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**International
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Court**

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No: *ICC-01/14-01/18*

Date: **22 May 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
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

with confidential ANNEX A

**Public Redacted Version of 'Ngaïssona Defence Request to Compel the
Prosecution to Comply with the Contact Protocol', ICC-01/14-01/18-2400-Conf, 11
March 2024**

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor Mr Karim Asad Ahmad Khan KC Mr Mame Mandiaye Niang Mr Kweku Vanderpuye	Counsel for the Defence of Mr Ngaïssona Mr Geert-Jan Alexander Knoops Ms Marie-Hélène Proulx Ms Lauriane Vandeler Ms Chiara Giudici
	Counsel for the Defence of Mr Yekatom Ms Mylène Dimitri Mr Thomas Hannis Ms Anta Guissé Ms Sarah Bafadhel
Legal Representatives of the Victims Mr Dmytro Suprun Mr Abdou Dangabo Moussa Ms Elisabeth Rabesandratana Mr Yaré Fall Ms Marie-Edith Douzima-Lawson Ms Paolina Massidda	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States’ Representatives	Amicus Curiae
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. The Defence for Mr Patrice-Edouard Ngaïssona (“Defence”) hereby respectfully requests Trial Chamber V (“Chamber”) to compel the Prosecution to comply with the Protocol on the Handling of Confidential Information and Contacts with Witnesses (“Contact Protocol”).¹
2. In *inter partes* exchanges provided as Annex A to the present submissions, the Defence has requested the Prosecution to facilitate contact with several Prosecution witnesses, namely 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 (“Selected Witnesses”). The Defence wishes to meet with the Selected Witnesses to question them on a narrow investigative lead. It has therefore sought the Prosecution’s cooperation to facilitate contact with the Selected Witnesses, in accordance with the Contact Protocol. However, the Prosecution refuses to contact the Selected Witnesses, arguing that any attempt to meet with the Selected Witnesses should be subject to the Chamber’s authorisation, given that the Selected Witnesses have already testified.²
3. The Defence requests the Chamber to compel the Prosecution to comply with its obligations under the Contact Protocol and facilitate contact between the Defence and the Selected Witnesses. Alternatively, should the Chamber concur with the Prosecution that any meeting with the Selected Witnesses should be subject to a specific authorisation, the Defence hereby requests the Chamber’s authorisation to meet with the Selected Witnesses, should they consent to a meeting.

II. CONFIDENTIALITY

¹ ICC-01/14-01/18-156-AnxA.

² See Annex A, Email from OTP CAR IIB to [REDACTED] and Ngaïssona Defence team, 2 February 2024, at 19:20.

4. In accordance with regulation 23bis(1) of the Regulations of the Court (the “RoC”), this request is filed as confidential, as it contains information on confidential *inter partes* discussions, as well as confidential submissions. The Defence will file a public redacted version in due course.

III. PROCEDURAL HISTORY

5. On 22 March 2019, Pre-Trial Chamber II issued a “Decision on a Protocol on the Handling of Confidential Information and Contacts with Witnesses”,³ adopting the Contact Protocol in the present case.
6. On 19 March 2020, having been seized of the case, the Chamber confirmed the continued applicability of the Contact Protocol.⁴
7. On 11 September 2023, the Prosecution issued a formal notice of the close of its case-in-chief.⁵
8. On 16 October 2023, the Prosecution withdrew charges in the case Prosecutor v. Maxime Mokom (“Mokom case”), on the basis that several “critical” witnesses have allegedly become unavailable to testify.⁶
9. On 30 January 2024, the Defence requested the Prosecution to contact the Selected Witnesses, to enquire as to their availability to meet with the Defence, in accordance with the Contact Protocol.⁷

³ ICC-01/14-01/18-156.

⁴ ICC-01/14-01/18-459, para. 8.

⁵ ICC-01/14-01/18-2089.

⁶ The Prosecutor v. Maxime Mokom, Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka, ICC-01/14-01/22-275, para. 3.

⁷ See Annex A, Email from [REDACTED] to OTP CAR IIB, 30 January 2024, at 14:53.

10. On 2 February 2024, the Prosecution declined to contact the Selected Witnesses, arguing that any requests to interview Prosecution witnesses should be submitted to the Chamber, in light of the fact that these witnesses have already testified.⁸
11. On 9 February 2024, the Defence requested the disclosure of items and information concerning the identity and circumstances of any overlapping witnesses who would have supposedly become unavailable to testify in the Mokom case ("Defence Disclosure Request").⁹ Adjudication of the Defence Disclosure Request is presently pending before Pre-Trial Chamber II.
12. On 26 February 2024, the Defence reiterated its request to the Prosecution to contact the Selected Witnesses, arguing that the Contact Protocol continued to apply and would do so until the end of the proceedings.¹⁰
13. On 4 March 2024, the Prosecution declined again to contact the Selected Witnesses, and invited the Defence to seize the Chamber in this regard.¹¹

IV. APPLICABLE LAW

14. Article 67 of the Rome Statute ("Statute") enshrines a number of fair trial guarantees, among which the principle of equality of arms, as well as the right to adequate time and facilities for the preparation of the defence and the right to present evidence.
15. Pursuant to Article 68(1) of the Statute, the measures taken to protect the safety and well-being of witnesses "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

⁸ See Annex A, Email from OTP CAR IIB to [REDACTED] and Ngaïssona Defence team, 2 February 2024, at 19:20.

⁹ The Prosecutor v. Maxime Mokom, Ngaïssona Defence Motion for Disclosure, ICC-01/14-01/22-322-Conf.

¹⁰ See Annex A, Email from [REDACTED] to OTP CAR IIB, 26 February 2024, at 15:27.

¹¹ See Annex A, Email from OTP CAR IIB to [REDACTED], 4 March 2024, at 12:22.

16. The Contact Protocol aims at striking the balance set forth by Article 68(1), by ensuring “the safety of witnesses (...) as well as the integrity of investigations, in a manner consistent with the rights of suspects and accused.”¹² Section VII of the Contact Protocol sets conditions for contacts with witnesses of other parties and participants. Notably, it requires the party or participant wishing to interview a witness of another party or participant to request the consent of the witness *via* the calling party. The calling party is mandated to seek the witness’ consent to be interviewed within five days and to facilitate contact with the opposing party, should the witness consent to the interview.¹³ Interviews with a witness of the opposing party shall be audio or video-recorded and such recording shall be provided to the calling party.¹⁴

V. SUBMISSIONS

17. The Defence hereby requests the Chamber to compel the Prosecution to seek the Selected Witnesses’ consent to be interviewed by the Defence, in accordance with the Contact Protocol.

18. Given the substantial overlap between the Prosecution’s witnesses in the present case and in the Mokom case, the Defence wishes to interview the Selected Witnesses to enquire as to the reasons and circumstances surrounding the interruption of their cooperation with the Prosecution in the Mokom case, if applicable. While the Defence is awaiting adjudication of the Defence Disclosure Request, further investigations on the matter are necessary, especially given that the Prosecution claims not to be in possession of any documents or information concerning the Selected Witnesses’ unavailability that may qualify as material to the preparation of the Defence.¹⁵ Furthermore, the Defence notes that the

¹² Contact Protocol (ICC-01/14-01/18-156-AnxA), para. 1.

¹³ Contact Protocol, paras 27, 30-31, 34.

¹⁴ Contact protocol, para. 40.

¹⁵ The Prosecutor v. Maxime Mokom, Prosecution’s Response to Ngaissona Defence Motion for Disclosure, ICC-01/14-01/22-326-Conf, paras 7, 9.

Prosecution appears to intend to call a number of the Selected Witnesses in the case of Prosecutor v. Mahamat Said Abdelkani ("Said case"). No availability issues appear to have arisen in the Said case, which reinforces the materiality of the sought evidence given the apparent discrepancy between the same witnesses' availability in the Said case, and the non-availability in the Mokom case.¹⁶ At the present stage of the proceedings, with its case currently ongoing, the Defence should be given an effective opportunity to pursue this investigative lead, which was unforeseeable at the time of the Defence's initial investigations, as it may well result in the retrieval of information concerning the reliability of the testimonies of key insider witnesses. Their role in the Mokom case and the reasons for their unavailability, if any, may well reflect on the reliability of their testimony in the present case.

19. The Prosecution has been stalling the Defence's requests to contact the Selected Witnesses, arguing that the procedure set forth in the Contact Protocol only applies "[REDACTED]. [REDACTED]."¹⁷ Tellingly, the Prosecution does not cite any authorities in support of this contention.

20. The Defence strongly disagrees with the Prosecution's position that contact with witnesses who have already testified should be expressly and individually authorised by the Chamber. The Contact Protocol contains no provision limiting its scope to the phase prior to a witness' testimony before the Court, nor has the Chamber given any indications in this sense. While the Contact Protocol defines as "witnesses" those persons whose statements a party intends to rely on, or whom a party intends to call,¹⁸ it does so in order to ensure full compliance with the Contact Protocol in the early investigative phases of a case. The Contact Protocol's

¹⁶ Note, for example, that P-0884's testimony in the Said case appears to be upcoming, as evidenced by the recent appointment of a legal adviser for the witness, pursuant to rule 74 of the Rules of Procedure and Evidence. See Prosecutor v. Mahamat Said Abdelkani, Notification of Appointment of Mr Noah Al-Malt as Legal Adviser to Witness P-0884, ICC-01/14-01/21-717, dated 7 March 2024.

¹⁷ Annex A, email from OTP CAR IIB to [REDACTED] and Ngaïssona Defence team, 2 February 2024, at 19:20.

¹⁸ Contact Protocol, para. 4 section f.

definition of “witnesses” should not however be interpreted as to mean that a “witness” ceases to qualify as such for the purpose of the Contact Protocol once he or she has appeared before the Court. A similar interpretation would, for one, 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. It would also result in stripping *viva voce* witnesses of the protections afforded by the Contact Protocol, as soon as their testimony concludes. This is certainly not the intended aim of the Contact Protocol.

21. Nothing in the Court’s legal framework or jurisprudence indicates that the Contact Protocol ceases to apply once a witness has provided their testimony before the Court. To the contrary, various Chambers of this Court have ruled for the continued applicability of contact protocols in their cases, well beyond the witnesses’ appearance. In *Bemba et al.*, the defence requested a deviation from the contact protocol for post-testimony interviews, insofar as it sought to exclude the presence of the calling party from those interviews. Trial Chamber VII rejected the defence proposal, finding that no deviation from the protocol was warranted, and thereby acknowledging not only the possibility of post-testimony interviews, but also the continued applicability of the protocol at that stage.¹⁹ In *Ongwen*, Trial Chamber IX granted a defence request to lift Mr Ongwen’s contact restrictions during the deliberations phase of the trial, finding that the applicability of the contact protocol in that case was one of the factors mitigating the concerns voiced by other parties as to the safety of witnesses.²⁰ Trial Chamber IX expressly stated that any contact with witnesses of the opposing party by Mr Ongwen or his

¹⁹ The Prosecutor v. Bemba et al., Decision adopting a Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, ICC-01/05-01/13-1093, para. 16.

²⁰ The Prosecutor v. Ongwen, Decision on the Defence Request for Immediate Release and the Communication Restrictions Applying to the Accused, ICC-02/04-01/15-1733, paras 35-38, 41.

defense team would have to take place in accordance with the rules set forth by the protocol.²¹ Lastly, in *Ntaganda*, the defence sought for a deviation from the contact protocol, so that it may interview a Prosecution witness who had already testified without a representative of the Prosecution being present, in order to assess whether to recall them as a defence witness. Trial Chamber VI rejected the request, determining that it would not modify the terms of the contact protocol for that witness.²² In all of the afore-mentioned cases, the contact protocols in place contained a similar definition of “witnesses” as the one contained in the Contact Protocol.²³

22. The above-referenced jurisprudence clearly supports the Defence’s reading that the Contact Protocol remains in place and will continue to until the end of the proceedings. This is further supported by the Chambers Practice Manual, which expressly states that if and once adopted, a contact protocol would then remain applicable “throughout the proceedings”.²⁴
23. The Prosecution’s attempt to add further requirements to the conducting of post-testimony interviews is without merit. The procedure set forth by the Contact Protocol remains the appropriate avenue to seek contact with the opposing party’s witnesses, even once they have provided their testimony before the Court. The provisions of the Contact Protocol already impose significant hurdles on the Defence’s investigative activities in relation to Prosecution witnesses. In fact, any contact with Prosecution witnesses must be recorded and provided to the

²¹ Ibid, para. 37.

²² The Prosecutor v. Ntaganda, Public redacted version of Decision on Defence request for recall of Witness P-0290, ICC-01/04-02/06-1791-Red, para. 20.

²³ The Prosecutor v. Bemba et al., Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Other Parties, ICC-01/05-01/13-1093-Anx, para. 4; The Prosecutor v. Ongwen, Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Witnesses of the Opposing Party or of a Participant, ICC-02/04-01/15-339-Anx, para. 4. The Prosecutor v. Ntaganda, Draft Protocol on the handling of Confidential Information During Investigations and Contact between a Party and Witnesses of the Opposing Party, ICC-01/04-02/06-167-AnxA (adopted with minor amendments through decision ICC-01/04-02/06-185).

²⁴ Chambers Practice Manual, Seventh edition, para. 103.

Prosecution. A representative of the Prosecution may even be present at the meeting, should the witness so require.²⁵ These limitations are substantial, and sufficiently achieve the goal of striking a balance between the Defence's right to mount an effective defence and the protection of witnesses. The Prosecution's suggestion that the Defence's investigative activities be interfered with further, by requiring the Chamber's specific authorisation to conduct post-testimony interviews with Prosecution witnesses, excessively encroaches on the Defence's right to be afforded a fair opportunity to present its case. This is especially so, given that new circumstances have clearly arisen following the Selected Witnesses' testimonies in the present case, which the Defence could not have anticipated at the time of the presentation of the Prosecution's case-in-chief.

24. In light of the above, the Defence respectfully requests the Chamber to compel the Prosecution to contact the Selected Witnesses within five days, in accordance with the Contact Protocol, in order to arrange a meeting with the Defence, if the Selected Witnesses so consent. The Defence wishes to underscore once more that the scope of the sought post-testimony interviews with the Selected Witnesses, should they take place, will be limited to enquiring as to the reasons and circumstances of their unavailability to testify in the Mekom case, if applicable. In other words, the Defence does not intend to go through the Selected Witnesses' prior testimonies beyond what will be necessary to explore this limited line of inquiry.

25. Lastly, should the Chamber concur with the Prosecution that the procedure set forth by the Contact Protocol only applies prior to a witness' testimony before the Court, and that post-testimony interviews require a specific authorisation, the Defence hereby requests the Chamber's authorisation to conduct post-testimony interviews with the Selected Witnesses.

²⁵ Contact Protocol, paras 36, 40.

VI. RELIEF SOUGHT

For the foregoing reasons, the Defence respectfully requests the Chamber to:

- **COMPEL** the Prosecution to contact the Selected Witnesses, as listed in paragraph 2, within five days, to seek their consent to be interviewed by the Defence in accordance with the Contact Protocol; or, in the alternative,
- **AUTHORISE** the Defence to conduct post-testimony interviews with the Selected Witnesses, within the scope set out at paragraphs 18 and 24 above.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 22 May 2024

At The Hague, the Netherlands