Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/14-01/18**
Date: **22 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD NGAÏSSONA*

Public

Prosecution's Response to "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" (ICC-01/14-01/18-1451), 10 June 2022

Source: **Office of the Prosecutor**

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

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I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") hereby provides its response to the Yekatom Defence Request for Amendment of the "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial" ("Request") ("Protocol").[1] The Request is unsubstantiated and should be rejected in its totality.

2. The Request advances no grounds warranting the amendment of the Protocol, nor indeed, the provision of times and dates that previous witnesses had access to their statement, as suggested by the Defence.

3. *First,* the Protocol does not require modification due to a young man of modest education (P-2475), whose request for additional time to read his statement was accommodated in good faith by Registry personnel. *Second,* any concern regarding the spontaneity or lack thereof respecting witness testimony can be developed through questioning during the hearing, the responses to which are subsequently evaluated by a Chamber composed of professional judges. *Third,* there is no rule which provides that a witness is not entitled to a copy of their statement at the conclusion of the interview process, the provision of their statement at a later time is no way unfairly suggestive, nor does it otherwise impede their evidence.

II. SUBMISSIONS

A. The Witness Familiarisation Protocol does not require modification

4. The Protocol does not require amendment in this case. The Victims and Witnesses Unit ("VWU") have made clear that the accommodation of the witness' needs in this specific instance was not approved internally, but instead, the result of exceptional circumstances. Moreover, appropriate steps are being taken to prevent a

[1] ICC-01/14-01/18-1451 and ICC-01/14-01/18-677-Anx1 respectively.

recurrence. Furthermore, VWU stresses that it is not aware of any other such anomalies.[2]

5. Here, P-2475's statements indicate that he left school at a young age and set out clearly that he speaks "a bit" of French.[3] The insinuation that this young man's request for more time to read not one, but two statements totalling 46 pages in a language not his own is suspicious in any way is unconscionable. VWU equally make it clear that Covid-19 rules and the witness' health issues also delayed the reading process, leading to the staff member's judgement that it was more efficient to allow the witness to read his statements in his hotel room. This minor transgression was the result of the staff member's legitimate concern that the proceedings might otherwise need to be postponed.[4]

6. During his testimony, the witness explained in detail that he cannot read very quickly, and wished to take the appropriate length of time to correct and explain certain aspects of his statements.[5] As evidenced by the laborious clarifications that he noted down during this process, it is clear that he used this time to carefully read – not rehearse – his *own* statements.[6] There is simply no evidence to support the Defence's contention that the witness "read and re-read his statement" to the point where his evidence was no longer spontaneous. Even if that were the case — and it clearly was not — it is a matter that can be fully addressed and tested during cross-examination.

7. In order to suggest that the re-reading procedure can negatively affect witnesses' recall, the Defence relies on *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor*, a case in which Justice Leggatt ultimately opted to "place little if any reliance at all on

[2] 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; Email from VWU dated 15 June 2022 at 18:29.
[3] CAR-OTP-2122-9809 at 9809; CAR-OTP-2110-0556 at 0556 and 0558, para. 12.
[4] See fn. 2, above.
[5] ICC-01/14-01/18-T-131-CONF-FRA CT, p. 35, lines 14-26.
[6] See CAR-OTP-2135-3160.

witnesses' recollections".[7] The Judge in *Gestmin* benefitted from access to vast reams of contemporaneous documentary evidence, which differs so dramatically from the current trial as to render the Defence's invocation of the case completely implausible. Indeed, in the 2021 case of *Barrow & Ors v Merrett & Anor*[8] in the same jurisdiction, the Judge rejected the Claimant's reliance on *Gestmin*, concluding that it had not established a "fixed rule of interpretation applicable to all commercial cases, let alone all cases in which there is a dispute of fact."

8. As pointed out by the Defence, the Chamber clarified merely nine months ago 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".[9] Prior to that decision, the Prosecution argued that the Defence sought to transform the Protocol into a discovery device in a manner not intended.[10] The Chamber has already considered the reasons for excluding such a requirement and the Defence has established no grounds for a contrary conclusion on this occasion.

B. Any concern regarding the spontaneity of testimony can be addressed through cross-examination

9. The Prosecution appreciates that the spontaneous nature of evidence is of paramount importance to the Chamber's ability to establish the truth, and finds it an essential element of the proceedings. The rejection of "witness preparation" in favour of "witness familiarisation" in the current case already serves to avoid the risk of any

[7] England and Wales, High Court of Justice Queen's Bench Division (Commercial Court), *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor*, [2013] EWHC 3560 (Comm), para. 22.
[8] England and Wales, High Court of Justice Queen's Bench Division, *Barrow & Ors v Merrett & Anor* [2021] EWHC 792 (QB), para. 34.
[9] Email from the Chamber to the Parties dated 23 September 2021 at 16:58, see ICC-01/14-01/18-1167-Anx33-Red.
[10] Email from the Prosecution to the Chamber dated 15 September 2021 at 14:12, see ICC-01/14-01/18-1167-Anx33-Red.

substantial loss of spontaneity during testimony.[11] As pointed out by the Chamber, the present practice whereby VWU assists the witness in reviewing their statement avoids the risk of "inadvertent transmission of the Calling Party's expectations about the testimony to the witness" and allows "a witness's recollection of the events [to] be first tested during the hearing in order to preserve the principle of immediacy."[12] Any "memorisation" or lack of spontaneity in the witness' testimony can be easily exposed through questions posed at trial, and the Defence is afforded ample opportunity to unveil any such issues during cross-examination.

C. A witness is generally entitled to a copy of their statement upon request

10. There is no rule which indicates that a witness is not entitled to a copy of their statement upon the conclusion of the interview process. Indeed, the Rules of Procedure and Evidence ("Rules") specifically provide for the provision of a copy of their statement to certain witnesses.[13] A statement contains, after all, nothing more than the witness' *own* account of events, and the provision of such is simply not suggestive. Nothing suggests that P-2475's motivation in re-reading his own statements was anything other than to provide honest, direct, and accurate evidence to the Chamber.

11. The Defence's concern that the witness retained his statements "without supervision" perverts the purpose of the rule. The Protocol indicates that a VWU staff member should be present during the reading process "[o]nly if it is assessed to be necessary to ensure the psychological and physical well-being of the witness".[14] The

[11] ICC-01/14-01/18-677, paras. 21-30.
[12] ICC-01/14-01/18-677, paras. 22-23; *See also Ongwen* Decision on Protocols to be Adopted at Trial, ICC-02/04-01/15-504, para. 13.
[13] Rule 112(1)(e) reads as follows: "The tape [of the interview] shall be transcribed as soon as practicable after the conclusion of the questioning and a copy of the transcript supplied to the person questioned together with a copy of the recorded tape [...]".
[14] Protocol, para. 87.

Defence's argument that the duration of the re-reading and the lack of "supervision" had any impact on testimony is unavailing.

III. CONCLUSION

12. For the above reasons, the Request should be rejected in its entirety.

Karim A. A. Khan QC, Prosecutor

Dated this 22nd day of June 2022
At The Hague, The Netherlands