

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **30 April 2020**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Motion for Disclosure of Draft Witness Statements

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Peter Robinson

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr. Abdou Dangabo Moussa

Mr. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

Mr. Dmytro Suprun

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move for an order, pursuant to Rule 76 of the Rules of Procedure and Evidence, that the Prosecution disclose drafts of witness statements.

RELEVANT PROCEDURAL HISTORY

2. On 20 August 2019, the Defence filed a *Motion for Disclosure of Rule 76 Material*, seeking, *inter alia*, information obtained from witnesses contained in draft or unsigned statements.¹
3. On 27 August 2019, the Prosecution responded, indicating that draft statements were not generally disclosable in that they are not final and have not been signed or ratified by the witness.²
4. On 3 September 2019, the Pre-Trial Chamber issued a decision on the motion in which it did not decide whether draft statements were disclosable under Rule 76, but simply directed the Prosecutor to verify whether she has in her possession any additional material that may fall within rule 76, and if so, to disclose it.³
5. In an *inter partes* communication of 13 December 2019, the Defence again requested disclosure of draft witness statements. On 12 March 2020, the Prosecution answered by stating that it would comply with its disclosure obligations. In subsequent *inter partes* consultation, the Prosecution declined to disclose any draft statements.⁴

¹ [ICC-01/14-01/18-285-Conf](#), Public redacted version: [ICC-01/14-01/18-285-Red](#).

² [ICC-01/14-01/18-295-Conf-Corr](#), para. 11.

³ [ICC-01/14-01/18-315-Conf](#), Public redacted version: [ICC-01/14-01/18-315-Red](#), para. 41.

⁴ A copy of the relevant *inter partes* correspondence can be provided upon request.

RELEVANT PROVISION

6. Rule 76—Pre-Trial disclosure relating to prosecution witnesses

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

ARGUMENT

7. When the Prosecution interviews a person who is not suspected of having committed a crime, it does not make an audio recording of that interview. Instead, the investigators prepare a draft statement for the witness to sign. The investigator meets with the witness, who makes changes to the draft statement, and a final statement is produced and signed by the witness. The Defence contends that is entitled to these draft statements pursuant to Rule 76(1). The Prosecution disagrees.
8. A witness statement is a “record of questions put to witnesses by the prosecution and of the answers given”.⁵ The Appeals Chamber has held that “the ordinary meaning of the term “statement” as used in rule 76 is broad and

⁵ *Prosecutor v. Niyitegeka*, [Judgement](#), Case No. ICTR-96-14-A, 9 July 2004, para. 33.

requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded".⁶

9. Investigators' notes of interviews with Prosecution witnesses have been held to come within the meaning of Rule 76.⁷ Draft versions of witness statements are no different than investigators' notes in that they represent the investigator's understanding of what the witness has said. If the witness makes changes in the final statement, the draft statement may be useful for cross-examination by showing a possible inconsistency in the witness' version or even the fact that the witness' drew attention to that particular part of the witness statement, making later claims of a misunderstanding less credible. Draft statements show how the witness's version has evolved.
10. Draft versions of witness statements have been specifically held to come within the meaning of "witness statements" at the ICTY⁸ and the STL.⁹ The ICTR has held that "records of all questions put to witnesses and of the answers given, even in cases where such questions and answers are repetitive" must be disclosed.¹⁰ The SCSL has found that any statement or declaration made by a witness in relation to an event he or she witnessed, or relating to matters about which he or she can give evidence, which is recorded

⁶ *Prosecutor v. Banda & Jerbo*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements, \(ICC-02/05-03/09-199\) and additional instructions on translation"](#), ICC-02/05-03/09-295, 17 February 2012, para. 23.

⁷ *Prosecutor v. Ntaganda*, [Decision on Defence Requests Seeking Disclosure Orders and a Declaration of Prosecution Obligation to Record Contacts with Witnesses](#), ICC-01/04-02/06-904, 16 October 2015, para. 29.

⁸ *Prosecutor v. Haradinaj*, [Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81](#), No. ICTY-04-84bis-T, 18 November 2011, para. 27: "Preliminary versions of a witness statement transcribed by another person must be disclosed, as Rule 66(A) is not limited to final official statements that have been signed and adopted by a witness. There is no valid distinction between official statements signed by a witness and other statements."

⁹ *Prosecutor v. Ayyash et al.*, [Decision on Merhi Defence Request for Disclosure of Documents Concerning Witness PRH230](#), No. STL-11-01/T/TC, 2 June 2017, paras. 77-83; *In the Matter of El Sayed*, [Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011](#), No. CH/AC/2011/01, 19 July 2011, paras. 85, 87-88.

¹⁰ *Prosecutor v. Nizeyimana*, [Decision on Urgent Defence Motion for Disclosure of Prior Statements](#), No. ICTR-00-55C-PT, 31 January 2011, para. 8

in any form by an official in the course of an investigation, falls within the meaning of a witness statement.¹¹

CONCLUSION

11. Therefore, the Defence respectfully requests that the Chamber order the Prosecution to disclose all draft statements in its possession for witnesses it intends to call to testify.

RESPECTFULLY SUBMITTED ON THIS 30th DAY OF APRIL 2020



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Peter Robinson
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

¹¹ *Prosecutor v. Brima et al.*, [Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigator's Notes Pursuant to Rules 66 and/or 68](#), SCSL-04-16-T, 4 May 2005, para. 16.