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**No. ICC-01/14-01/18
Date: 30 November 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***

Public

**Decision on the Ngaïssona Defence Request for Further Directions on the
Contact Protocol**

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

The Office of the Prosecutor

Karim A. A. Khan
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamaï
Marie-Hélène Proulx

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

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

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 and 67 of the Rome Statute, issues this ‘Decision on the Ngaïssona Defence Request for Further Directions on the Contact Protocol’.

I. Procedural history

1. On 19 October 2022, the Ngaïssona Defence requested the Chamber to clarify the scope 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’¹ (the ‘Contact Protocol’ and the ‘Request’). Specifically, it asks the Chamber to clarify when a participant’s intention to call a witness to testify or to rely on their statement is ‘otherwise clearly apparent’.²
2. On 31 October 2022, the Common Legal Representatives of the Victims of the Other Crimes and the Common Legal Representative of the Former Child Soldiers (jointly, the ‘CLRV’) responded to the Request, submitting that the Contact Protocol needs no further clarification (the ‘CLRV Response’).³
3. On the same day, the Yekatom Defence supported the Request (the ‘Yekatom Defence Response’).⁴
4. Also on the same day, the Office of the Prosecutor (the ‘Prosecution’) indicated that it does not intend to respond to the Request and defers to the Chamber’s

¹ Annex 5 to the Decision on Protocols at Trial, 8 October 2020, ICC-01/14-01/18-677-Anx5.

² 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), ICC-01/14-01/18-1623-Conf. The Chamber notes that the request was initially sent per email (see email from the Ngaïssona Defence, 13 October 2022, at 11:03). The Chamber subsequently instructed the Ngaïssona Defence to file it on the record (see email from the Chamber, 14 October 2022, at 16:38).

³ 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)”, ICC-01/14-01/18-1642-Conf.

⁴ Yekatom Defence Response to Ngaïssona “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)”, ICC-01/14-01/18-1623-Conf, 19 October 2022, ICC-01/14-01/18-1643-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence and the Prosecution (confidential redacted version notified on 2 November 2022).

discretion. However, it provided the Chamber with *inter partes* communications between itself and both defence teams to ‘avoid any misunderstanding or inaccurate representations’ regarding its position on paragraph 27 of the Contact Protocol (the ‘*Inter Partes Communications*’).⁵

5. On 4 November 2022, the Yekatom Defence requested leave to reply to the CLRV Response (the ‘Request for Leave to Reply’).⁶
6. On 9 November 2022, the CLRV responded to the Request for Leave to Reply (the ‘Response to the Request for Leave to Reply’).⁷
7. On 25 November 2022, as instructed by the Chamber,⁸ the Ngaïssona Defence provided it with an email from 3 October 2022, in which it asked the Prosecution to abstain from contacting a certain individual, whom the Ngaïssona Defence intends to call as a witness (the ‘3 October 2022 Email’) and subsequent exchanges between itself and the Prosecution.⁹

II. Analysis

A. Request for Leave to Reply

8. The Yekatom Defence seeks to respond to the CLRV’s submission that ‘without a final or provisional list of the Defence witnesses and “if the [NGAISSONA] 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

⁵ See emails from the Prosecution, 31 October 2022, at 17:59, 18:17 and 18:31. The latter includes an attachment with three *inter partes* communications: email from the Prosecution to the Yekatom Defence, 6 October 2022, at 19:34; email from the Prosecution to the Ngaïssona Defence, 6 October 2022, at 11:58; email from the Prosecution to the Ngaïssona Defence, 19 October 2022, at 19:46.

⁶ Yekatom Defence Request for Leave to Reply to the ‘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)”, 31 October 2022, ICC-01/14-01/18-1642-Conf, ICC-01/14-01/18-1654-Conf.

⁷ Common Legal Representatives’ Joint Response to the “Yekatom Defence Request for Leave to Reply to the ‘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)”, ICC-01/14-01/18-1660-Conf.

⁸ Email from the Chamber, 24 November 2022, at 12:59.

⁹ Email from the Ngaïssona Defence to the Chamber, 25 November 2022, at 12:26.

unduly burdened in their engagement with any persons that they might - or might not – call to testify at the end””.¹⁰ It submits that it could not have anticipated that the CLRV ‘would take a position which appears to be at odds to *inter partes* communications’ and thus seeks to provide said communications and limited related submission.¹¹

9. The CLRV request the Chamber to dismiss the Request for Leave to Reply *in limine*, arguing that the Yekatom Defence ‘– being one of the responding participants – is not entitled under regulation 24(5) of the Regulations of the Court [...] to request leave to reply’. In the alternative, the CLRV request that the Chamber reject it on the merits, or should it be granted, to authorise the CLRV to file further observations on the new issues eventually raised by the Yekatom Defence.¹²
10. While the Chamber does not consider that the Yekatom Defence is prohibited from requesting leave to reply in this instance, it is not persuaded that the proposed reply would in fact assist the Chamber in adjudicating the Request. In this regard, the Chamber notes that it does not require the *inter partes* conversations between the Yekatom Defence and the CLRV concerning their field investigations in order to interpret paragraph 27 of the Contact Protocol. Accordingly, the Request for Leave to Reply is rejected.

B. Request

11. As stated on several occasions, the Chamber recalls that the Prosecution’s investigations in this case should largely be completed at the stage of the confirmation of charges hearing.¹³ Furthermore, it notes that the Prosecution submitted its Final Witness List on 10 November 2020¹⁴ and expects that this list is, indeed, *final*. In view of that, and noting that no allegations to the contrary

¹⁰ Request for Leave to Reply, ICC-01/14-01/18-1654-Conf, para. 3, *referring to the CLRV Response*, ICC-01/14-01/18-1642-Conf, para. 15.

¹¹ Request for Leave to Reply, ICC-01/14-01/18-1654-Conf, paras 4-5.

¹² Response to the Request for Leave to Reply, ICC-01/14-01/18-1660-Conf, paras 2-6.

¹³ *See, for example*, Decision on the Prosecution Request to Add 103 Items to its List of Evidence, 6 October 2022, ICC-01/14-01/18-1597-Conf (public redacted version notified the same day), para. 23.

¹⁴ Annex A to the Prosecution’s List of Witnesses and Evidence, ICC-01/14-01/18-724-Conf-AnxA.

have been made by the defence, the Chamber trusts that the Prosecution is not contacting further individuals with the purpose of testifying *in the present case*.

12. To the extent that the Prosecution is contacting individuals as part of its investigations in other cases, including the case of *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawak* (the ‘Mokom Case’), the Chamber notes that the Contact Protocol does not apply across cases and recalls its previous directions on this matter.¹⁵ The Prosecution is therefore free to contact individuals for the purpose of calling them as witnesses in the *Mokom Case*, or any other case before this Court, even if these individuals might be, or become, witnesses for the defence in the present case. In this respect, the Chamber stresses that nothing in the Court’s legal framework prevents a witness from testifying as a Prosecution witness in one case and as a defence witness in another.
13. In light of the above, the Chamber sees no need to further clarify paragraph 27 of the Contact Protocol at this point. Accordingly, the Request is rejected.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request;

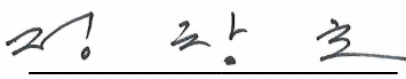
ORDERS the Ngaïssona Defence and the Yekatom Defence to file public redacted versions of the Request, ICC-01/14-01/18-1623-Conf and the Yekatom Defence Response, ICC-01/14-01/18-1643-Conf-Exp, respectively, within one week of notification of the present decision;

ORDERS the Prosecution and the Ngaïssona Defence to file the *Inter Partes* Communications and the 3 October 2022 Email, respectively, on the record of the case, with redactions as needed, within one week of notification of the present decision; and

ORDERS the Registry to reclassify the CLRV Response, ICC-01/14-01/18-1642-Conf, the Request for Leave to Reply, ICC-01/14-01/18-1654-Conf and the Response to the Request for Leave to Reply, ICC-01/14-01/18-1660-Conf to public.

¹⁵ Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case, 23 August 2022, ICC-01/14-01/18-1552, para. 14.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 30 November 2022

At The Hague, The Netherlands