

ANNEX 9

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Version

From: Trial Chamber V Communications
Sent: 15 February 2023 14:22
To: OTP CAR IIB; D29 Yekatom Defence Team; D30 Ngaissona Defence Team; V44 LRV Team; V44 LRV Team OPCV; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: Decision on the Defence's requests to reject the placing of a shield in the courtroom for P-0487's testimony
Attachments: RE: Observations on 'Outcome Vulnerability Assessment CAR-OTP-P-0487' of 14 February 2023

Dear Counsel,

The Single Judge takes note of the requests by the Defence teams to reject the measure recommended by the VWU of 'plac[ing] a shield between the witness and the accused persons to prevent direct eye contact' (*see below* email from the Ngaissona Defence, 14 February 2023, at 16:33; *see attached* email from the Yekatom Defence, 14 February 2023, at 16:55). He further takes note of the observations submitted by the Prosecution, which defers to the Chamber's discretion and the VWU's assessment (*see below and attached* emails from the Prosecution, 14 February 2023, at 18:27 and 20:07).

The Single Judge recalls that the VWU's recommendation is based on a psychosocial assessment conducted pursuant to Article 68 of the Statute and Rule 88 of the Rules, aimed at protecting the witness's integrity and well-being (*see also* email from the Chamber, 31 August 2022, at 18:51).

In this regard, the Single Judge notes that, in its latest report, the VWU recommends the measure in question 'as it can decrease [the] state of arousal and anxiety' of the witness, who, during his interview, 'expressed concern about the presence of both [...] accused in the Courtroom', stated that 'their presence causes fear' and reported 'symptoms compatible with [REDACTED]' (report attached to the email from the VWU to the Chamber, 14 February 2023, at 13:45).

Further, the Single Judge considers that, contrary to the Ngaissona Defence's submissions, the measure in question would not 'preven[t] Mr Ngaissona from assessing aspects of P-0487's testimony such as body language' nor 'essentially exclud[e] him from participating fully in his own trial'. Both accused will be able to fully observe P-0487 on the monitors in the courtroom.

Under these circumstances, the Single Judge does not consider this measure to be 'disproportionate', 'unwarranted', nor prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Defence's requests are therefore rejected.

Kind regards, TC V

From: Vanderpuye, Kweku [REDACTED]
Sent: 14 February 2023 20:07
To: [REDACTED] Trial Chamber V Communications [REDACTED]
Cc: OTP CAR IIB [REDACTED]; D29 Yekatom Defence Team [REDACTED];
 D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team
 [REDACTED] V45 LRV Team [REDACTED] V44 LRV Team OPCV [REDACTED]
Subject: RE: Request to reject the placing of a shield in the courtroom during P-0487's testimony

Dear Trial Chamber V,

Dear All,

The Prosecution defers to the Chamber and to the VWU's assessment referenced below. As stated in respect of the similar request by the *Yekatom* Defence, the Prosecution does not consider that the proposed measure to place a shield between the witness and the accused persons to prevent direct eye contact is disproportionate, or otherwise unfairly impedes the Accused's right to participate or follow the proceedings. The Court has a substantial countervailing interests in protecting the witness's well-being, and to advance the search for the truth. In circumstances where the witness's life has allegedly been threatened by the Accused, the measure proposed cannot be considered as disproportionate or overreaching.

As has been the Court's practice, Messrs. Ngaissona and Yekatom are not precluded from observing the witness fully in their presence, and further to communicate effectively and contemporaneously with Counsel. Monitors broadcasting the witness's testimony live in the Courtroom enable the Accused to observe the his demeanour completely – notwithstanding any absence of direct eye contact.

The Prosecution considers that the facilities available in the Courtroom easily and sufficiently mitigate any impediment to the Accused's ability to follow the proceedings – which are marginal at best. Although the witness is not a victim of the charges in this case, he nevertheless has a history with the Accused which has entailed receiving serious threats to his life previously. In these circumstances, the VWU's assessment cannot be said to be 'drastic', 'disproportionate', or unreasonable. Thank you.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: 14 February 2023 16:33
To: Trial Chamber V Communications [REDACTED]
Cc: OTP CAR IIB [REDACTED] D29 Yekatom Defence Team <[REDACTED]>;
 D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team
 [REDACTED]; V45 LRV Team [REDACTED]; V44 LRV Team OPCV [REDACTED]
 [REDACTED]
Subject: Request to reject the placing of a shield in the courtroom during P-0487's testimony

Dear Trial Chamber V,

Further to the "Outcome Vulnerability Assessment" of P-0487 transmitted by VWU today at 13:46, the Defence for Mr Ngaissona respectfully requests the Chamber to reject VWU's recommendation to "*place a shield between the witness and the accused persons to prevent direct eye contact*".

This measure is disproportionate and unwarranted.

First, placing a "shield" preventing Mr Ngaissona from seeing P-0487 (and vice versa) is a drastic measure, which has the effect of preventing Mr Ngaissona from assessing aspects of P-0487's testimony such as body language and essentially excludes him from participating fully in his own trial. Significantly, the recommended measure unduly encroaches on Mr Ngaissona's right to confront the evidence, which is an essential requirement of a fair trial, as guaranteed by Article 67 of the Statute and international human rights instruments. According to the Prosecution, P-0487 is expected to provide core evidence against Mr Ngaissona, which only heightens the disproportional nature of the measure and fair trial concerns.

Second, the drastic measure of placing a "shield" in the courtroom is unwarranted and should be reserved for particularly vulnerable witnesses. P-0487's circumstances differ fundamentally from those of witnesses P-2475 or P-1339, for which the Chamber granted the measure of placing a "shield" in the courtroom; the evidence clearly shows that P-0487, [REDACTED]

[REDACTED]. There is therefore no indication in the record that P-0487 presents particular vulnerabilities, that would not already be mitigated by the in-court protective measures put in place (use of pseudonym, face and voice distortion, see ICC-01/14-01/18-906-Conf-Red).

Third, the VWU has already conducted its vulnerability assessment of P-0487, which it communicated to the Chamber, parties and participants on 2 December 2022 (see email from VWU of 2 December 2022, at 9:00). The placement of a shield was not recommended. The VWU provided no explanation whatsoever for its renewed assessment and the addition of the new recommended measure, particularly in light of the short amount of time elapsed since the last vulnerability assessment performed with P-0487 in December 2022.

In light of Mr Ngaïssona's fair trial right to be present at trial and confront the evidence against him, and in the absence of any indication which would explain why P-0487 would qualify as a sufficiently vulnerable witness, the recommendation of placing a "shield" between the witness and Mr Ngaïssona should be rejected.

Kind regards,



Legal Assistant, Defence of Mr Ngaïssona

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From: OTP CAR IIB
Sent: 14 February 2023 18:27
To: Trial Chamber V Communications
Cc: OTP CAR IIB; D29 Yekatom Defence Team; D30 Ngaissona Defence Team; V44 LRV Team; V44 LRV Team OPCV; V45 LRV Team; [REDACTED]
Subject: RE: Observations on 'Outcome Vulnerability Assessment CAR-OTP-P-0487' of 14 February 2023

Dear Trial Chamber V,
 Dear All,

The Prosecution defers to the Chamber and VWS's assessment. However, we do not consider the recommended course of action unduly impedes the Accused's right to follow the proceedings, and oppose the Defence's request to reject the measure on this ground.

As is clear from P-0478's Statement, the Accused has threatened and/or conspired to threaten the witness's life previously. As the witness's evidence attests (and that of other witnesses), the Accused's history of involvement in serious acts of violence is clear, and even extends to his admitted killing of fellow FACA members.

Although VWS's first assessment of P-0487 did not recommend placing "a shield between the witness and the accused persons to prevent direct eye contact", such a measure can hardly be characterised as "stigmatiz[ing]" here. Nor, is it disproportionate in the circumstances, given the substantial countervailing statutory interest in safeguarding the witness's well-being in respect of his participation in the proceedings.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: mardi 14 février 2023 16:55
To: Trial Chamber V Communications [REDACTED]
Cc: OTP CAR IIB [REDACTED]; D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED] V44 LRV Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; V45 LRV Team [REDACTED]
Subject: Observations on 'Outcome Vulnerability Assessment CAR-OTP-P-0487' of 14 February 2023

Subject: Observations on 'Outcome Vulnerability Assessment CAR-OTP-P-0487' of 14 February 2023

Dear Trial Chamber V,

The Yekatom Defence wishes to raise a concern in relation to the new vulnerability assessment made by VWS regarding P-0487 (Email sent by VWS to the Chamber, the Parties and the Participants on 14 February 2023 at 13:45).

Indeed, as P-0487 was scheduled to start his testimony on 5 December 2023, an assessment of this same witness was made fairly recently (Email sent by VWS to the Chamber, the Parties and the Participants on 2 December 2022 at 9:00). This initial assessment recommended to adapt the questioning to the needs and capacities of the witness, but made no mention of placing a shield between the witness and the accused persons.

This new measure is now suggested by VWS despite no mention of changes in circumstances that would explain a change in the measures to be taken.

The Defence reiterates that the suggested measure is particularly severe in that not only it is a limitation of Mr. Yekatom's right to fully follow the proceedings when there is live testimony but it is also a form of stigmatization. It is our view that this measure should be reserved for particularly vulnerable witnesses. [REDACTED]

[REDACTED]. It is revealing that VWS's first assessment of P-0487 did not conclude that there was a need for such measure.

In light of the above, and in the absence of any specific reasons which would explain why P-0487 would qualify as a sufficiently vulnerable witness, the Defence contends that the suggested measure of placing "a shield between the witness and the accused persons to prevent direct eye contact" should be rejected.

Kind regards,

Case manager, Yekatom Defence

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