

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: **19 October 2022**

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***

Confidential

Defence Request for Further Directions on the “Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant” (ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5)

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence for Mr Patrice-Edouard Ngaïssona ("the Defence") hereby seeks Trial Chamber V's guidance (the "Chamber") with respect to the interpretation of paragraph 27 of the "Protocol on the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant" (the "Protocol") (the "Request").¹

II. PROCEDURAL HISTORY

2. On 22 March 2019, the Chamber adopted the Protocol.²
3. Having been made aware that on two occasions the Prosecution had been in contact with one Defence witness within the meaning of the Protocol, the Defence approached the Prosecution to ask that it refrains from further contact with this individual.³ It emerged from the exchange of emails that followed between the Defence and the Prosecution that the two parties disagreed on the interpretation of the Protocol and in particular as to the circumstances of the applicability of its paragraph 27.
4. As a result of this unfruitful discussion, and given that it was not the first time that a potential violation of the Protocol by the Prosecution had come to the Defence's attention, the Defence sought the Chamber's guidance as to the scope of paragraph 27 of the Protocol by way of email dated 13 October 2022.⁴

¹ ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5.

² ICC-01/14-01/18-156.

³ Email from the Defence to the Prosecution dated 3 October 2022 at 09:59am.

⁴ Email from the Defence to the Chamber dated 13 October 2022 at 11:03am.

5. On 14 October 2022, the Chamber instructed the Defence to submit its request by way of formal filing.⁵

III. CONFIDENTIALITY

6. In accordance with regulation 23 *bis* (1) of the Regulations of the Court, this response is filed confidentially as it refers to confidential *inter partes* exchanges.

IV. SUBMISSIONS

7. Paragraph 27 of the Protocol states that

a party or participant shall not contact or interview a witness of another party or participant (the "calling party or participant") if the intention to call the witness to testify or to rely on his or her statement has been communicated to the party or participant, or if this intention is otherwise clearly apparent (emphasis added).

8. In light of the wording of this paragraph 27, the Defence is of the view that the Prosecution should refrain from pursuing any discussion with individuals they approach who make it clearly apparent that the intention of the Defence is to call them as witnesses or rely on their statement. Whenever such intention becomes apparent, and if need be, the Prosecution has always the opportunity to request confirmation from the Defence of that intention.

9. As already addressed in the course of *inter partes* discussions, the Defence interprets the last part of paragraph 27 as meaning that the communication of a list of witnesses is only one way of communicating the calling party's intention and that such intention can also be determined by the opposing party based on its exchange with the individual approached.

⁵ Email from the Chamber to the Defence dated 14 October 2022 at 04:38pm.

10. This interpretation is also in line with the definition of “witness” in paragraph 4(f) of the Protocol, which does not expressly require the calling party’s intention to be conveyed by the calling party directly.
11. For its part, the Defence has always followed this approach and refrained from speaking to individuals whom it found out had been in contact with the Prosecution long before the Prosecution communicated its List of Witnesses to the other parties.
12. As emerged during *inter partes* discussions, however, the Prosecution holds a different interpretation, and appears to consider its obligation to be limited to refraining from contacting or interviewing individuals a list of which has been communicated by the Defence to the Prosecution.
13. This overly restrictive interpretation of paragraph 27 of the Protocol could damage the Defence’s investigations in the field at this particularly sensitive stage of the proceedings where the Defence is not yet required to provide the Chamber and the parties with its witness list but has already initiated investigations which it expects to safeguard.
14. The Prosecution would be put in a position to present a defence witness with its own theory and documents, without the Defence knowing this, and even might influence a defence witness with its own theory and documents. Such a situation is highly undesirable and runs counter to the purpose of the Protocol. Needless to say, that such a situation would be highly prejudicial to the Defence.
15. For the aforementioned reasons and in order to preserve the integrity of its investigations, the Defence seeks the Chamber’s guidance as to the scope of paragraph 27 of the Protocol.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character, followed by a horizontal line.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 19 October 2022

At The Hague, the Netherlands.