

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/14-01/18

Date: 23 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 YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA***

Public

Common Legal Representatives' Joint 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' (ICC-01/14-01/18-677-Anx1) and related matters"

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Common Legal Representatives” or the “CLRV”) hereby file their joint 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’ (ICC-01/14-01/18-677-Anx1) and related matters” (the “Defence Request” or the “Request”).¹

2. The Common Legal Representatives, while not disputing that in the case of Witness P-2475 the provisions of the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial (the “Witness Familiarisation Protocol” or the “Protocol”)² were not fully complied with, nevertheless contend that the requested amendment to the Witness Familiarisation Protocol is not necessary, neither to preserve the objectives of witness familiarisation nor to ensure that future deviations from said Protocol are known to all participants in the proceedings. The current provisions of the Protocol, in particular paragraph 90 thereof, are sufficient to ensure the fulfilment of the above goals. There is also no reason or basis to shift the responsibility to identify and report any deviation from the familiarisation phase of witnesses from the Victims and Witnesses Unit (the “VWU”) to the parties. Finally, the requested amendment will not provide Trial Chamber V (the “Chamber”) with any additional tool in its assessment of witnesses’ credibility, but it is instead very likely to impact on the expeditiousness of the trial.

¹ See the “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”, [No. ICC-01/14-01/18-1451](#), 10 June 2022 (the “Defence Request” or the “Request”).

² See the “Annex 1 to the Decision on Protocols at Trial” (Trial Chamber V), [No. ICC-01/14-01/18-677-Anx1](#), 8 October 2020 (the “Witness Familiarisation Protocol” or the “Protocol”).

II. PROCEDURAL BACKGROUND

3. On 8 October 2020, the Chamber issued its “Decision on Protocols at Trial”,³ which included, *inter alia*, the Witness Familiarisation Protocol.⁴

4. On 14 September 2021, the Defence for Mr Yekatom (the “Yekatom Defence”) requested clarification from the Chamber concerning the Witness Familiarisation Protocol, in particular, “[w]hether 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” for familiarisation purposes.⁵

5. 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*”.⁶

6. On 30 May 2022, upon request by the Yekatom Defence, the VWU explained via email that Witness P-2475 retained his statement from 19 to 23 of May 2022 and read it, exceptionally, in the hotel without the VWU supervision. The VWU acknowledged this deviation from the Witness Familiarisation Protocol and explained the reasons therefor.⁷

³ See the “Decision on Protocols at Trial” (Trial Chamber V), [No. ICC-01/14-01/18-677](#), 8 October 2020.

⁴ See the Witness Familiarisation Protocol, *supra* note 2.

⁵ See the email from the Defence to the Chamber dated 14 September 2021 at 15:56, “Annex 33 to the Fifth Registry Quarterly Report on Decisions issued by way of e-mail from 11 June to 31 October 2021”, [No. ICC-01/14-01/18-1167-Anx33-Red](#).

⁶ See the email from the Chamber to the participants dated 23 September 2021 at 16:58, “Annex 33 to the Fifth Registry Quarterly Report on Decisions issued by way of e-mail from 11 June to 31 October 2021”, [No. ICC-01/14-01/18-1167-Anx33-Red](#).

⁷ See the email from the VWU to the parties dated 30 May 2022 at 11:22, transmitted to the Chamber and all participants by the VWU on 3 June 2022 at 11:33.

7. On 2 June 2022, the Chamber instructed the VWU to provide its comments regarding the compliance with the applicable Witness Familiarisation Protocol by 8 June 2022.⁸

8. On 3 June 2022, the VWU transmitted by e-mail to the Chamber and all participants its explanations about the previous correspondence dated 30 May 2022.⁹

9. On 6 June 2022, the Chamber issued the “Second order in relation to P-2475’s witness familiarisation” (the “Second Order”), taking note of the explanations provided by the VWU and its acknowledgement that a deviation from the Witness Familiarisation Protocol occurred during Witness P-2475’s familiarisation, and finding that, as stipulated in the Protocol, the VWU should apply the procedures set out therein to all witnesses called to testify before the Court, “*unless otherwise ordered*”.¹⁰

10. On 10 June 2022, the Yekatom Defence submitted the Request, asking the Chamber to amend paragraph 88 of the Witness Familiarisation Protocol in order to add the sentence “*The VWU will transmit this record [of the dates when the statements were provided to the Unit, made available to the witness and, if applicable, returned to the party] to the Parties before the testimony of the witness*” (the “Requested Amendment”).¹¹

11. On 15 June 2022, the VWU submitted its observations on the Request.¹²

12. On 16 June 2022, the Chamber by e-mail instructed the Registry to file its observations on the Request, and any further observations it may have on the matter, by 23 June 2022.¹³

⁸ See the email from the Chamber to the VWU and the participants dated 2 June 2022 at 14:02.

⁹ See *supra* note 7.

¹⁰ See the email from the Chamber to the VWU and the participants dated 6 June 2022 at 10:27 (the “Second Order”).

¹¹ See the Defence Request, *supra* note 1, para. 20.

¹² See the email from the VWU to the Chamber dated 15 June 2022 at 18:29.

¹³ See the email from the Chamber to the VWU and the participants dated 16 June 2022 at 14:51.

13. On 22 June 2022, the Prosecution and the VWU filed their respective observations on the Request.¹⁴

III. SUBMISSIONS

1. The Requested Amendment is unnecessary neither to preserve the objectives of witness familiarisation nor to ensure compliance with the Protocol

14. The Yekatom Defence argues that the Requested Amendment is necessary to “safeguard the integrity of the proceedings” since witness familiarisation maintains the “spontaneity of a witness’ testimony”¹⁵ and the parties should 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”.¹⁶

15. The Common Legal Representatives concur with the Yekatom Defence that the provisions of the Witness Familiarisation Protocol were not fully complied with regarding Witness P-2475 because the VWU failed to inform the Chamber on its own initiative of the deviation from the Protocol.¹⁷ However, they contend that the Requested Amendment is not necessary, neither to preserve the objectives of witness familiarisation nor to ensure that any deviations from the Protocol are known to all participants.

¹⁴ See the “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)”, [No. 01/14-01/18-1472](#), 22 June 2022. See also the “Registry’s Observations on the “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)”, [No. ICC-01/14-01/18-1473-Conf](#), 22 June 2022.

¹⁵ See the Defence Request, *supra* note 1, para. 16.

¹⁶ *Idem*, para. 21.

¹⁷ *Idem*, para. 18.

16. The CLRV submit in this regard that the current provisions of the Witness Familiarisation Protocol are sufficient to ensure the fulfilment of the above goals, including in the case of scenarios such as the one faced with Witness P-2475. In particular, paragraph 90 of the Protocol provides as follows:

“[...] 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. The VWU will also report this to the legal adviser of the respective witness, if applicable”.¹⁸

17. Pursuant to this provision, it was incumbent upon the VWU to immediately notify the Chamber and the Prosecution (as the entity calling the concerned witness) of the deviation from paragraphs 86 and 88 of the Protocol during Witness P-2475's familiarisation, *i.e.* that upon his request, the witness was allowed to keep his statement for reading at the hotel for four days, instead of proceeding with this exercise at the VWU's premises and with the latter support.¹⁹ Had the VWU complied with paragraph 90 of the Witness Familiarisation Protocol, the Prosecution would have then disclosed this “exceptionality” in Witness P-2475's statement reading to the Defence, which in turn would have enabled the Defence to raise this matter at the earliest opportunity. In this scenario, the deviation from the Protocol would have been identified in a timely manner, noticed by the Prosecution, and the Defence's awareness thereof would not have been “*fortuitous*”.²⁰

18. The Second Order in relation to P-2475's witness familiarisation points to the course of action the VWU should have followed in the circumstances, although without specifically referring to paragraph 90 of the Witness Familiarisation Protocol,

¹⁸ See the Witness Familiarisation Protocol, *supra* note 2, para. 90.

¹⁹ See the email from the VWU to the participants dated 30 May 2022 at 11:22, transmitted to the Chamber by the VWU on 3 June 2022 at 11:33.

²⁰ See the Defence Request, *supra* note 1, paras. 18 and 23.

insofar the Chamber found it “[d]isappointing that this matter [the deviation of the Protocol] was not brought to the Chamber’s attention by the VWU itself, but rather by the Defence during the hearing”.²¹

19. The Yekatom Defence, while referring to paragraph 90 of the Witness Familiarisation Protocol to demonstrate the VWU’s omission to inform the Chamber on its own initiative of the deviation from the Protocol,²² nonetheless requests the amendment of said Protocol.

20. The CLRV contend that in fact the very objective of the Requested Amendment seems to be to shift - from the VWU to the parties - the responsibility to identify and report any deviation from the Protocol during the familiarisation phase of a witness.²³ Based on this premise, the Requested Amendment lacks any justification. Indeed, the Yekatom Defence does not demonstrate that the VWU – a neutral entity within the Registry – is not, as a matter of principle, capable or sufficiently equipped to identify any deviation that may occur during the familiarisation phase so as this responsibility needs to be vested with the parties instead.

21. In conclusion, the CLRV submit that the Requested Amendment is neither necessary nor justified. It is unnecessary because the procedure on the identification and the reporting of any deviation during the familiarisation phase of witnesses is already provided by the current provisions of the Protocol, in particular paragraph 90. It is unjustified because there is no basis or reason to shift the responsibility of the identification of any deviation from the Protocol - during the familiarisation phase of witnesses – from the VWU to the parties. The fact that the provisions under paragraph 90 were not complied with in the particular instance of Witness P-2475 does not justify in itself the amendment of the Protocol to ensure its effectiveness in future instances.

²¹ See the Second Order, *supra* note 10.

²² See the Defence Request, *supra* note 1, para. 18, footnote 18.

²³ *Idem*, para. 21.

2. The Requested Amendment is unnecessary for the Chamber to assess the credibility of witnesses

22. The Yekatom Defence argues that the Requested Amendment is necessary for the Chamber to “[h]ave 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”.²⁴

23. The CLRV note that in fact the Yekatom Defence takes this opportunity to reiterate the same arguments already made in September 2021, when seeking clarification from the Chamber regarding paragraph 88 of the Witness Familiarisation Protocol.²⁵ Indeed, the Defence previously argued that the information related to the dates and times when the statements are provided to the witness in the context of the familiarisation process was “potentially highly relevant for the purpose of a non-calling Party’s challenge on the witness credibility” because the “amount of time granted to a witness to review their statement would be relevant to the witness’s failure to clarify or correct that information” and to the “risk that witnesses memorise their prior statements”.²⁶ The Single Judge already addressed the above arguments and clarified that the Protocol does *not* require the VWU to provide the participants with the information as sought by the Yekatom Defence.²⁷

24. The CLRV submit that the Requested Amendment remains unnecessary for the Chamber to assess the credibility of witnesses. The more or less amount of time employed by a witness to read his or her statement and to correct/clarify any information therein is not *per se* determinant as to whether the individual at hand failed to properly review the information and/or intended to learn the statement by heart. There may be many other factors explaining the amount of corrections made by a witness or the lapse of time used to read the statement, such as the witness’ age,

²⁴ *Idem*, para. 22.

²⁵ See the email from the Defence to the Chamber dated 14 September 2021 at 15:56, *supra* note 5; and the Defence Request, *supra* note 1, para. 19.

²⁶ See the email from the Defence to the Chamber dated 14 September 2021 at 15:56, *supra* note 5.

²⁷ See the email from the Chamber to the participants dated 23 September 2021 at 16:58, *supra* note 6.

memory, stress, level of literacy, etc. If any concerns come up regarding the amount of time employed by a witness to read his or her statement, the Defence can always raise them in court by way of examining the witness.

25. In fact, had the Protocol been respected and had the Defence been notified that Witness P-2475 kept his statement and read it alone,²⁸ the Defence could have made the same submissions on Witness P-2475's credibility as they have made in the Request, after examining the witness.²⁹

26. Moreover, the CLRV submit that amending the Witness Familiarisation Protocol as requested by the Yekatom Defence may negatively impact on the length and expeditiousness of the trial. On the basis of the time employed by witnesses to read and correct their statements, the Defence may go into *fishing expeditions* to challenge the credibility of other witnesses in this case relying on the dates and times provided by the VWU, by speculating for instance that, despite having ample time to read their statements or after spending ample time reading them, the witnesses unduly failed to correct anything or memorised their statements.

27. In conclusion, introducing the Requested Amendment will not provide the Chamber with additional tools in its assessment of the credibility of witnesses, but it is instead very likely to impact on the expeditiousness of the trial. The length of time employed by a witness to read and eventually correct his or her statement is a matter of the witness's personal skills and capacities – to be properly assessed by the VWU – and cannot *per se* impact on his or her credibility. The VWU is best placed to identify and report any deviation from the familiarisation phase.

²⁸ See *supra* para. 17.

²⁹ See the Defence Request, *supra* note 1, para. 17.

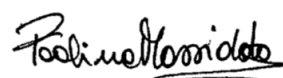
IV. CONCLUSION

28. For the foregoing reasons, the Common Legal Representatives respectfully request the Chamber to reject the Defence Request.

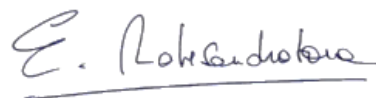


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Dated this 23rd day of June 2022

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)