

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **11 March 2019**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF  
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD  
NGAISSONA***

**Public  
With  
Public Annexes A and B**

**Ngaïssona Defence Observations on the Protocol on the Handling of Confidential  
Information during Investigations and Contacts with Witnesses**

**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**

Ms Fatou Bensouda

Mr James Stewart

**Counsel for the Defence of Mr Ngaïssona**

Mr Geert-Jan Alexander Knoops

**Counsel for the Defence of Mr Yekatom**

Mr Stéphane Bourgon

Ms Mylene Dimitri

**Legal Representatives of the Victims**

**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**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Defence of Patrice-Edouard Ngaïssona (the “Defence”) hereby presents its observations on the Protocol on the Handling of Confidential Information and Contacts with Witnesses and proposes that Trial Chamber II (the “Chamber”) adopts the protocol as set out in Annex B.

## II. Procedural history

2. On 17 December 2018, in the *Yekatom* case, the Prosecution submitted a proposed protocol on the handling of confidential information and contacts with witnesses (the “Prosecution’s Proposed Protocol”).<sup>1</sup>
3. On 7 January 2019, the Defence for Mr Yekatom responded to the Prosecution’s submissions and requested modifications (“Yekatom’s Response”).<sup>2</sup>
4. On 16 January 2019, pursuant to an order of the Single Judge of Pre-Trial Chamber II (the “Chamber”),<sup>3</sup> the Prosecution replied to the Defence for Mr Yekatom (the “Prosecution’s Reply”).<sup>4</sup>
5. On 21 January 2019, the Defence for Mr Yekatom sought either leave to present additional submissions following the Prosecution’s Reply or the scheduling of *inter partes* consultations chaired by a representative of the Chamber.<sup>5</sup>

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<sup>1</sup> “Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”, with public annexes A and B, dated 17 December 2018, ICC-01/14-01/18-35.

<sup>2</sup> “Response to the Prosecution’s submission on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses”, with public annexes A and B, dated 7 January 2019, ICC-01/14-01/18-51 (“Prosecution’s Submissions”).

<sup>3</sup> ICC-01/14-01/18-55, para. 8.

<sup>4</sup> “Prosecution’s Reply to the Defence’s Response to the Prosecution’s submissions on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses (ICC-01/14-01/18-51)”, dated 16 January 2019, ICC-01/14-02/18-58.

<sup>5</sup> “Request on behalf of Alfred Rombhot Yekatom seeking either leave to present additional submissions following the “Prosecution’s Reply to the Defence’s Response to the Prosecution’s submissions on a Proposed Protocol on the Handling of Confidential Information and Contacts with Witnesses” or the scheduling of *inter partes* consultations chaired by a representative of Pre-Trial Chamber II”, dated 21 January 2019, ICC-01/14-02/18-60.

6. On 20 February 2019, the Chamber issued the “*Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters*” (“the Joinder Decision”),<sup>6</sup> and invited the Defence to present observations on the Protocol on the Handling of Confidential Information and Contacts with Witnesses at the latest on 11 March 2019.
7. On 26 February 2019, the Defence<sup>7</sup> and the Yekatom Defence<sup>8</sup> requested leave to appeal the Joinder Decision.

### III. Submissions

8. The Defence generally endorses the views and concerns of the Defence for Mr Yekatom in filing ICC-01/14-01/18-51.<sup>9</sup> It has therefore adopted the vast majority of the amendments the Defence for Mr Yekatom suggested should be made to the protocol annexed to the Chambers Practice Manual,<sup>10</sup> while making minor additional suggestions appearing in yellow in the Defence’s proposed Protocol as reproduced in Annex A.<sup>11</sup> The Defence submits the below observations to elaborate further on specific issues of the Protocol.

#### *General Definitions*

9. First, with respect to the definition of “Participants”, the Defence agrees with the Defence for Mr Yekatom that the term “any other entity” as suggested by

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<sup>6</sup> “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters”, dated 20 February, ICC-01/14-02/18-34.

<sup>7</sup> ICC-01/14-01/18-127.

<sup>8</sup> ICC-01/14-01/18-128.

<sup>9</sup> See Annex A where the modifications suggested by the Defence of Mr Yekatom and appearing in track changes have been generally reproduced.

<sup>10</sup> Annex to the Chambers Practice Manual, “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”, May 2017, pp. 32-38 (“Practice Manual Protocol”).

<sup>11</sup> See ICC-01/14-01/18-51-AnxA.

the Prosecution is too vague.<sup>12</sup> Therefore, the Defence suggests, in order to ascertain that only such entities as entitled to participate in the proceedings and having rightfully gained access to confidential information are hereby referenced while ensuring that all such entities are bound by the Protocol's obligations, to amend the Practice Manual Protocol as follows:

“Participant” shall mean any entity, other than a party, judges or authorized Court staff, authorized by the Court to participate in the proceedings and gain access, in accordance with the legal framework of the Court, to confidential information, including the Principal Counsel of the Office of the Public Counsel for Victims, the Legal Representative(s) duly assigned to represent participating of victims and States in the present case, and any other persons properly designated as members of their teams;<sup>13</sup>

10. With regards to the definition of confidential information, the Defence concurs with the Defence for Mr Yekatom that the inclusion of the term “confidential discussion” as proposed by the Prosecution is not appropriate<sup>14</sup> in that the use of such an ambiguous and broad term, without any further precision as to what it exactly entails, would inevitably trigger disclosure violations which would not be possible to identify and monitor. Also, the definition as it initially stands in the Practice Manual Protocol is sufficiently broad to cover oral discussions with witnesses given that those would be audio or video recorded and would therefore fall within the definition of confidential document which encompasses “any other type of material” as suggested by the Prosecution itself.<sup>15</sup> The Defence thus submits that the definition as set out in the Practice Manual Protocol adequately serves the purpose of the Protocol and does not need to be amended.<sup>16</sup>

11. With regards to the definition of Witness, the Defence fully supports the suggestion made by the Defence for Mr Yekatom, which, contrary to the Prosecution, takes a realistic approach to the conduct and sequencing of the

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<sup>12</sup> Yekatom's response, para. 20.

<sup>13</sup> Annexes A and B, para. 4(b).

<sup>14</sup> Yekatom's Response, para. 26.

<sup>15</sup> Prosecution's Submissions, para. 12.

<sup>16</sup> See Annexes A and B, para. 4(e).

different stages of the proceedings before this Court.<sup>17</sup> The use of a common definition for all parties and participants as suggested by the Prosecution is not adapted to the situation at hand as it fails to address the facts that (i) the Prosecution and the Defence are from the outset positioned at very different investigative stages and (ii) participants do not have the right to call witnesses on their own motion. This intrinsic difference of status and investigative advancement between the respective parties and participants should not be ignored and should imperatively be reflected in the scope of the definition of witness. Failing to do so would necessarily affect the fair trial rights of Mr Ngaïssona, create an inequality of arms and inappropriately and/or prematurely assume the existence of certain participants' rights.

12. By restricting the definition of Defence Witness in this case to persons the intention to call has been clearly communicated to the Prosecution<sup>18</sup> would require the Defence to disclose its case strategy before the Prosecution has completed the presentation of its case. It would in other words impede the ability of the Defence to investigate. Once a person gives a statement to the Defence, he should benefit from the protection provided by the Protocol until such time that the Defence discloses its list of witnesses to the Prosecution, and the witness status of the person in question is either confirmed or infirmed. The case of the Prosecution is different and needs to be treated as such. Where the investigations of the Defence are only about to start, the Prosecution's are expected to end. The Prosecution has been investigating for years *in situ*, should have a clear overview of the persons it intends to call to testify and should be in a position to formally communicate such intention to the Defence through the filing of its list of witnesses, bearing in mind that it does not preclude the Prosecution from deciding to withdraw certain witnesses from its list at a later

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<sup>17</sup> ICC-01/14-01/18-51-AnxA, para. 4(f).

<sup>18</sup> Prosecution's Proposed Protocol, para. 4(f).

stage.

13. The definition of Defence witness as suggested by the Defence for Mr Yekatom prevents from any risk of having the Protocol applied to individuals who are only remotely linked to the case as the Defence would have already determined that those individuals are of such interest in the context of the proceedings that (i) an interview with them and (ii) the disclosure of their identity to the VWU were required. The procedure as described in paragraphs 28 and 29 of the Defence for Mr Yekatom's proposed Protocol when meeting with potential witnesses provides the Prosecution with the necessary safeguards for compliance with its own obligations not to interview the Defence's witnesses without consent.
  
14. Finally, as far as participants are concerned, the general definition of "witness" as suggested by the Prosecution is in contradiction with the Court's legal framework. Indeed, rule 103 of the Rules restricts the participation of a State, organisation or person to the possibility for them to request leave to submit observations. It does not foresee the possibility for them to call witnesses. Moreover, a well-established general principle as acknowledged by the Appeals Chamber is that victims are not parties to the proceedings and as such, do not have an automatic right to introduce evidence.<sup>19</sup> Pursuant to Article 68(3) of the Rome Statute ("Statute"), read in conjunction with Article 69(3) of the Statute, victims may only invite the Chamber to exercise its discretion to request a victim's attendance to testify.<sup>20</sup> In order for the Chamber to exercise such a discretion, a certain number of limited conditions and criteria are required to be met, in addition to the demonstration of personal interests being

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<sup>19</sup> Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paras 93-100.

<sup>20</sup> ICC-02/05-03/09-545, 20 March 2014, para. 24. *See also* ICC-02/04-01/15-1199-Red, dated 6 March 2018, para. 15.

affected, including, to name a few, whether such evidence is consistent with the rights of the accused, whether it is repetitive of the parties' previously disclosed evidence, whether it would make a genuine contribution to the ascertainment of the truth or whether it is typical of a larger group of participating victims.<sup>21</sup> Therefore, the Defence submits that the definition of participants' witnesses as suggested by the Defence for Mr Yekatom is much more realistic than the general definition provided by the Prosecution since relying on the intention of the participants to call witnesses would be meaningless in a context where it is ultimately for the Chamber to decide whether to call the victim in question or not.

15. In the unlikely event that the Chamber would require the attendance of certain persons, other than victims, to testify, pursuant to its general power to do so in accordance with Article 69(3), those individuals could be protected by the definition of "confidential information" which encompasses any "*information ordered not to be disclosed to third parties by any Chamber of the Court*", including thereby the identity of a protected witness authorised by the court to testify.

*Witnesses whose identity has not been made public*

16. First, the Defence submits that the disclosure restrictions of the parties and participants should not expand to witnesses benefitting from "protection" measures other than related to his/her identity or involvement with the court.<sup>22</sup> There would be little point to refrain from revealing the identity of a person who benefits from protection unrelated to his or her identity and whose identity would therefore be public. The provision as it is set out in the Practice Manual Protocol is fully comprehensive and already adequately covers any

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<sup>21</sup> ICC-01/05-01/08-2138, dated 22 February 2012, paras 23-24. *See also* ICC-01/04-01/07-1665-Corr, 20 November 2009, paras. 20-24 and ICC-02/04-01/15-1199-Red, dated 6 March 2018, para. 15, referring to "previously undisclosed evidence".

<sup>22</sup> See Prosecution's Proposed Protocol, para. 10.

situations of concern. The Prosecution fails to explain why this additional reference to other “protection” measures, which term is extremely vague, would be required.

17. Second, the Defence is concerned that informing the VWU, in advance, of the disclosure of the identity of any protected witnesses, *i.e.*, those not in the ICCPP, but who are protected, for example by use of a pseudonym, will be impossible to implement, because all of the important Prosecution witnesses are likely to have a pseudonym. Thus, the Defence submits that it cannot avoid mentioning them during the interviews it conducts and that while the Defence will do its best efforts to disclose them to the VWU in advance of the interview, it should not be obliged to notify the VWU of such a disclosure prior to the interview as long as it notifies it as soon as possible afterwards.<sup>23</sup> This was previously accepted by Trial Chamber I’s single judge adopting a similar protocol in the case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*.<sup>24</sup>

18. Finally, the parties and participants will not necessarily have the means of knowing that the identity of a witness has been protected if that witness’ identity is for instance protected by the VWU in a case other than the present case. Paragraph 10 of the Practice Manual Protocol is drafted in such a broad way, by the use of the term “with the Court”, so as to encompass witnesses from other cases. Therefore, the Defence suggests to restrict the disclosure obligations of the parties and participants only in relation to witnesses the protection of identity of whom the parties and participants have been made aware.<sup>25</sup>

*Contact between participants and witnesses of other parties and participants*

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<sup>23</sup> Annexes A and B, para. 11.

<sup>24</sup> ICC-02/11-01/15-200, 1 September 2015, para. 24.

<sup>25</sup> Annexes A and B, para. 11.

19. The Defence submits that the participants should not have the right to request to have contacts with the witnesses of the parties. This position is in line with the decision of the aforementioned single judge in the case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*. In this decision, the single judge ruled that the legal representative of victims should not be permitted to contact a party's witness, noting *inter alia* that “under the statutory scheme, the LRV, as participant to the proceedings, does not have a responsibility comparable to that of the parties”.<sup>26</sup>
20. Neither any legal representatives nor the OPCV are parties to the proceedings, thus they should not be authorised, as of right, to seek to contact witnesses of the parties. As recalled by Judge Cotte in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “[t]he victims are not parties to the trial and certainly have no role to support the case of the Prosecution”.<sup>27</sup> This statement applies equally to other participants.
21. While the legal representatives of the victims are permitted to participate in the proceedings in accordance with article 68(3) of the Statute and rule 91 of the Rules, the Appeals Chamber has ruled that their participation is confined within the context of judicial proceedings and does not extend to the investigations themselves.<sup>28</sup>
22. The Defence's position is also consistent with the interpretation given to article 69(3) of the Statute by chambers, as elaborated in paragraph 14 above, according to which there is no systematic victim's right to give evidence or request the attendance of witnesses. Similarly, the possibility for the legal

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<sup>26</sup> ICC-02/11-01/15-200, dated 1 September 2015, para. 42.

<sup>27</sup> ICC-01/04-01/07-1665-Corr, para. 82.

<sup>28</sup> See Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04-556 0A4 0A5 0A6, para. 45; ICC-02/05-03/09-545, para. 16.

representatives for victims to question witnesses of the other parties in court is also subject to an application to be made to the Chamber pursuant to rule 91(2)(a) of the Rules and has been strictly interpreted by the Court.<sup>29</sup>

23. In light thereof, the Defence submits that participants cannot have more right in relation to witnesses in the context of the parties' investigations than in the context of the judicial proceedings. It would indeed be illogical and unfair to suspects or accused to allow participants to have an automatic right to contact the parties' witnesses in the field, including before the parties have even had the chance to present their own evidence, and without limiting in any way the topics to be covered with that witness, while the legal texts and jurisprudence of the Court do not grant them the right, on their own motion, to call witnesses or question the other parties' witnesses in court, and when such an authorisation is granted, the conditions in which to do so are extremely circumscribed.

24. Therefore, the above arguments militate in favour of the deletion of all references to the possibility for "participants" to contact the other parties and participants' witnesses.<sup>30</sup>

25. As a final point, the Defence would agree to the scheduling of further *inter partes* discussions on this matter as proposed by the Defence for Mr Yekatom should the Chamber consider them appropriate.<sup>31</sup>

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<sup>29</sup> ICC-01/05-01/08-807-Corr, 12 July 2010, para. 102 h); ICC-01/05-01/08-1005, 10 November 2010, para. 3; ICC-01/05-01/08-1023, 19 November 2010, para. 18.

<sup>30</sup> See Annex A, section VII.

<sup>31</sup> ICC-01/14-01/18-60, para. 14.

**RELIEF SOUGHT**

26. For the foregoing reasons, the Defence respectfully requests the Chamber to **ADOPT** the Defence proposed Protocol as set out in Annex B.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Mr. Knoop', enclosed within a rectangular box.

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Mr. Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this  
11 March 2019  
At The Hague, the Netherlands