

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/14-01/18
Date: 29 September 2023

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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

**Confidential, *EX PARTE*, only available to the Ngaïssona Defence, the Prosecution,
and the Registry**

**Prosecution's Response to "Defence Request to deviate from the "Protocol on the
handling of confidential information during investigations and contact between a
party or a participant and witnesses of the opposing party or participant""**

(ICC-01/14-01/18-2108-Conf-Exp-Red)

Source: Office of the Prosecutor

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 Counsel for Patrice-Edouard Ngaïssona Mr Geert-Jan Alexander Knoops Mr Richard Omissé-Namkeamai Ms Marie-Hélène Proulx
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Legal Representatives of Victims	Legal Representatives of Applicants
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Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
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States Representatives	Amicus Curiae
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REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit Mr Nigel Verrill	Detention Section
Victims Participation and Reparations Section	Other

I. INTRODUCTION

1. Trial Chamber V ("Chamber") should reject the NGAISSONA Defence's request to deviate from the Decision on a protocol on the handling of confidential information and contacts with witnesses¹ ("Request").² *First*, the Request amounts to an application for reconsideration for which the Defence fails to establish the requisite criteria. *Second*, the Defence fails to show proper cause for the Chamber to i) grant a broad deviation from the five-day time limit imposed by paragraph 31 of the Protocol; and ii) limit the scope of any future interviews of Defence witnesses by the Prosecution. Rather, the Request seeks to bend the Protocol — in effect now for more than two years — to the Defence's strategic objectives, which are transparently aimed at prejudicing the Prosecution's ability to prepare effectively for the prospective Defence case.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is classified as "*Confidential, ex parte*" because it responds to a filing of the same designation. It can be re-classified as Confidential or Public as the Chamber sees fit.

III. SUBMISSIONS

A. The Request amounts to an unsubstantiated motion for reconsideration

3. The Request effectively seeks reconsideration of the Chamber's longstanding Decision implementing the Protocol in this case. Moreover, litigation concerning the scope and application of the Protocol was previously advanced by the NGAISSONA Defence. Thus, its terms were well within the its contemplation. However, the Defence advances no substantiated ground for reconsideration. It argues neither an error of

¹ See ICC-01/14-01/18-156-AnxA ("Protocol").

² ICC-01/14-01/18-2108-Conf-Exp-Red.

reasoning, nor the appearance of new facts or arguments.³ As such, the Chamber should reject the Request summarily.

4. Even if *arguendo* the Chamber does not consider the Request as amounting to a motion for reconsideration, it nevertheless fails as there is no proper basis for the relief sought.

B. No proper cause shown for a broad deviation from the five-day time limit

5. The Prosecution notes at the outset that the Request is premature insofar as it seeks a broad deviation from the five-day time limit imposed by paragraph 31 of the Protocol. In its communication to the Defence of 19 September 2023, the Prosecution stated its willingness to consider deferral of the time limit on a case-by-case basis.⁴ However, no such requests in respect of individual witnesses have been forthcoming from the Defence, meaning that attempts at reaching mutual agreement under paragraph 3 of the Protocol have not been exhausted.⁵ The Defence's request amounts to a blanket exemption from the five-day time limit without any plausible or particularised substantiation, and should be rejected on this basis alone.

6. Contrary to the Request, the Defence's strategy pursued in preparing its case does not constitute just cause for delay, whether that be in the proceedings generally,⁶ or as concerns a general deferral of the applicable process under the Protocol. The Protocol reasonably confers on the non-calling Party a fair opportunity to prepare, in this case, such that the Prosecution may interview Defence witnesses in advance of

³ See ICC-01/12-01/1330, para. 4.

⁴ See Annex 2 to the Request: "Should you be unable to contact the relevant witnesses timely, we request that you let us know promptly. In this way we can determine on a case by case basis whether or not to defer the applicable provisions of the Protocol."

⁵ Cf Request, para. 13.

⁶ See ICC-01/14-01/18-1623; ICC-01/14-01/18-1686.

their testimony. To hold otherwise would effectively nullify the Prosecution's ability to exercise its right under the Protocol to interview consenting witnesses.

7. *First*, the purpose of a Preliminary List of Witnesses is to enable the non-calling Party to begin its preparations. As such, the Defence necessarily would have anticipated that the filing of its Preliminary List of Witnesses would trigger requests by the Prosecution under paragraph 31 of the Protocol. Whether or not it was ready to do so⁷ is beside the point and, in any event, nothing prevented the Defence from seeking the delayed disclosure of witnesses identities or a similar protective order from the Chamber on a substantiated basis. Having chosen not to do so, the Defence's arguments that it did not expect such requests from the Prosecution, that it had prepared its witnesses for further (Defence) interviews, and that arranging Prosecution interviews would "result in confusion" for the witnesses do not hold water.⁸ Likewise, the suggestion that the Prosecution may be abusing the Protocol⁹ by requesting to meet with 17 out of 30 witnesses is unsubstantiated and inappropriate — obviously, the Protocol imposes no such restriction.

8. *Second*, as noted, the preliminary nature of the list is not cause in itself for deviation from the Protocol¹⁰ — rather it accords fully with it. Until the Defence advises that it will *not* be calling a witness appearing on the list, the Prosecution must proceed in its preparation in accordance with the Protocol. The Defence cannot have it both ways — i.e. bringing their *potential* witnesses under the Protocol, such that the Prosecution is obliged to provide notice in order to meet with them, while at the same time effectively obstructing the process through unreasonable delay.¹¹ Furthermore,

⁷ See Request, para. 16, 26.

⁸ See Request, para. 20-21.

⁹ See Request, para. 6.

¹⁰ Cf Request, para. 14.

¹¹ Whereas, if the potential witnesses had not been included on the Defence's Preliminary List, they would have fallen entirely outside the scope of the Protocol: see Chamber's by email of 17 March 2021: ICC-01/14-01/18-1315-Anx2-Red.

far from expending resources unnecessarily,¹² the proper and timely implementation of the Protocol as foreseen may assist the Court in its truth-seeking function, as well as promote the efficiency of the proceedings.

9. *Third*, the Defence's broad (and largely redacted) appeal to prejudice against its own investigation and presentation of evidence is unavailing. The Prosecution is of course not in the position to respond to the redacted portions of the Request. Suffice to say, however, that after two and a half years of trial, the Defence should be far enough along with its investigation to have made meaningful contact with and interviewed at least those individuals identified in its Preliminary List of Witnesses. Failing this, the Preliminary List of Witnesses would be reduced to a sham, and moreover, cannot form just cause for a deviation from the Protocol.

10. *Fourth*, granting the Request would all but extinguish the Prosecution's ability to interview consenting witnesses ahead of their testimony. If the Prosecution must wait until Monday 20 November 2023 for the Defence to begin acting on requests for interviews under paragraph 31 of the Protocol, the Defence would have until Monday 27 November 2023 to seek the consent of the requested witnesses. This would leave the Prosecution with insufficient time, prior to the first Defence witness appearing on 15 December 2023, to make arrangements for and to proceed with interviews potentially material to its preparation.

C. No proper cause shown to limit the Prosecution's questioning

11. The Defence has advanced no reasonable argument to justify curtailing the Prosecution's questioning of its witnesses in a pre-testimony interview. Contrary to Defence claims, the Prosecution has at no point "indicated to the Defence that it does not intend to use any caution with respect to its investigations regarding Defence

¹² Cf Request, para. 30.

witnesses.”¹³ Nor has it given the Defence any reason to believe that its questioning would be contrary to the cited case law, in the sense of being “onerous”, or anything other than “sensible” and “focused”.¹⁴

12. Interviewing the witnesses on topics indicated in the Defence summaries and any other matters probative of the charges within the witnesses’ awareness¹⁵ is not only to be expected, but is necessary to the Prosecution’s duty to act with competence and diligence in its investigation and prosecution of crimes under the Rome Statute.¹⁶ While, once more, the Prosecution does not have access to the redacted arguments made by the Defence, in no circumstance can it be reasonably entertained that a pre-testimony Prosecution interview of witnesses in relation to the subject matter of their testimony as advanced by the Defence, would “destablilise” or “deter” any Defence witnesses.¹⁷

¹³ See Request, para. 18.

¹⁴ See Request, para. 35.

¹⁵ See Annex 2 to the Request.

¹⁶ See OTP Code of Conduct, para. 51(a).

¹⁷ Cf Request, para. 17.

IV. CONCLUSION

13. For the reasons above, the Chamber should reject the Request.



Karim A. A. Khan KC, Prosecutor

Dated this 29th day of September 2023
At The Hague, The Netherlands