

ANNEX 45

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Version

From: Trial Chamber V Communications
Sent: 14 October 2022 16:38
To: D30 Ngaissona Defence Team
Cc: D29 Yekatom Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team; OTP CAR IIB; Trial Chamber V Communications; Associate Legal Officer-Court Officer; Chamber Decisions Communication
Subject: Decision on the Ngaissona Defence Request for Further Directions on the Contact Protocol

Dear Counsel,

The Single Judge considers that it would be more appropriate to adjudicate the below request on the record.

Accordingly, he instructs the Ngaissona Defence to submit its request by way of formal filing.

Kind regards, TC V

From: [REDACTED]
Sent: 13 October 2022 11:03
To: Trial Chamber V Communications [REDACTED]
Cc: D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; V44 LRV Team [REDACTED]; V45 LRV Team [REDACTED] OTP CAR IIB [REDACTED]

Subject: Request for Further Directions 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"

Dear Trial Chamber V,

The Defence for Mr Patrice-Edouard Ngaissona ("the Defence") hereby seeks the Chamber's guidance with respect to the interpretation of paragraph 27 of 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 "Protocol", ICC-01/14-01/18-156-AnxA and ICC-01/14-01/18-677-Anx5).

In light of the wording of paragraph 27 of the Protocol, which states that "*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*", the Defence is of the view that the Prosecution should refrain from pursuing any discussion with individuals they approach who make it clearly apparent that the intention of the Defence is to call them as witnesses or rely on their statement. Whenever such intention becomes apparent, and if need be, the Prosecution has always the opportunity to request confirmation from the Defence of that intention.

As already discussed with the Prosecution, the Defence interprets the last part of paragraph 27 as meaning that the communication of a list of witnesses is only one way of communicating the calling party's intention and that such intention can also be determined by the opposing party based on its exchange with the individual approached. This interpretation is also in line with the definition of "witness" in paragraph 4(f) of the Protocol, which does not expressly require the calling party's intention to be conveyed by the calling party directly. For its part, the Defence has always followed this approach and refrained from speaking to individuals who had been in contact with the Prosecution long before the Prosecution communicated its List of Witnesses to the other parties.

As emerged during *inter partes* discussions, however, the Prosecution holds a different interpretation, and appears to consider its obligation to be limited to refraining from contacting or interviewing individuals a list of which has been communicated by the Defence to the Prosecution. This overly restrictive interpretation of paragraph 27 could damage the Defence's investigations in the field at this particularly sensitive stage of the proceedings where the Defence is not yet required to provide the Chamber and the parties with its witness list but has already initiated investigations which it expects to safeguard.

For the aforementioned reasons and in order to preserve the integrity of its investigations, the Defence seeks the Chamber's guidance as to the scope of paragraph 27 of the Protocol.

Should the Chamber deem it preferable, the Defence stands ready to present the current request for guidance by way of a formal filing.

Thank you for your consideration on the above.

Kind regards,



On behalf of Counsel

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