

Annex 33

From: Trial Chamber V Communications
Sent: 23 September 2021 16:58
To: Vanderpuye, Kweku; [REDACTED]
Cc: D30 Ngaissona Defence Team; OTP CAR IIB Managers; OTP CAR IIB Case Management; V44 LRV Team; V44 LRV Team OPCV; V45 LRV Team; VWS Legal; D29 Yekatom Defence Team; Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: RE: Clarification of the Witness Familiarisation Protocol (ICC-01/14-01/18-677-AnxI)

Dear counsel,

The Single Judge takes note of the Yekatom Defence's request seeking 'the Chamber's clarification 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'.

The Witness Familiarisation Protocol (ICC-01/14-01/18-677-Anx1) indicates in paragraph 81 that the VWU should provide the participants with a 'record of all material provided to a witness prior to his/her testimony.' Further, it indicates in paragraph 88 that the VWU 'will keep record of the dates when the statements were provided to the Unit, made available to the witness and, if applicable, returned to the party', without indicating that this record should be provided to the participants.

In light of the above, the Single Judge clarifies 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.

Kind regards, TC V

From: Vanderpuye, Kweku [REDACTED]
Sent: 15 September 2021 14:12

To: [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

Subject: RE: Clarification of the Witness Familiarisation Protocol (ICC-01/14-01/18-677-AnxI)

Dear Trial Chamber V,

Dear All

The Prosecution does not consider that the Witness Familiarisation Protocol requires clarification. The request for clarification effectively seeks to transform the Protocol into a discovery device in a manner not intended.

First, neither the Chamber nor the Registry are charged with 'disclosure' under the Court's regulatory framework. Save matters which may otherwise impair the proceedings, the Chamber may take it upon itself to direct that the Registry or even the Court itself make certain material available to the Parties and Participants. This is clearly not such a case.

Second, even if a 'disclosure'-type analysis could be said to apply *arguendo*, there is no showing of the materiality of this information – at best, the demand for such information on grounds of "sufficient relevance" is vague and speculative in the circumstances. The length of time that a witness has or reads their statement is not dispositive or

even necessarily indicative of the extent of their familiarity with it. There are myriad factors which may rebut any associated assumptions, such as the literacy level of the witness, their comprehension of the exercise, their disposition, fatigue, concentration, and understanding of what is required of them. At any rate, the trial process easily affords the Parties and Participants ample opportunity to examine witnesses about the circumstances under which they have familiarised themselves with their prior statement.

Third, it is not uncommon for a witness to correct elements of their prior statement (even having attested to the same) when their attention is drawn to a specific aspect thereof. Absent an appropriate foundation being laid and/or a clear and express or implied obligation for the witness to do so, the fact that they may not have made such corrections during the familiarisation process does not require the provision of the information sought in order to address the issue effectively.

Fourth, the Defence are of course free to pursue whatever examination strategy considered effective within appropriate bounds. However, simply because more information may speculatively bear on the matter, it does not require the Parties Participants (particularly those having no disclosure obligation) to oblige the Defence's strategy.

For the reasons above, the Prosecution considers that neither does the Protocol require clarification, nor is there any tenable basis for the information sought. Thank you for your consideration.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]

Sent: 14 September 2021 15:56

To: Trial Chamber V Communications [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Subject: Clarification of the Witness Familiarisation Protocol (ICC-01/14-01/18-677-AnxI)

Dear Trial Chamber V,

The Yekatom Defence would like to request clarification concerning the Witness Familiarisation Protocol (ICC-01/14-01/18-677-AnxI) regarding the reading and the provision of witness statements to a witness by VWU.

Paragraph 81 of the Witness Familiarisation Protocol states that the record of all the material provided to the witness should be sent to the parties and participants in advance of the hearing in which the witness will testify.

The same Annex specifies in paragraph 84 that the calling party should indicate the length of the statement and estimate the time required to read the statement when the services of the VWU are requested.

Finally, paragraph 88 indicates that the VWU will keep record of the dates when the statements were made available to the witness.

While the Defence is notified of both i) the Familiarisation package from the OTP before the material is made available to the witness, and ii) the Records of materials provided to the witness after the familiarisation phase, the latter does not contain any further information. Specifically, it does not specify the dates and times during which the material has been made available to the witness.

Consequently the Defence hereby respectfully seeks the Chamber's clarification 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.

The Defence contends that this information is potentially highly relevant for the purpose of a non-calling Party's challenge on the witness credibility. To date, while a number of witnesses have amended their statement during the familiarisation phase (i.e. P-2841, P-0291 and P-0965), they maintained core portions of their statements when testifying to their accuracy. However, some witnesses may later claim, when confronted with prior inconsistent statements during their testimony (as the Court saw with regard to P-0965), that the information contained in their prior statement was incorrect, mistranslated or mis-transcribed. In such circumstances, the fact that a witness has taken a manifestly disproportionate amount of time to review their statement would be relevant to the witness's failure to clarify or correct that information during the familiarisation stage.

Further, the Defence respectfully submits that this information will provide further transparency as regards the amount of time that the witness has spent reviewing their statement(s) for the purposes of familiarisation. It would minimise the risk that witnesses memorise or internally rehearse their prior statements and by extension, ensure that the spirit of the Familiarisation Protocol is respected (in this regard, see ICC-01/14-01/18-677, paras 20-21, 23).

The Defence therefore submits that information regarding the dates and the times when the statements were provided to the witness are of sufficient relevance and importance to warrant inclusion in the VWU's post-familiarisation reports. Given that VWU is already keeping a record of the dates when the statements were made available to the witness pursuant to paragraph 88 of the Protocol, disseminating this information to the Parties and Participants would not be unduly burdensome.

Kind regards,



Case Manager - Yekatom Defence

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