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Pénale
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**International
Criminal
Court**

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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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of “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”**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom (“Defence”) hereby responds to the Ngaïssona Defence’s “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)”, notified on 19 October 2022.¹
2. The Defence supports the Ngaïssona Defence in seeking the Chamber’s guidance as to 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”² (the “Protocol”). The Defence fully concurs with the Ngaïssona Defence’s interpretation of paragraph 27 of the Protocol to the effect that “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”.³

PROCEDURAL HISTORY

3. On 22 March 2019, Pre-Trial Chamber II introduced the Protocol in its “Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses”.⁴
4. On 8 October 2020, the Chamber in its “Decision on Protocols at Trial” adopted the Protocol as set out by Pre-Trial Chamber II.⁵

¹ ICC-01/14-01/18-1623-Conf.

² ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5.

³ ICC-01/14-01/18-1623-Conf, para. 9.

⁴ ICC-01/14-01/18-156 and ICC-01/14-01/18-156AnxA.

⁵ ICC-01/14-01/18-677, fn. 4 and ICC-01/14-01/18-Anx5 ; whilst the situations explained by the Defence below occurred under the 22 March 2019 Protocol, the content has not changed under the current 8 October 2020 Protocol and paragraph 27 stayed exactly the same

5. On 25 March 2022, an updated Chambers' Practice Manual was published, with, in Annex, an updated version of the Protocol, which states, at paragraph 28:

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. Where a comprehensive (final) list of witnesses has been filed by a party or a participant for its presentation of evidence at trial, the obligations set out in the present section shall apply only in respect of individuals included in such list, and not in respect of any other individuals appearing in earlier (provisional) lists or relied upon or otherwise interviewed at earlier stages of the proceedings. [emphasis added]⁶

6. On 19 October 2022, the Ngaïssona Defence filed 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)".⁷

SUBMISSIONS

7. The Defence supports the Ngaïssona Defence's view that paragraph 27 of the Protocol should be interpreted in a way 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 exchanges with the individual approached".⁸
8. The Defence also supports the Ngaïssona Defence's view that its interpretation of paragraph 27 is in line with the definition of "witness" provided by paragraph 4(f) of the Protocol, "which does not expressly require the calling party's intention to be conveyed by the calling party directly".⁹

⁶ See Chamber's Practice Manual, [Fifth edition adopted following the judicial retreat of 2021](#).

⁷ ICC-01/14-01/18-1623-Conf.

⁸ ICC-01/14-01/18-1623-Conf, para. 9.

⁹ ICC-01/14-01/18-1623-Conf, para. 10.

9. The Defence submits the Prosecution should follow the same steps the Defence applies itself when meeting with a potential witness.
10. Specifically, when meeting for the first time with a potential witness, the Defence always asks them if they have previously met or spoken to a representative of the Prosecution of the International Criminal Court.¹⁰ If so, the Defence notifies by email the Prosecution and immediately stops questioning the individual.
11. The Defence has consistently applied the above procedure to date, even prior to the filing of the Prosecution's Final Witness List¹¹ on 10 November 2020.
12. By way of example, on [REDACTED], a Defence resource person called P-2013, who at that time was a potential Prosecution Witness; and he immediately ended the call when P-2013 informed him he had already been contacted by the Prosecution. On the same day, the Defence notified the Prosecution of this inadvertent contact, informing the latter that the resource person was "[REDACTED]";¹² and further [REDACTED].¹³ On [REDACTED], the Prosecution confirmed to the Defence that P-2013 was a Prosecution Witness.¹⁴ At that point, P-2013's Witness Statement had not been disclosed;¹⁵ nor had the Prosecution's Final Witness List been communicated.
13. In the same period, similar exchanges occurred involving potential Prosecution witnesses – again, prior to their witness statements having been disclosed, and prior to the filing of the Prosecution Final Witness List.

¹⁰ See, as example, ICC-01/14-01/18-1603-Conf-Exp-AnxA.

¹¹ ICC-01/14-01/18-724-Conf-AnxA.

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ CAR-OTP-2075-1751-R01, disclosed on 13 June 2019.

- P-1974: the inadvertent contact occurred on [REDACTED], the Defence notified the Prosecution on [REDACTED];¹⁶ P-1974's Witness Statement¹⁷ was disclosed on [REDACTED].
- P-0888: the inadvertent contact occurred on [REDACTED], the Defence notified the Prosecution on the same day;¹⁸ P-0888's Witness Statement¹⁹ was disclosed on [REDACTED].
- P-2084: the inadvertent contact occurred on [REDACTED], the Defence notified the Prosecution on [REDACTED];²⁰ P-2084's Witness Statement²¹ was disclosed on [REDACTED].

14. P-2013 was later dropped by the Prosecution and did not appear on its Final Witness List. Up to that point, the Defence continued to consider P-2013 as a Prosecution Witness within the meaning of paragraph 4(f) of the Protocol,²² i.e. that the Prosecution *intended* to call him as a witness or to rely on his statement. Only when P-2013 was not included in the Final Witness List, the Defence contacted him as a potential Defence Witness.

15. Subsequently, on [REDACTED], P-2013 informed the Defence that he had been contacted by the Prosecution and that the Prosecution, apparently without having asked him if he was at that stage a potential witness of another party, informed him that it would contact him again in the following weeks in order to meet with him in Bangui.²³

¹⁶ [REDACTED]

¹⁷ CAR-OTP-2068-0222-R01.

¹⁸ [REDACTED]

¹⁹ CAR-OTP-2031-0217-R01.

²⁰ [REDACTED]

²¹ CAR-OTP-2094-0968-R01.

²² ICC-01/14-01/18-677-Anx5, para 4 f) : "Witness" shall mean a person whom a party or participant intends to call to testify or on whose statement a party or participant intends to rely, insofar as the intention of the party or participant to call the witness or to use his or her statement has been clearly communicated to the opposing party. The term "witness" includes expert witnesses.

²³ [REDACTED]

16. When the Defence asked the Prosecution to refrain from directly contacting P-2013, the Prosecution replied, in relation to paragraph 27 of the Protocol, that [REDACTED]²⁴ However, as recalled by the Ngaïssona Defence, the Defence is under no obligation to provide a list of witnesses at this stage of the proceedings.²⁵ Moreover, the Prosecution adopts an unduly broad interpretation of the Protocol, contrary to paragraph 2 which states that it [REDACTED], when suggesting that the Defence is obliged to provide a list of all the potential Defence witnesses.
17. It would be unreasonable for the Prosecution to ask for a list of witnesses before any such deadline is date set by the Chamber, and prior to the close of the Prosecution's presentation of evidence.²⁶ Moreover, to this date, only roughly half of the witnesses expected to be called by the Prosecution have appeared before the Chamber.
18. Regarding P-2013, the Prosecution further stated [REDACTED].²⁷ The Defence submits that for the Prosecution to ask a simple question to the individual, i.e. whether they have previously been contacted by another party in these proceedings, cannot be reasonably characterised as a "burden of discovering" a potential witness, especially given that the Defence has been following this verification step to avoid any difficulties, before the Prosecution Final Witness List of witnesses was communicated.
19. The Defence also notes that its proposed verification procedure would ensure with the Code of Conduct for the office of the Prosecutor ("Code of Conduct"). Under this Code of Conduct, the Prosecution's duties consist notably in

²⁴ [REDACTED]

²⁵ ICC-01/14-01/18-1623-Conf, para. 13.

²⁶ See, in particular, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Fifth decision on matters related to the conduct of proceedings: presentation of evidence by the LRVs and Defence, 22 Sept 2021, ICC-01/12-01/18-1756, para. 11, where the Defence's Final Witness List had to be provided within four weeks of the Prosecution's notice; *Procureur c. Dominic Ongwen*, Preliminary Directions for any LRV or Defence Evidence Presentation, 13 Oct 2017, ICC-02/04-01/15-1021, para. 7, where the delay fixed was three weeks.

²⁷ [REDACTED]

“conduct[ing] investigations [...] in the interests of justice” (para. 49(a)) and to “fully respect the rights of persons under investigation and the accused and ensure that proceedings are conducted in a fair manner” (para. 51(b)).

20. The above-noted example of P-2013 demonstrates that the Defence’s proposed preliminary verification while meeting with potential witnesses is necessary to comply with the Protocol and further, that it is in the interests of justice and transparency. The Defence also notes that at its paragraph 1, the Protocol clearly states that one of its purposes is to protect “the integrity of investigations, in a manner consistent with the rights of suspects and accused”.
21. The example of P-2013 also justifies the Defence’s view that under paragraph 27, the Protocol applies not only when the Final Witness List has been communicated to the other parties upon Chamber’s instruction (“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”) but also when a party has contacted and exchanged with an individual, before communicating any list of witnesses (“or if this intention is clearly apparent [emphasis added]”).
22. Similarly, on [REDACTED], the Defence informed the Prosecution that it was made aware of potential contacts between the Prosecution and another Defence Witness, [REDACTED] and if such, asked its investigators to refrain from further contacts.²⁸ At timing of filing, the Prosecution is yet to reply to the Defence’s email on the matter.
23. Most importantly, this is in line with paragraph 28 of the Protocol as set out in the updated Chamber’s Practice Manual, which clearly differentiates two situations, that is before and after the Final Witness List has been disclosed. The Protocol is clear when using the phrase “Where a comprehensive (final) list of

²⁸ [REDACTED]

witnesses has been filed” and stating it is only when said list has been filed that the prohibition on contacting the witnesses of another party or participant “apply only in respect of individuals included in such list, and not in respect of any other individuals appearing in earlier (provisional) lists or relied upon or otherwise interviewed at earlier stages of the proceedings”. It can be understood from this, that before a final witness list is filed, the obligations apply to *any* individual “interviewed at an earlier stage of the proceedings”) who could be a potential witness for another party or participant.

24. In light of the above, there is a clear prohibition on contacting potential witnesses of another party or participant when this party intends to call them to testify or to rely on their statement, whether or not they appear on a party’s Final Witness List. It is also clear that this is the intention of the Chambers in their Practice Manual, indicating at paragraph 28 of the Protocol that only when the Final Witness List has been provided, then the restrained contacts obligations of the other party are limited to individuals included in this list and only then they can communicate with any individuals not mentioned in this list. Nowhere, neither in practice nor on paper, does the obligation of restrained contacts only arise when a Final Witness List has been provided. Indeed, the Defence would otherwise carry the burden to communicate to the Prosecution on a continuous basis, information regarding every potential witness it meets, which would go against the Protocol’s letter and spirit.

25. The Defence hereby submits the Prosecution should use the same method as the Defence to prevent any misunderstandings and prejudice to Defence investigations. Specifically : when contacting potential witnesses asking them at a preliminary stage if they have had previous contacts with individuals affiliated with the Court; and if so, to immediately stop communication with the individual concerned, to promptly notify the party or participant of the inadvertent contact, and to seek confirmation from the party or participant in

question as to whether it intends to call that individual to testify or rely on their statement.

CONCLUSION

26. In light of the above, the Defence contends that the Ngaissona Defence request for guidance in relation to paragraph 27 of the Protocol should be granted. The Chamber should clarify 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”.²⁹

CONFIDENTIALITY

27. The present response is filed as confidential *ex parte* only available to the Yekatom Defence and the Prosecution as it reveals inadvertent contact by the Prosecution of Defence witnesses and their identity therein. A public redacted version of the response will be filed forthwith.

RELIEF SOUGHT

28. In light of the above, the Defence respectfully requests Trial Chamber V to:

PROVIDE the sought clarification as set out in paragraph 26 above.

RESPECTFULLY SUBMITTED ON THIS 5TH DAY OF DECEMBER 2022³⁰



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

²⁹ ICC-01/14-01/18-1623-Conf.

³⁰ The Defence thanks Legal Intern Ms Léa-Marie Gagnon for her precious assistance in the drafting of this filing.

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