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**International
Criminal
Court**



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Date: 31 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-ÉDOUARD NGAÏSSONA**

Confidential

Common Legal Representatives' Joint Response to the "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: Common Legal Representatives of Victims

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

The Office of the Prosecutor Mr Karim A. A. Khan KC Mr Mame Mandiaye Niang Mr Kweku Vanderpuye	Counsel for Alfred Yekatom Ms Mylène Dimitri Mr Thomas Hannis Ms Anta Guissé
	Counsel for Patrice-Édouard Ngaïssona Mr Geert-Jan Alexander Knoops Mr Richard Omissé-Namkeamai Ms Marie-Hélène Proulx
Legal Representatives of the Victims Mr Dmytro Suprun Mr Abdou Dangabo Moussa Ms Elisabeth Rabesandratana Mr Yaré Fall Ms Marie Édith Douzima Lawson Ms Paolina Massidda	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims Ms Paolina Massidda Mr Dmytro Suprun	The Office of Public Counsel for the Defence
States' Representatives	Amicus Curiae

REGISTRY	
Registrar Mr Peter Lewis	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

I. INTRODUCTION

1. The Common Legal Representatives of the Victims of Other Crimes and the Common Legal Representative of the Victims Former Child Soldiers (together the "CLR") hereby file their joint response to the Defence's 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 (the "Request").¹

2. The CLR submit that the requirement of instructing parties or participants to not contact or interview a witness if the intention of the other party (or participant) to call him or her is *clearly apparent* – already constitutes a high standard and needs no further clarification. Indeed, as established in the jurisprudence of the Court, names of such persons or potential witnesses should firstly be communicated to the opposing party or participant using a final or, at least, provisional list of witnesses.

3. In fact, without being in possession of said list the concerned party or participant cannot possibly be certain that, said intention, if any, is *clearly apparent*. Otherwise, parties or participants will be prevented from properly leading their investigation and unduly burdened in identifying and engaging with persons that they might - or might not – called to testify. In any event, whether certain situation when a party's (or participant) intention to call is *clearly apparent* is fact-specific and depends on the nature, purpose, and, ultimately, outcome of the contacts initiated or interviews conducted. Therefore, a blanket prohibition, as advocated by the Defence, of any contact or interview by the other party (or participant) with an individual who might or might not eventually become a potential witness would be premature, inappropriate and highly detrimental to the fairness of the proceedings.

¹ See the "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)", [No. ICC-01/14-01/18-1623-Conf](#), 19 October 2022, (the "Request").

II. PROCEDURAL BACKGROUND

4. On 22 March 2019, Trial Chamber V (the "Chamber") issued the "Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses" (the "Protocol").²

5. On 13 October 2022, the Defence for Mr Patrice-Edouard Ngaïssona (the "Defence") sought via an email the Chamber's guidance as to the scope of paragraph 27 of the Protocol.³ On 14 October 2022, the Chamber by e-mail instructed the Defence to submit its request by way of formal filing.⁴

6. On 19 October 2022, the Defence filed the Request.⁵

III. LEVEL OF CLASSIFICATION

7. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. However, the CLRV indicate that this document does not contain information which should remain confidential and therefore can be reclassified as public.

² See the "Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses" (Pre-Trial Chamber II), No. ICC-01/14-01/18-156 and No. ICC-01/14-01/18-156-AnxA, 22 March 2019 (the "Protocol").

³ See the e-mail from the Defence to the Chamber dated 13 October 2022 at 11:03.

⁴ See the e-mail from the Chamber to the Defence dated 14 October 2022 at 16:38.

⁵ See the Request, *supra* note 1.

IV. SUBMISSIONS

8. Paragraph 27 of the Protocol states that:

"Except under the conditions specified in this section, 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".⁶

9. In the Request, the Defence argues that (a) the Prosecution should refrain from pursuing any discussion with individuals it approaches who make it clearly apparent that the Defence has the intention to call them as witnesses or rely on their statement(s). Whenever such intention becomes apparent, the Prosecution has always the opportunity to request confirmation from the Defence of that intention; (b) yet, the Prosecution disagrees and considers its obligation to be limited to refraining from contacting or interviewing individuals whose names are on a list communicated by the Defence; (c) such communication of a list of witnesses is only one way of communicating the calling party's intention since the latter can also be determined by the opposing party based on its exchange with the individual approached; and (d) the Prosecution's interpretation of paragraph 27 of the Protocol could be prejudicial to the Defence or damage the Defence's investigations in the field while the Prosecution might present a potential defence witness with its own theory and documents or influence her or him.⁷

10. The CLRV submit that the scope of paragraph 27 of the Protocol is absolutely clear and needs no further clarification. Indeed, it explicitly indicates that a party or participant shall not contact or interview a witness of a 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*.

⁶ See the Protocol, *supra* note 2.

⁷ See the Request, *supra* note 1, paras. 8-14.

The first way of communicating is without any controversy. The real question is what constitutes an intention that is *clearly apparent*.

11. A legal dispute concerning this matter has been raised and resolved in the *Ongwen* case. In particular, the Single Judge of Trial Chamber IX (the "Single Judge") issued the "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'" (the "Ongwen Decision")⁸ which dealt with a similar situation.

12. In said case, Mr Ongwen was found to be in breach of a similar protocol as a result of his attempt to transfer monies to his "family".⁹ The fact was that, while some of the concerned individuals had already testified for the Prosecution, others were likely to be called to testify either by the Prosecution or the Defence.¹⁰ The Single Judge found that such money transfers to potential witnesses might influence their testimonies and damage the integrity of the proceedings.¹¹

13. Most importantly, when the Single Judge issued the decision, the Prosecution was still presenting its case while the Defence was preparing its evidence concerning Article 31 affirmative defences. Therefore, the Single Judge clarified in the *Ongwen* Decision that "*potential witnesses*" are those who appear on a provisional or final witness list".¹² The Single Judge thus held that only those persons whose names have been communicated via a provisional or final witness list to the other party or participant by the calling party (or participant) are considered to be *potential witnesses* of the case.

⁸ See "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'" (Trial Chamber IX), [No. ICC-02/04-01/15-521](#), 10 August 2016 (the "Ongwen Decision").

⁹ *Idem*, paras. 6-14.

¹⁰ *Idem*, paras. 14-15.

¹¹ *Idem*, paras. 15 and 17.

¹² *Idem*, footnote 37.

14. In other words, unless the Defence communicates its *final* or, at least, *provisional* list of witnesses, the Prosecution will not be in the position to correctly identify those potential witnesses that the Defence has the intention to call. This matter also concerns the legal representatives of victims in the event that they decide to call witnesses to testify since the Protocol applies equally to participants including both teams of the Common Legal Representatives.¹³ Indeed, because (more or less) similar factual situations of the case are investigated by all parties and participants, *potentially anyone* approached by the Prosecution (as well as by the legal representatives of victims) could become a witness for the Defence at any given point of time.

15. Hence, without being in possession of said *final* or, at least, *provisional* list of the Defence witnesses, the Prosecution (as well as the legal representatives of victims) cannot be certain that, if any, such intention is *clearly apparent*. Otherwise, if the Defence's interpretation of paragraph 27 of the Protocol is adopted, all parties or participants will be prevented from properly leading their investigation and be unduly burdened in their engagement with any persons that they might - or might not - call to testify at the end.

16. Again, the Protocol *requires explicitly* that the calling party's or participant's intention to call the witness to testify or to rely on his or her statement(s) must be *clearly apparent*. Strictly speaking, a simple suspicion or fact-less belief on part of the other party or participant that certain individual might or might not become a witness of, or whose statement might or might not be relied by the calling party is not sufficient to meet this high standard.

17. In this regard, it should be recalled that the Protocol not only prohibits an interview with a potential witness but also bans even a simple contact with him or her.

¹³ See the Protocol, *supra* note 2. In particular, para. 4.b) reads as follows: "Participant" shall mean any other entity participating in the proceedings, including but not limited to the legal representatives of victims and States, and any other persons properly designated as members of their teams (emphasis added). See also paras. 27 and 31-32.

As a result, in the event that the Defence's interpretation of paragraph 27 of the Protocol prevails, the Prosecution (as well as the legal representatives of victims) will be barred even from establishing a simple contact with individuals whom the former has no clear idea if they might or might not eventually be called by the Defence.

18. On the other hand, the high standard provided in paragraph 27 of the Protocol – the intention of the other party or participant being *clearly apparent* – would be met in plain and more serious situations like the one arisen in the *Ongwen* case where a party (or the accused) directly contacted potential witnesses in order to give them monies while being fully conscious of the fact that they were in fact called or would likely to be called to testify in the case. Indeed, such actions, as held by the Single Judge in the *Ongwen* case, might have effect on their prospective testimonies or even amount to witness interference.¹⁴

19. In any event, whether certain situation when a party's (or participant's) intention to call is *clearly apparent* is fact-specific and thus largely depends on the purpose, nature and, ultimately, outcome of the contacts initiated or interview conducted. A blanket prohibition (as advocated by the Defence) of any contact or interview by the Prosecution (as well as the legal representatives of victims) with an individual *who might or might not eventually become a potential witness* or, in other words, *whose name is not communicated via, at least, a provisional witness list* would be premature, inappropriate and highly detrimental to the fairness of the proceedings.

¹⁴ See the Ongwen Decision, *supra* note 8, paras. 15 and 17.

Respectfully submitted.

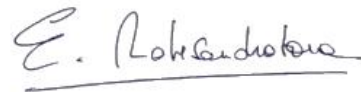


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Dated this 31st day of October 2022

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle
(France) and Saint Louis (Senegal)