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Date: **22 March 2024**

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

**Corrected version of "ICC-01/14-01/18-2418-Conf"
Prosecution Response to the Ngaissona Defence's "Request to compel the
Prosecution to Comply with the Contact Protocol"
(ICC-01/14-01/18-2400-Conf)"**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Ngaissona Defence’s “Request to compel the Prosecution to Comply with the Contact Protocol” (“Request”).¹ The Request misunderstands the application of the Contact Protocol² in the circumstances. Given that all of the witnesses sought to be interviewed have already been examined by the Parties at trial,³ the Defence’s request to do so now does not accord with (a) the terms of the Contact Protocol or (b) the statutory framework.

2. *First*, to be clear, the Prosecution is not in violation of the Contact Protocol.

3. *Second*, by its terms, the Contact Protocol is intended to facilitate a Party’s preparation for *prospective* witnesses. It does not require the calling Party to act in respect of witnesses whose testimony is already *sub judice* before the Chamber. And in any case, it is not a device to be exploited retroactively to provide a Party a ‘second bite at the apple’. As this appears to be the objective of the Ngaissona Defence — the Chamber’s express authorisation is required.

II. CONFIDENTIALITY

4. Pursuant to regulation 23bis(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

¹ ICC-01/14-01/18-2400-Conf.

² ICC-01/14-01/18-156-AnxA.

³ See ICC-01/14-01/18-2400-Conf, para. 2 (“Selected Witnesses”) (noting, P-2625, P-1847, P-0801, P-2843, P-2841, P-2673, P-0306, P-0965, P-2328, P-2232, P-1521, P-0808, P-0888, P-0889, P-0884, P-0876, P-0992, P-0446, P-0954, P-0966, P-1719, and P-0487).

III. SUBMISSIONS

A. The Prosecution is in compliance with the Contact Protocol

5. The Request presumes that witnesses who have already appeared before the Court, have been subjected to direct and cross-examination by the Parties and Participants, and whose sworn testimony is presently submitted and under the Chamber's consideration, fall within the ambit of the Protocol. This is incorrect. Rather, as explained below, in these circumstances the Chamber's express authorisation for a Party's interview of a witness is necessary.

6. As the Defence's erroneous assumption underpins its suggestion that the Prosecution is not in compliance with its obligation under the Contact Protocol, the Chamber should dismiss the Request.

B. The Contact Protocol is limited to 'witnesses' as defined

7. The Contact Protocol expressly defines the term 'witness'. To the extent that the Ngaissona Defence seeks to expand this definition to include witnesses who have already testified — *i.e.*, the Selected Witnesses — the Chamber must weigh-in on the matter.

i. The Contact Protocol applies to prospective witnesses

8. The Contact Protocol provides that:

"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."⁴

⁴ ICC-01/14-01/18-156-AnxA, para. 4 (f) (emphasis added).

The reference to the calling Party's 'intention' in this context denotes the Party's future posture in terms of the witness's appearance or evidence.

9. The Contact Protocol does not expressly address the circumstance wherein a person has already testified before the Court, and moreover requires that it be "interpreted restrictively."⁵ As such, its implementation in respect of the Selected Witnesses cannot simply be presumed, nor based on mere anecdote. In this instance, the history of the Court's contact protocols informs the definition of 'witness' and its application.

10. Notably, these protocols were developed to regulate "prior contact between a party or a participant and the witnesses *to be called* by the other party or a participant."⁶ Accordingly, Trial Chamber I observed the benefit of such regulation in pertinent part, noting that "irrelevant lines of questioning may be identified and discarded [and] lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence."⁷

11. The Defence's contention that the Contact Protocol entitles it to interview witnesses who, *inter alia*, it has already had the opportunity of examining under oath in Court constitutes an implied modification of its terms, and it is unavailing.

12. The Defence cannot simply claim an entitlement in circumstances that are not expressly addressed in the Contact Protocol. Rather, it must seek the Chamber's authorisation. This is even more clear because, by its terms, "[a]ny deviation from [the Contact] Protocol requires the prior authorisation of the Chamber."⁸

⁵ ICC-01/14-01/18-156-AnxA, para. 2.

⁶ ICC-01/05-01/08-2293-Conf, para. 7.

⁷ ICC-01/05-01/08-2293-Conf, para. 8; and ICC-01/04-01/06-2192-Red, para. 49.

⁸ ICC-01/14-01/18-156-AnxA, para. 3.

ii. *The limited scope of the Contact Protocol is justified*

13. The Defence misunderstands the scope of the Contact Protocol. Contrary to the Request,⁹ there is good reason for a distinction to be drawn between an individual whose evidence is yet to come and one whose evidence has already been submitted. The clearest reason for such a distinction is so that the Chamber itself can regulate the nature and scope of a non-calling party's conduct in circumstances where its proposed activities (*i.e.*, interviews) may affect evidence under the Chamber's consideration.

14. The Defence's suggestion that drawing such a distinction illogically distinguishes between witnesses appearing before the Chamber *viva voce* and witnesses on whose statement the calling party wishes to rely on pursuant to Rule 68.¹⁰ misses the point. Moreover, applying the definition of 'witness' provided in the Contact Protocol to *prospective* witnesses entails no distinction between Rule 68 witnesses and *viva voce* witnesses. Nor, does it "strip[] *viva voce* witnesses of the protections afforded by the Contact Protocol, as soon as their testimony concludes."¹¹ Rather, it turns on whether the witnesses appearance in the case or the Party's reliance on their evidence is forthcoming — as opposed to it being past.

15. Contrary to the Request, obtaining the Chamber's authorisation in these circumstances in no way compromises the interests of individuals who do not fall within the definition of 'witness' under the Contact Protocol. To the contrary, it protects them and, importantly, safeguards the Chamber's right and obligation to ensure the integrity of the proceedings over which it presides.

⁹ ICC-01/14-01/18-2400-Conf, para. 20.

¹⁰ ICC-01/14-01/18-2400-Conf, para. 20 (arguing that limiting the Contact Protocol to its express terms would "create an illogical difference of treatment between witnesses appearing before the Chamber to provide their testimony *viva voce* and witnesses on whose statement the calling party wishes to rely on pursuant to Rule 68").

¹¹ ICC-01/14-01/18-2400-Conf, para. 20.

iii. *It is for the Chamber to determine the application of the Contact Protocol in unusual circumstances*

16. Where the Contact Protocol does not speak to the circumstances of a Party's intended contact with a person, it is for the Chamber to determine the issue.

17. The Request's reference to Trial Chamber VII's Decision on the Defence's application in the *Bemba et al* case to deviate from the contact protocol in order to conduct post-testimony interviews, only underscores the propriety of seizing the relevant Chamber with an appropriate request where the contact sought does not squarely fall within the applicable protocol.¹² It is for the Chamber, on the basis of the facts substantiated by the proponent, to determine whether to authorise the contact sought by a non-calling party and, if so, to what extent.

18. Although a Chamber may extend a contact protocol to cover a particular circumstance, doing so does not necessarily confirm its application *without* its involvement. At the end of the day, a Chamber determines such matters – not the Parties, as the *Ongwen* case referenced in the Request shows.¹³ The Request's reference to the *Ntaganda* case, which involved a Defence request to recall a witness, did not deal with the definitions set out in the contact protocol.¹⁴ Still, that case also shows that in unusual circumstances, the Chamber must be seized in determining.

19. The process should be no different here. As this Chamber has previously found, the scope of the Contact Protocol may be subject to exceptions, including as may arise under article 68(1) for example.¹⁵ The Chamber's discretion is broad, particularly given that the historical focus of regulating contacts at the Court was to ensure efficient trial

¹² ICC-01/14-01/18-2400-Conf, para. 21.

¹³ ICC-01/14-01/18-2400-Conf, para. 21.

¹⁴ See ICC-01/14-01/18-2400-Conf, para. 21(fn. 22 citing ICC-01/04-02/06-1791-Red, para. 20[sic]). Note, that no case cited in the Request has construed a similar definition of "witness" as provided in the Contact Protocol.

¹⁵ See ICC-01/14-01/18-942, para. 11.

management and the effective determination of the truth.¹⁶ Thus, the propriety of the Court's intervention and authorisation even where a contact protocol expressly applies, may still be necessary in certain circumstances.¹⁷

20. Having previously litigated matters of interpretation of the Contact Protocol, the Defence is aware that the interpretation of its provisions fall squarely within the purview of the Chamber.¹⁸ It is unclear why the Defence raised this issue with Pre-Trial Chamber II in its related "Defence Disclosure Request"¹⁹ currently pending, but appears to be a litigation strategy to circumvent the Chamber's disposition of the present matter.

21. Nevertheless, having finally acceded to the Prosecution's invitation to bring the *inter partes* disagreement on the retroactive application of the Contact Protocol before the Chamber, the Request ultimately fails.

¹⁶ See ICC-01/05-01/08-2293-Conf, para. 8 and 9 (noting the "particular benefit such meetings may have for the interviewing party in cases where the disclosed summaries of the issues on which the witnesses called by the other party will testify provide insufficient detail for the interviewing party to effectively and efficiently carry out any investigations").

¹⁷ See e.g., ICC-01/05-50-Conf-Exp, p. 7, reclassified as public, 3 February 2014; see also ICC-01/05-46-Conf-Exp, reclassified as public, 4 February 2014 (wherein Pre-Trial Chamber II modified limitedly the application of the contact protocol issued by Trial Chamber III, to permit the Prosecution to interview Defence witnesses who had already testified at trial, in carrying out its article 70 investigations).

¹⁸ See ICC-01/14-01/18-1623.

¹⁹ See ICC-01/14-01/22-322-Conf, para. 8.

IV. CONCLUSION

22. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Request in all respects.



Karim A. A. Khan KC, Prosecutor

Dated this 22nd day of March 2024
At The Hague, The Netherlands