) of the Statute, which stipulates that the accused may 'communicate freely with *counsel*

⁴⁴ See also 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, paras 7-11.

⁴⁵ Decision on Mr Ngaïssona's Restrictions on Contacts and Communications in Detention, 17 April 2020, ICC-01/14-01/18-484-Conf-Exp, confidential *ex parte*, only available to the Prosecution, the Ngaïssona Defence and the Registry (confidential redacted version notified the same day), para. 15, p. 17.

⁴⁶ Emphasis added.

of [his or her] choosing in confidence'.⁴⁷ Although counsel may be assisted by certain other individuals,⁴⁸ including a [REDACTED] expert, the Single Judge does not consider that a [REDACTED] expert would enjoy privileges under Rule 73(1) of the Rules.

31. As regards [REDACTED] 'limited access to confidential information required in the conduct of his evaluation', the Single Judge understands this request to relate to the medical record. The Single Judge notes that Regulation 156(2) of the Regulations of the Registry exhaustively lists the individuals who may access the accused's medical record. External practitioners, who consult an accused pursuant to Regulation 103(4) of the Regulations and Regulation 157 of the Regulations of the Registry, are not mentioned in this list. Nonetheless, this provision acknowledges that other individuals may consult the medical record, where the accused gives his or her consent. In light of the fact that the Single Judge cannot discern whether Mr Ngaïssona has given his explicit consent to sharing his medical record with [REDACTED], and in the absence of any indication that the Medical Officer has refused to disclose it, the Single Judge cannot decide on this request at this point.
32. While this is without prejudice to further requests, the Single Judge reminds the Defence that matters which can be resolved *inter partes*, or with the Registry, as the case may be, should only be brought before the Chamber if an agreement cannot be reached.

E. Modalities of the consultation visit

33. The Single Judge recalls that pursuant to the Temporary Measures, in-person visits cannot be facilitated until at least 29 June 2020. It is not the Single Judge's role to override these measures by issuing orders to the Registry. Rather, the Single Judge must make decisions within this framework, by considering all interests at stake and bearing in mind alternative, less intrusive, ways. In this instance, this means balancing Mr Ngaïssona's rights and well-being and the

⁴⁷ Emphasis added.

⁴⁸ Rule 22(1) of the Rules permits that '[c]ounsel [...] be assisted by other persons [...] with relevant experience'; Regulation 68 of the Regulations foresees that such '[p]ersons assisting counsel [...] may include persons who can assist counsel in the presentation of a case before a Chamber'.

well-being of other detainees and those staff members needed to facilitate the in-person visit, in particular the interpreter. In light of the fact that medical care has been continuously available at the Detention Centre through the Medical Officer, and noting that a consultation with [REDACTED] could have been facilitated per video, the Single Judge rejected the Request with regard to the in-person visit on 22 June 2020.

34. That being said, for future consultation visits, the Defence can either use the video-technology available to schedule a consultation visit with [REDACTED], or schedule an in-person appointment for when the Temporary Measures on visits are lifted, provided that the Registrar agrees to external consultation pursuant to the second sentence of Regulation 157(1) of the Regulations of the Registry.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the request to exceptionally facilitate in-person meetings between Mr Ngaïssona and [REDACTED];

REJECTS the request to grant [REDACTED] access to the medical record;

GRANTS the request for privileged communications between [REDACTED] with Mr Ngaïssona, as described above in paragraph 29;

ORDERS the Defence to request reclassification of ICC-01/14-01/18-544-Conf-Exp and ICC-01/14-01/18-558-Conf-Exp, or file redacted versions, within seven days of notification of this decision; and

ORDERS the Registry to request reclassification of ICC-01/14-01/18-557-Conf-Exp (including the annex), or file a redacted version, within seven days of notification of this decision.

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



Judge Bertram Schmitt

Single Judge

Dated 26 January 2021

At The Hague, The Netherlands