

ANNEX 2

PUBLIC

From: Trial Chamber V Communications
Sent: 17 March 2021 17:54
To: [REDACTED]; Trial Chamber V Communications
Cc: D30 Ngaissona Defence Team; D29 Yekatom Defence Team; OTP CAR IIB Case Management; OTP CAR IIB Managers; V44 LRV Team; V44 LRV Team OPCV; V45 LRV Team; Chamber Decisions Communication; VWS Legal
Subject: RE: Request for Guidance as to the Scope 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"

Dear Counsel,

The Chamber takes note of the Ngaissona Defence's request below, which essentially concerns the scope of the direction contained in 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', ICC-01/14-01/18-677-Anx5 (the 'Protocol').

Paragraph 27 of the Protocol provides 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 Chamber considers 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 (ICC-01/14-01/18-724-Conf-AnxA). Conversely, 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 considers that paragraph 27 of the Protocol applies only to those witnesses included in the Prosecution's Final Witness List.

Kind regards, TC V

From: [REDACTED]
Sent: 02 March 2021 18:37
To: Trial Chamber V Communications [REDACTED]
Cc: D30 Ngaissona Defence Team [REDACTED] D29 Yekatom Defence Team [REDACTED] OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Managers [REDACTED] V44 LRV Team [REDACTED] V44 LRV Team OPCV <[REDACTED]> V45 LRV Team [REDACTED]
Subject: Request for Guidance as to the Scope 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"

Dear Trial Chamber V,

The Defence for Mr Patrice-Edouard Ngaissona ("the Defence") hereby seeks the Chamber's guidance with respect to the scope of Section VII 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, paras 27-44).

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 Section VII of the Protocol currently applies exclusively to witnesses on whose statements the Prosecution intends to rely on at trial, as reflected in the “Prosecution’s Final List of Witnesses” (ICC-01/14-01/18-724-Conf-AnxA). The Defence’s interpretation is supported by a recent decision in the *Al Hassan* case on the same matter, where Trial Chamber X found that “[a]fter the filing of the Prosecution’s final list of witnesses, only those individuals appearing on the list shall qualify as Prosecution ‘witnesses’ for the purpose of this protocol” (ICC-01/12-01/18-674, para. 28). However, as emerged during *inter partes* discussions, the Prosecution holds a different interpretation, and maintains that Section VII of the Protocol continues to apply “particularly” to those witnesses on whose statements the Prosecution has already relied on in these proceedings, regardless of the fact that the witnesses do not appear in its Final List of Witnesses. Moreover, the Prosecution appears to consider that Section VII of the Protocol equally applies to witnesses on whose statements the Prosecution has never relied on, such as witnesses whose statements were disclosed as “PEXO”.

For the aforementioned reasons and in order to organise its investigations, the Defence seeks the Chamber’s guidance, as to:

- whether Section VII of the Protocol applies to witnesses on 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”;
 - whether Section VII of the Protocol applies to persons who have given a statement to the Prosecution, but on whose statement the Prosecution never relied on (such as persons whose statements were disclosed as “PEXO”).
- 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.

Yours sincerely,



Case manager – on behalf of the Defence team for Mr Patrice-Edouard Ngaïssona

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