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No. ICC-01/14-01/18

Date: 1 April 2021

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

Decision Providing Further Directions on the Contact Protocol

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamaï
Marie-Hélène Proulx

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and (3)(a), 67(1) and 68(1) of the Rome Statute (the ‘Statute’), issues this ‘Decision Providing Further Directions on the Contact Protocol’.

I. Procedural history and submissions

1. On 8 October 2020, the Chamber issued 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’ (the ‘Contact Protocol’).¹
2. On 2 March 2021, the Ngaïssona Defence (the ‘Defence’) sought the Chamber’s guidance with respect to Section VII, and particularly paragraph 27, of the Contact Protocol (the ‘Defence Request’). Specifically, the Defence sought clarification as to ‘whether Section VII of the Protocol applies to witnesses [...] whose statements the Prosecution relied on at the confirmation stage, but who will not be called at trial as reflected in the “Prosecution’s Final List of Witnesses”’ and ‘whether Section VII of the Protocol applies to persons who have given a statement to the Prosecution, but [...] whose statement the Prosecution never relied on (such as persons whose statements were disclosed as “PEXO”)’. In the Defence’s view, ‘Section VII of the Protocol currently applies exclusively to witnesses [...] whose statements the Prosecution intends to rely on at trial, as reflected in the “Prosecution’s Final List of Witnesses”’.²
3. On 17 March 2021, the Chamber clarified the scope of paragraph 27 of the Contact Protocol (the ‘Initial Guidance’). Notably, it found that the Prosecution ‘clearly communicated to the participants which witnesses it intends to call to testify or whose statements it intends to rely on by virtue of its Final Witness List’. Furthermore, the Chamber found that ‘this list also makes clear which witnesses the Prosecution does not, or no longer, intend to call to testify or otherwise rely upon’. Accordingly, the Chamber considered that paragraph 27 of

¹ Annex 5 to the Decision on Protocols at Trial, ICC-01/14-01/18-677-Anx5.

² Email from the Defence, 2 March 2021, at 18:37.

the Contact Protocol applies only to those witnesses included in the Prosecution's Final Witness List.³

4. On 18 March 2021, the Prosecution sought clarification regarding the Initial Guidance (the 'Request for Guidance'). The Prosecution indicates that it understands the Initial Guidance to mean that 'witnesses on whom the Prosecution relied in support of, and to obtain, the confirmation of charges against the Accused, including those witnesses whose evidence may have been instrumental, but whom the Prosecution will not or cannot call at trial for *any given reason* – may be directly contacted by an opposing Party, without limitation and without the protection afforded by the pre-existing Contact Protocol'. Further, it submits that '[t]his would include witnesses who, for instance, may have withdrawn further cooperation under extraneous threats, duress, or interference'. In the Prosecution's submission, this understanding of the Initial Guidance would be 'incongruent with the underlying rationale for the issuance of the initial Contact Protocol in the first instance'⁴ [...] and the absence of any reference therein concerning its duration or expiry'.
5. The Prosecution thus requests the Chamber's guidance as to 'whether [its] reading and appreciation of [the Initial Guidance] comports with the Chamber's intent, or whether the Contact Protocol continues in effect without modification in respect of witnesses properly notified as such to the Parties who participated in proceedings before the Pre-Trial Chamber'.⁵

II. Analysis

6. At the outset, the Chamber observes that the Prosecution did not respond to the Defence Request, despite having had sufficient time to do so. On the contrary, the Prosecution sent its request only after the Chamber issued its Initial Guidance, essentially questioning the Chamber's guidance on the matter.

³ Email from the Chamber, 17 March 2021, at 17:54.

⁴ Referring to the initial Contact Protocol adopted by Pre-Trial Chamber II, see ICC-01/14-01/18-156-AnxA, paras 1-2.

⁵ Email from the Prosecution, 18 March 2021, at 13:55.

7. Turning to the substance of the Request for Guidance, the Chamber recalls that paragraph 27 of the Contact Protocol prohibits the contact of a party or participant with a witness of the calling party or participant. It further specifies that this restriction only applies to those witnesses for which ‘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’.⁶ At the trial stage, this restriction thus only applies to those witnesses whom the calling participant intends to call or rely on *at trial*.
8. The Chamber observes that the Contact Protocol does not specify how the calling participants’ intention must be communicated. However, the Chamber considers that, at this stage of the proceedings, this intention is communicated, and in any case is clearly apparent, by virtue of including a certain individual in the relevant participants’ final witness list.⁷ Not including an individual in this list on the other hand shows that the participant does not intend to call or rely on this individual for the purposes of trial.
9. This interpretation is in line with the overall objective of the Contact Protocol, namely to strike an adequate balance between protecting the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations on one hand, and the rights of the accused on the other.⁸ Moreover, this understanding responds to the Contact Protocol’s requirement to interpret it ‘restrictively’, as set out in paragraph 2 therein.⁹

⁶ Contact Protocol, ICC-01/14-01/18-677-Anx5, para. 27 provides in full: ‘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.’

⁷ See also Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision 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’, the ‘Dual Status Witness Protocol’, and related matters, 19 March 2020, ICC-01/12-01/18-674, para. 28.

⁸ In this regard, the Chamber notes that the Contact Protocol, ICC-01/14-01/18-677-Anx5, provides in paragraph 1 that ‘[t]he purpose of this Protocol is to protect the safety of witnesses, victims and other individuals at risk, as well as the integrity of investigations, in a manner consistent with the rights of suspects and accused’.

⁹ Contact Protocol, ICC-01/14-01/18-677-Anx5, para. 2 provides: ‘This Protocol shall be interpreted restrictively and no provision shall be interpreted to derogate any general rule of confidentiality or other protection accorded to witnesses, victims or other persons at risk on account of the activities of the Court,

10. In light of the above, the Chamber reiterates its Initial Guidance that paragraph 27 of the Contact Protocol applies only to those witnesses included in the Prosecution's Final Witness List.¹⁰ Consequently, paragraph 27 of the Contact Protocol does not apply to individuals absent from this list, irrespective of whether they have been previously relied upon by the Prosecution during pre-trial proceedings.
11. Nonetheless, and mindful of its obligations under Article 68(1) of the Statute, the Chamber acknowledges that exceptions to the above may be warranted, where the safety of victims or witnesses so requires. Should the Prosecution thus be in possession of information suggesting that the safety of specific individuals is at risk, it is instructed to immediately liaise with the Victims and Witnesses Unit (the 'VWU'). Where the VWU shares the Prosecution's safety concerns, the Chamber may be approached on an *ex parte* basis, Prosecution and VWU only. Any request for an exception to the above must include the VWU's assessment on the matter.

FOR THESE REASONS, THE CHAMBER HEREBY

DIRECTS the participants to proceed in accordance with the present decision.

Done in both English and French, the English version being authoritative.

 Judge Péter Kovács	 Judge Bertram Schmitt Presiding Judge	 Judge Chang-ho Chung
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Dated 1 April 2021

At The Hague, The Netherlands

or any obligations of the parties and participants under the Code of Conduct of the Office of the Prosecutor, the Code of Professional Conduct for counsel, the Code of Conduct for Investigators, the Code of Conduct for Intermediaries and any binding national codes of conduct.'

¹⁰ Email from the Chamber, 17 March 2021, at 17:54, with reference to Annex A to the Prosecution's List of Witnesses and Evidence, ICC-01/14-01/18-724-Conf-AnxA.