

ANNEX 9

Public

Redacted Version

From: Trial Chamber V Communications
Sent: 10 August 2022 17:02
To: Vanderpuye, Kweku; [REDACTED]
Cc: Office of the Director DJSS; Office of the Director DEO; [REDACTED] VWS Legal; [REDACTED] OTP Protection Strategies Unit; OTP CAR IIB Case Management; OTP CAR IIB Managers; [REDACTED]; Trial Chamber V Communications; Chamber Decisions Communication
Subject: Decision on Prosecution Request to Contact [REDACTED] after Familiarisation

Dear Counsel, dear colleagues from the Registry,

The Chamber takes note of the Registry's email below, following the Chamber's order, whereby it provides its observations on the Prosecution's request to contact [REDACTED] after the familiarisation process commenced, and the Prosecution's reply thereto (see emails from the Prosecution, 29 July 2022, at 11:42; 9 August 2022, at 13:45; email from the Chamber, 4 August 2022, at 16:55) (the 'Request', the 'Registry Response' and the 'Reply', respectively).

In particular, the Chamber notes the Registry's submissions that the situation of [REDACTED] is unique and not foreseen in the Witness Familiarisation Protocol (ICC-01/14-01/18-677-Anx1), given that (i) the witness [REDACTED] (ii) due to [REDACTED] of the witness when he was first met by the VWU in [REDACTED] he was never introduced by the Prosecution and because 'no proper transfer of responsibility [...] took place', the witness has never been formally under the VWU's management; and (iii) the witness, in the meantime, also refused to testify, all of which 'disrupted the regular application of the Protocol'.

The Registry also submits that the VWU is not equipped to provide long term care and management support to witnesses who are not included in the ICCPP, and that their management pertains in principle to the calling party and is only transferred for short and defined periods of time to the VWU around the time of field preparation or testimony.

The Chamber further notes the Prosecution's submissions that the fact that [REDACTED] was familiarised is not in dispute, that the Witness Familiarisation Protocol is 'unambiguous', that the VWU's arguments relate to 'internal policy matters which do not attend to the plain text of the Protocol or its implementation as ordered by the Chamber', and that it should formally raise the issue with the Chamber.

Having examined the Registry Response, in particular, the Chamber takes into account the time elapsed since the witness was initially familiarised in [REDACTED] the fact that he is currently expected to commence his testimony on [REDACTED] the stated absence of a proper handover from the Prosecution to the VWU and the logistical challenges faced. While the fact that [REDACTED] was familiarised is not disputed, as indicated by the Prosecution, and that the Witness Familiarisation Protocol is 'unambiguous' as to the prohibition of contact between the calling party and the witness once such process has taken place, the Chamber notes that this matter is to be distinguished from the question of whether [REDACTED] is currently to be considered as falling under the responsibility of the calling party or the VWU. In this regard, the Chamber clarifies that under the circumstances, the Prosecution, as the calling party, continues to remain responsible for the witness.

That being said, the Chamber takes note of the Prosecution's concern with regard to the fact that the witness had already been familiarised. However, it also notes that the Request is limited in scope and exceptional, and trusts that the contact between the Prosecution and witness [REDACTED] will indeed be limited to scheduling his upcoming testimony. The Prosecution may thus contact the witness until he is transferred to the VWU prior to his upcoming testimony, and proceed thereafter in accordance with the Witness Familiarisation Protocol.

In light of the above, the Chamber grants the Request.

The Chamber further instructs the Prosecution and the Registry to share a redacted version of the Request, the Registry Response and the Reply, respectively, with the Chamber and the rest of participants.

Kind regards,

TC V

From: Vanderpuye, Kweku [REDACTED]
Sent: 09 August 2022 13:45
To: [REDACTED]; Chamber Decisions Communication [REDACTED]
Cc: Office of the Director DJSS [REDACTED] Office of the Director DEO [REDACTED] VWS Legal [REDACTED] OTP Protection Strategies Unit [REDACTED] OTP CAR IIB Case Management [REDACTED]; OTP CAR IIB Managers [REDACTED] Trial Chamber V Communications [REDACTED] Chamber Decisions Communication <[REDACTED]> [REDACTED]
Subject: RE: Order on Prosecution Request to Contact [REDACTED] after Familiarisation

Dear All,

The Prosecution is of the view that the Familiarisation Protocol is clear concerning the apportionment of responsibilities between VWS and the Calling Party. As the Chamber's communication below underscores, the relevant provision of the Protocol is unambiguous: 'once the process of witness familiarisation has *commenced*, any further meeting between the entity calling the witness [...] outside of Court is prohibited'.

The position that *"it would be unreasonable for the VWU to accept the responsibility of trial witnesses' case management for an extensive period of time as the VWU is not equipped to provide long term care and management support to witnesses who are not included in the ICCPP"* does not derive from any provision in the Protocol. Nor, does it correspond to any other directive or order in this case. Although VWS may understandably seek to limit its responsibility for witnesses under the Protocol due to resource or other burdens associated with their management 'once the process of familiarisation has commenced', these are *internal policy* matters which do not attend to the plain text of the Protocol or its implementation as ordered by the Chamber. The Protocol does not provide for any *exception* to VWU's responsibility for witnesses on account of the length of their prospective management, and it is not for VWS to 'accept' or 'decline' the terms thereof.

That [REDACTED] was 'familiarised' in [REDACTED] is not in dispute and VWU's responsibility for the witness under the Protocol is clear. While VWU's policy concerns may be understandable, the Prosecution does not consider it appropriate for VWU to take unilateral action with regard to the implementation of the terms of the Protocol, which alters the express division of responsibilities. This is even more so where doing so may have a deleterious impact on the management and security interests of witness. Rather, to the extent that VWS seeks to advance policy considerations in respect of its responsibilities, this should be raised formally with the Chamber which may then review, modify, or amend the Protocol as it may deem necessary — not achieved by simply refusing to acknowledge its terms. To be clear, the Prosecution did not 'agree' to seize the Chamber in respect of contacting the witness, but rather was instead compelled to do so given VWU's reticence to discharge its responsibility as assigned under the Protocol.

We hope that the above clarifies the matter and will contribute to the expeditious resolution of this issue, such that the scheduled appearance of [REDACTED] is not placed in jeopardy and, more importantly, that there is not a continuing vacuum of responsibility to attend to any security issues that might arise in the interim. Thank you.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: 08 August 2022 17:28
To: Chamber Decisions Communication [REDACTED]
Cc: Office of the Director DJSS [REDACTED]; Office of the Director DEO [REDACTED]
 [REDACTED] VWS Legal [REDACTED]
 [REDACTED] Vanderpuye,
 Kweku [REDACTED] OTP Protection
 Strategies Unit [REDACTED]; OTP CAR IIB Case Management
 [REDACTED] OTP CAR IIB Managers [REDACTED]
 [REDACTED] Trial Chamber V Communications
 [REDACTED]; Chamber Decisions Communication [REDACTED]
 [REDACTED]
Subject: RE: Order on Prosecution Request to Contac [REDACTED] after Familiarisation

Dear colleagues,

The situation of witness [REDACTED] is unique in that [REDACTED] when he was first met by the VWU. He was also supposed to testify [REDACTED]. This type of situation is not foreseen in the applicable Familiarisation Protocol (ICC-01/14-01/18-677-Anx), which is why it is necessary to seek the Chamber's views.

In accordance with the said Protocol, a witness would be under the care of the VWU for two limited periods of time:

- 1) in the field after the witness is introduced by the calling party to the VWU to complete some logistics and preparatory steps (see para. 4 to 11) after which he would be handed over back to the calling party;
- 2) at the time the witness arrives at the location of testimony where he/she would be handed over again by the calling party and until he/she returns home after the cooling down period (para. 26-34).

The default principle is that the management of trial (unprotected) witnesses remains with the calling party except during these two specific periods of time.

In the case of witness [REDACTED] these two periods are difficult to clearly identify: Due to [REDACTED], the witness was never introduced by the Prosecution and no proper transfer of responsibility ("handover") took place between the Prosecution and the VWU. The witness [REDACTED]. In the meantime the witness also refused to testify which, according to the VWU, together with [REDACTED], disrupted the regular application of the Protocol. The witness then appeared in front of the Chamber on [REDACTED] but will only testify in [REDACTED].

It is the VWU's view that due to [REDACTED] witness, the absence of introduction by the Prosecution and of a proper handover, the witness had never been formally under the Unit's management. This position was shared with the Prosecution several times since the witness' [REDACTED]. Furthermore, the fact that the witness informed the Court that he did not want to testify created another disruption to the regular application of the Protocol, which requires informing the calling party (see para. 10 of the Protocol) and a new decision on the case management to be taken.

Notwithstanding the unique situation of witness [REDACTED], it would be unreasonable for the VWU to accept the responsibility of trial witnesses' case management for an extensive period of time as the VWU is not equipped to provide long term care and management support to witnesses who are not included in the ICCPP. Unprotected witnesses' management pertains in principle to the calling party and is only transferred for short and defined periods of time to the VWU around the time of field preparation or testimony. Should a long period of time elapse between the familiarisation of a witness and their actual appearance, a discussion as to the need for "handing over" the witness back to the calling party would also take place, and

the intervention of the Chamber sought if necessary. In the present case the witness was first familiarised in prior to his scheduled appearance at trial.

In the case of witness [REDACTED] and due to the unclear circumstances, it was agreed that the Prosecution would seek the Chamber's authorization before contacting the witness.

I hope this e-mail provides you with sufficient information. The VWU remains available should you have further questions on the matter or to implement any guidance of the Chamber with respect to the witness.

Kind regards,
Natacha

[REDACTED]
Senior Manager – Services Unit/Administratrice principale – Unité des services
Victims and Witnesses Section/ Section de l'aide aux victimes et aux témoins
Registry / Greffe
International Criminal Court / Cour pénale internationale
[REDACTED]

From: Trial Chamber V Communications [REDACTED]
Sent: 04 August 2022 16:55
To: [REDACTED] Vanderpuye, Kweku [REDACTED]
[REDACTED]
Cc: OTP Protection Strategies Unit [REDACTED] OTP CAR IIB Case Management
[REDACTED] OTP CAR IIB Managers [REDACTED]
[REDACTED] Trial Chamber V Communications
[REDACTED] Chamber Decisions Communication [REDACTED]
[REDACTED]
Subject: Order on Prosecution Request to Contact [REDACTED] after Familiarisation

Dear Counsel, dear colleagues from the Registry,

The Single Judge takes note of the Prosecution's email, in which it seeks the approval of the Chamber to contact [REDACTED] 'in order to manage the witness and schedule his upcoming testimony' (see email below) (the 'Request').

The Single Judge recalls that, according to paragraph 26 of the Witness Familiarisation Protocol (ICC-01/14-01/18-677-Anx1), 'once the process of witness familiarisation has commenced, any further meeting between the entity calling the witness [...] outside of Court is prohibited'. In this regard, the Single Judge notes the Prosecution's submissions that [REDACTED] was familiarised in [REDACTED], prior to his first appearance before the Court, and that the Prosecution was informed by the VWU that 'they do not believe [REDACTED] is currently under their management'.

The Single Judge considers it necessary that the VWU provide further information as to the reasons why it is reportedly not managing [REDACTED] for the purposes of scheduling his upcoming testimony. Therefore, the Single Judge instructs the VWU to provide its observations on the Request by Monday, 8 August 2022, at 12:00.

Kind regards,

TC V

From: [REDACTED]
Sent: 29 July 2022 11:42
To: Trial Chamber V Communications [REDACTED]
Cc: [REDACTED];
OTP Protection Strategies Unit [REDACTED] OTP CAR IIB Case Management
[REDACTED]; OTP CAR IIB Managers [REDACTED]
[REDACTED]
Subject: ex parte Prosecution, VWS only, request to contact [REDACTED] after his familiarization

Dear Trial Chamber V,

As you know, [REDACTED] was familiarized in [REDACTED], prior his appearance in Court. However, we were informed by VWS that they do not believe [REDACTED] is currently under their management despite the fact that the Familiarization Protocol prohibits any contact between the entity calling the witness once the process of familiarization has commenced (#677-Anx1, para.26).

As a result, the Prosecution is seeking the approval of the Chamber to contact [REDACTED] in order to manage the witness and schedule his upcoming testimony.

Kind regards,

[REDACTED]



[REDACTED]
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