

ANNEX 58

Public Redacted

Version

From: [REDACTED]
Sent: 14 December 2022 15:06
To: [REDACTED]
Subject: FW: CONFIDENTIAL - Contacts with witness

Follow Up Flag: Follow up
Flag Status: Flagged

From: Vanderpuye, Kweku [REDACTED]
Sent: mercredi 19 octobre 2022 19:46
To: [REDACTED]; OTP CAR IIB [REDACTED]
Cc: OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED]; D30 Ngaissona Defence Team [REDACTED]
Subject: RE: CONFIDENTIAL - Contacts with witness

Dear Ms [REDACTED],

Thank you for your email. We do not consider that paragraph 27 of the Protocol requires clarification. As noted, paragraph 4(f) unambiguously defines what a 'witness' is. Paragraph 27 relates to a discrete issue, and we do not consider that your position is consistent with the Protocol or viable within the statutory framework. Instead, it conflicts with, and would unduly impede, the Prosecution's discharge of its responsibilities under articles 54 and 68 regarding this and/or other cases.

To the extent that you choose to refrain from clearly communicating the identity of the witnesses the Defence intends to call or upon whom you intend to rely, this does not shift the burden to the other Party to affirmatively ascertain who such witnesses might or might not be. As we have previously mentioned, it is not by speaking with, meeting, or even interviewing and taking a statement that an individual is thereby transformed into a Party's 'witness' within the meaning of the Protocol. There may be perfectly good reasons, having interviewed an individual, not to call or rely on them. Thus, such actions do not prima facie implicate the Protocol.

Concerning the 19 January 2021 email from your colleague [REDACTED] you are correct in that it appears that we overlooked it. Nevertheless, our position is entirely consistent. In those circumstances, the Defence contested the Prosecution's interview of [REDACTED] in October 2019, arguing that he had agreed to be a Defence witness in August 2019, as noted in the Prosecution interview statement. However, as you know (1) [REDACTED] did not provide this information until the end of his interview (as is readily discernible from the narrative); and (2) in any event, the Defence made no reference to its own interview of [REDACTED] or statement when filing its LoE concerning the confirmation hearing pursuant to rule 121(6) (ICC-01/14-01/18-322-Conf-Anx1- (particularly section D).

This illustrates our point. Notwithstanding that the Defence had interviewed [REDACTED] and even obtained his agreement to testify in August 2019, he was altogether excluded from the LoE filed on 4 September. Given that the Prosecution's interview did not take place until after the October 2019 conclusion of the Parties' confirmation, if ever the Defence had the intention to call this witness or to rely on his evidence, the LoE belied any such intention. Significantly, this is the very argument the Defence advanced on 2 March 2021, arguing that witnesses on whom the Prosecution relied in the confirmation process but not included on its Final List of Witnesses for trial did not fall under the Protocol (see, ICC-01/14-01/18-942, but also note, particularly para. 11).

Should we encounter individuals who communicate the Defence's intention to call them or to rely on their statement, we will of course refrain from further contact. However, bear in mind that your strategic decision to withhold such

information risks that, like [REDACTED], your witness may fail to communicate such information altogether or after the fact, or does so ambiguously.

If you have any questions or concerns, please let us know.

Kind regards,

Kweku

From: [REDACTED]
Sent: 07 October 2022 08:47
To: OTP CAR IIB [REDACTED]
Cc: OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED]; D30 Ngaissona Defence Team [REDACTED]
Subject: RE: CONFIDENTIAL - Contacts with witness

Dear Mr Vanderpuye,

Many thanks for conveying your position on this matter, which is indeed very clear.

Since the Prosecution's interpretation could negatively impact the Defence's investigations, and given that it is not the first time that a potential violation by the Prosecution of the Protocol on the Handling of Confidential Information and Contacts with Witnesses comes to our attention (I am referring to my colleague [REDACTED] email to your office dated 19 January 2021, which remains unanswered to this date), we propose that clarification of paragraph 27 of the Protocol be sought with the Trial Chamber.

In the meantime, and until clarity is obtained as to the correct interpretation of the Protocol, we kindly ask that your office refrains from speaking with individuals who made the Defence's intention to call them or rely on their statement clearly apparent.

Kind regards,

[REDACTED]

From: OTP CAR IIB [REDACTED]
Sent: 06 October 2022 11:58
To: [REDACTED] OTP CAR IIB [REDACTED]
Cc: OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED]; D30 Ngaissona Defence Team [REDACTED]
Subject: RE: CONFIDENTIAL - Contacts with witness

Dear Counsel,

Thank you for your reply. If you do not wish to provide the Prosecution with the names of individuals whom you intend to rely on as 'witnesses' or on their statements that is your prerogative. However, be advised that in doing so, you act at your own peril if what you seek is to avert potential contacts *prospectively*.

To be clear, it is not incumbent on the Prosecution to *discover* whether an individual is a Defence ‘witness’. The default under the Protocol is that, unless and until an individual’s status is made known, they are not a “witness.” I refer you again to paragraph 4(f) which express and unambiguous:

“For the purposes of this Protocol:

[...] f) “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.”

Paragraph 27 defines the limitation on contacts with “witnesses” as that term is defined. It does not expand or alter the definition.

We appreciate your consideration of the above, and trust that our position is clear. Thanks again.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: 06 October 2022 10:01
To: OTP CAR IIB [REDACTED]
Cc: OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED]; D30 Ngaissona Defence Team [REDACTED]
Subject: RE: CONFIDENTIAL - Contacts with witness

Dear Mr Vanderpuye,

Many thanks for your response and for taking notice of our intention to call [REDACTED] or to rely on his statement.

As you know, paragraph 27 of the Protocol specifies that “[e]xcept 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”.

The last part of this sentence makes it clear 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 inferred by the other parties, especially at this stage of the proceedings, when the Defence is not yet required to provide the Chamber and the parties with its witness list. The Defence has refrained in the past from speaking to individuals who had been interviewed by the Prosecution long before the Prosecution communicated its List of Witnesses to the other parties. The exchange between [REDACTED] and the Prosecution’s investigator(s) should have made our intention sufficiently apparent to the investigators so as to (i) conclude that paragraph 27 applied and (ii) refrain from contacting [REDACTED] a second time.

We would very much appreciate it if, in case a similar scenario were to repeat itself in the future, the Prosecution could contact us before pursuing any contact with the individual in question, so we can confirm our intention if need be.

Many thanks.

Kind regards,

[REDACTED]

From: OTP CAR IIB [REDACTED]
Sent: 04 October 2022 15:47
To: [REDACTED]
Cc: OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED]; OTP CAR IIB [REDACTED] D30 Ngaissona Defence Team [REDACTED]
Subject: RE: CONFIDENTIAL - Contacts with witness
Importance: High

Dear Counsel,

Thank you for your email. We take notice of your communication regarding [REDACTED].

Just to clarify the matter, please be aware that when the Prosecution approached [REDACTED] did not mention that he was an Ngaissona Defence witness. As you know, merely meeting with a person or even conducting an interview does not transform them into a "witness" either practically, or per paragraph 4(f) of the Protocol. On the contrary, the provision expressly defines a "witness" as a person whom the calling Party has *clearly* communicated to the opposing Party its intention to call or to use their statement.

We are not aware that the Defence has provided the Prosecution with a list of individuals that it considers to be witnesses within the meaning of the Protocol. However, to the extent that you are already aware of any such persons, we would appreciate it if you could transmit this information to us as soon as possible. In this way, we can avoid any misapprehensions going forward. Thanks again.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: 03 October 2022 09:59
To: Vanderpuye, Kweku [REDACTED]
Cc: OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED] OTP CAR IIB [REDACTED] D30 Ngaissona Defence Team [REDACTED]
Subject: CONFIDENTIAL - Contacts with witness

Dear Mr Vanderpuye,

It has come to our attention that the Prosecution was in recent contact with [REDACTED]

We advise that [REDACTED] is a Ngaissona Defence witness within the meaning of paragraph 4(f) of the Protocol on the Handling of Confidential Information (ICC-01/14-01/18-677-Anx5). It appears that despite the fact that [REDACTED] informed the Prosecution's investigator(s) as such and, more specifically, that he already met with our Defence team, the Prosecution's investigator(s) approached him on a second occasion.

Accordingly, we kindly ask that your investigator(s) refrain from further direct contact with [REDACTED]. In the event the Prosecution would like to meet with [REDACTED], please do not hesitate to inform us and we will, as per the Protocol, inquire whether or not he requires a Ngaissona Defence representative during the meeting.

Kind regards,

[REDACTED]

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