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**International
Criminal
Court**

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Date: **10 June 2022**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Yekatom Defence Request for Amendment of the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” (ICC-01/14-01/18-677-Anx1) and related matters

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr. Alfred Rombhot Yekatom (“Defence”) hereby requests amendment of the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial” (“Witness Familiarisation Protocol”).
2. The Defence submits that in order to ensure the fairness of the proceedings and to protect the effectiveness of Mr. Yekatom’s defence, amendment of paragraph 88 of the Witness Familiarisation Protocol is necessary. This amendment would oblige the Victims and Witnesses Unit (“VWU”) to share with the Defence the record of dates and times when a statement was made available to a witness.
3. In addition, the Defence requests the Chamber to order VWU to review the dates and times of provision of statements to witnesses who have already testified, and report any further deviation from the Witness Familiarisation Protocol which may have occurred.

PROCEDURAL HISTORY

4. On 8 October 2020, the Trial Chamber issued its Decision on Protocols at Trial which included, *inter alia*, the Witness Familiarisation Protocol.¹
5. On 14 September 2021, the Defence sought clarification of the Protocol as to “whether or not the report sent by the VWU following the familiarisation phase should include the dates and times when the statements, or if applicable audio, were provided to the witness”.²

¹ [ICC-01/14-01/18-677](#) and [ICC-01/14-01/18-677-Anx1](#) respectively.

² Email from the Defence to the Chamber dated 14 September 2021 at 15:56, see [ICC-01/14-01/18-1167-Anx33-Red.](#)

6. On 15 September 2021, the Prosecution submitted that “neither does the Protocol require clarification, nor is there any tenable basis for the information sought” on the ground that, *inter alia*, “there is no showing to the materiality of this information”.³
7. On 23 September 2021, the Chamber clarified that the “Witness Familiarisation Protocol does not require the VWU to provide the participants with information related to the dates and times when the statements are provided to the witness in the context of the familiarisation process”.⁴
8. On 23 May 2022, the Prosecution sent to the Chamber and Parties the corrections made by P-2475 to his statement, of which the cover page consisted of the “Statement Sign in Form” which indicated that the witness retained his statement from 19 May 2022 10:09 to 23 May 2022 08:00.⁵
9. On 24 May 2022, the Defence contacted the Prosecution to obtain clarifications regarding the provision to P-2475 of his statement and whether or not the Witness Familiarisation Protocol was duly respected. The Prosecution responded that they would reach out to VWU and also invited the Defence to contact VWU contemporaneously, indicating that they did not object to the Defence enquiring directly with VWU, which the Defence then did.⁶
10. On 30 May 2022, VWU confirmed that P-2475 retained his statement from 19 to 23 May 2022, in his hotel room and without VWU’s supervision, which comprised a deviation from the Witness Familiarisation Protocol.⁷ On the same

³ Email from the Prosecution to the Chamber dated 15 September 2021 at 14:12, see [ICC-01/14-01/18-1167-Anx33-Red](#).

⁴ Email from the Chamber to the Parties dated 23 September 2021 at 16:58, see [ICC-01/14-01/18-1167-Anx33-Red](#).

⁵ Email from the Prosecution to the Chamber and Parties dated 23 May 2022 at 17:09, including the document bearing ERN CAR-OTP-2135-3160.

⁶ Email from the Defence to the Prosecution 24 May 2022 at 16:10, Email from the Prosecution to the Defence 24 May 2022 at 18:36 and Email from the Defence to VWU dated 24 May 2022 at 19:00.

⁷ Email from the VWU to the Parties dated 30 May 2022 at 11:22, transmitted to the Chamber by VWU on 3 June 2022 at 11:33.

day, the Defence questioned P-2475 on the time spent and the conditions in which he read his statements.⁸

11. In light of this incident the Chamber voiced its disappointment that “this matter was not brought to the Chamber’s attention by VWU itself, but rather by the Defence during the hearing”, found that it was “concerning that the VWU deviated from the Protocol without any instruction from the Chamber to do so”, and further indicated that it “expects VWU to review its internal workings, in order to ensure strict adherence with the Protocol in place [...]”.⁹

APPLICABLE LAW

12. Article 64 of the Rome Statute provides, inter alia, that :

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. [...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: [...]

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; [...]

(f) Rule on any other relevant matters.

SUBMISSIONS

13. The Defence first wishes to express its concern following the deviation from the rules set out in the Witness Familiarisation Protocol regarding the provision to P-2475 of his statements for the purpose of their re-reading by the witness. Indeed, it appears from both the witness’s and VWU’s accounts that P-2475 was allowed to keep his statements, in his hotel room and without supervision, for four days.¹⁰

⁸ P-2475 : [ICC-01/14-01/18-T-131-CONF-FRA ET](#), pages 34-36.

⁹ Email from the Chamber to VWU and Parties dated 6 June 2022 at 10:27.

¹⁰ Email from the VWU to the Parties dated 30 May 2022 at 11:22, transmitted to the Chamber by VWU on 3 June 2022 at 11:33; See also P-2475 : [ICC-01/14-01/18-T-131-CONF-FRA ET](#), pages 34-36.

14. The current Witness Familiarisation Protocol provides that witnesses are provided their statement by VWU “to enable the witness to refresh his/her memory”.¹¹ It is also provided that the witness will read the statement on the premises of the VWU and that it “will keep record of the dates when statements were provided to the Unit, made available to the witness and, if applicable, returned to the party”.¹²
15. Those directives were put in place by the Chamber with the expectation that “Witness Familiarisation adequately enables a witness to reflect on their memory of the events as well as their statement, while still maintaining spontaneity of their responses when examined before the Chamber”.¹³ This procedure was specifically put in place by the Chamber, instead of the “Witness Preparation” procedure, in order to prevent the “inherent risk of rehearsing” the witnesses’ evidence which “should be first tested during the hearing in order to preserve the principle of immediacy”.¹⁴
16. The strict adherence to the procedure is necessary to maintain the spontaneity of a witness’ testimony and by extension safeguard the integrity of the proceedings. In this regard, the Defence submits that the following findings of Justice George Leggatt in the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* before the UK Queen's Bench Division of the High Court, regarding the manner in which the statement production and re-reading procedure can negatively impact a witness’s recollection of events, are illustrative:

The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised.

¹¹ [ICC-01/14-01/18-677-Anx1](#), para. 85.

¹² [ICC-01/14-01/18-677-Anx1](#), paras 85, 88.

¹³ [ICC-01/14-01/18-677](#), para. 24.

¹⁴ [ICC-01/14-01/18-677](#), paras. 21, 23.

Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.¹⁵

17. While this decision was made in the context of a commercial case, the Defense submits that these findings are nonetheless relevant to the familiarisation procedure applied in the present situation. It is especially argued that the deviations observed in the familiarisation process of P-2475 directly impacted his testimony before the Chamber as, during the close to 96 hours during which he had an unsupervised and unlimited access to his statement, P-2475 read and re-read his statement to such an extent that his testimony was no longer spontaneous.¹⁶ It is the Defence submission that his recollection of the alleged events might have been based more on his memorisation of his statement than his alleged original experience of the events.
18. The Defence further notes that its awareness of the existence of such a deviation in the case of P-2475 was fortuitous. Indeed, the Defence first inquired of this situation with VWU following the disclosure by the Prosecution of a courtesy copy of corrections made by P-2475 to his statement, which included the record of its provision.¹⁷ As VWU did not inform the Chamber on its own initiative of this deviation from the protocol,¹⁸ should those corrections which are neither systematic nor necessarily accompanied with the record of provision of documents to a witness had not occurred,¹⁹ the Defence would not have been in

¹⁵ United Kingdom, High Court of Justice Queen's Bench Division (Commercial Court), *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor*, [2013] EWHC 3560 (Comm), 15 November 2013, para. 20.

¹⁶ P-2475 : [ICC-01/14-01/18-T-131-CONF-FRA ET](#), page 36, lines 12-15.

¹⁷ Email from the Prosecution to the Chamber and Parties dated 23 May 2022 at 17:09, including the document bearing ERN CAR-OTP-2135-3160.

¹⁸ The Defence notes to this effect the Chamber's email addressed to VWU dated 6 June 2022 at 10:27; the Defence also recalls that the Familiarisation Protocol expressly states that 'Should something exceptional occur during the statement reading process and come to the attention of VWU staff, the VWU will report this to the entity calling the witness and the Chamber; see, [ICC-01/14-01/18-677-Anx1](#), para. 90.

¹⁹ See as an example the modifications made by P-1704 in the Prosecution's email to the Chamber and Parties dated 2 May 2022 at 14:05 with the document bearing ERN CAR-OTP-2136-0486.

a position to make its inquiries, and the deviation would have remained unknown to the Parties and the Chamber.

19. The Defence is cognisant of the Chamber's clarification that the current Witness Familiarisation Protocol does not require VWU "to provide the participants with information related to the dates and times when the statements are provided to the witness in the context of the familiarisation process".²⁰ However, it is submitted that given the seriousness of the deviation in the case of P-2475, its likely impact on this witness's testimony, the fortuitous manner of its discovery, the lack of internal approval reported by the VWU, the internal communication issues underscored by the Chamber and the Chamber's expectations that VWU review its internal workings constitute new facts that establish that the current Witness Familiarisation Protocol warrants amendment.
20. The Defence therefore suggests that paragraph 88 of the Witness Familiarisation Protocol should be amended by the addition of the sentence "The VWU will transmit this record to the Parties before the testimony of the witness" after the words "[...] returned to the party" and before "The VWU will not be in a position [...]".
21. This amendment would help safeguard the integrity of the proceedings by ensuring that all parties will be in a position to identify any deviation from the protocol during the familiarisation of a witness, and to raise the matter during the subsequent testimony. Depriving the Defence from raising such an issue in this manner, should a deviation not be properly notified as it was the case for P-2475, would infringe on the right of Mr. Yekatom to an effective defence.

²⁰ Email from the Chamber to the Parties dated 23 September 2021 at 16:58, see [ICC-01/14-01/18-1167-Anx33-Red.](#)

22. More generally, and in light of the importance of testimonies in this case, it is submitted that this amendment would allow the Chamber to have one more tool at its disposition to better understand of the background of a witness's recollection of events and to assess the credibility of their evidence, which will further assist the truth-seeking function of the Chamber.
23. To be clear, the Defence is confident that the Prosecution acted in good faith throughout in dealing with this matter. However, it appears that the above mentioned deviation was not noticed and/or acted upon by the Prosecution prior to the Defence having raised the issue. This further militates in favour of the sought amendment. In other words, given that it is in the interests of all the Parties, as well as the Chamber, that any deviation from the Witness Familiarisation Protocol be discovered and identified in a timely manner, it follows that this information should duly be transmitted to all Parties.
24. The Defence also stresses that ordering the VWU to provide this information is well into the purview of the Chamber's prerogatives, article 64(6)(b) providing that it can require the production of documents if necessary. Moreover, the amendment would not put any undue burden upon the VWU as it only entails the transmission of information which is already recorded.
25. In light of the above, the Defence respectfully requests the Chamber to amend the Witness Familiarisation as set out above.
26. Finally, and irrespective of its decision on the amendment request, the Defence requests the Chamber to order VWU to review all the records of provision of statements to witnesses who have already testified and to report any anomaly or deviation from the Witness Familiarisation Protocol to the Chamber and the Parties.

RELIEF SOUGHT

27. In light of the above, the Defence respectfully requests Trial Chamber V to:

AMEND the Witness Familiarisation Protocol as set out in paragraph 20 above;

ORDER the VWU to review records of provision of statement to witnesses and report any deviation from the Witness Familiarisation Protocol.

RESPECTFULLY SUBMITTED ON THIS 10th DAY OF JUNE 2022



Me Mylène Dimitri
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