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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Prosecution's Response to Yekatom Defence's Motion for Disclosure of Draft
Witness Statements (ICC-01/14-01/18-500)**

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the YEKATOM Defence’s Motion for Disclosure of Draft Witness Statements.¹ Rule 76(1) - (3) of the Rules of Procedure and Evidence (“Rules”) imposes no obligation on the Prosecution to disclose “draft” statements of witnesses in addition to their original finalised versions. The Request fails to provide any persuasive authority or jurisprudence to the contrary. Additionally, and in any case, the Request is premature at this stage of the proceedings.

II. SUBMISSIONS

A. Rule 76(1) creates no general obligation to disclose draft statements

2. Contrary to the Defence’s open-ended demand for disclosure of all “draft” statements of witnesses in the Prosecution’s possession, rule 76(1) creates no such general obligation. The Defence’s contention that these *incomplete* versions of witness statements qualify as prior “statements made by those witnesses” within the meaning of rule 76(1)² is unavailing and unsubstantiated.

3. Earlier versions of witness statements as prepared by Prosecution investigators do not amount to “prior statements made by those witnesses” unless and until such witnesses accept or acknowledge their contents. It is only through a witness’s adoption of his or her statement, normally by way of a signed acknowledgement that the statement is “true to the best of [the witness’s] knowledge and recollection”,³ that its content can be *attributed* to the witness, and the witness thus held legally *accountable* for it. The definition of a “witness statement” as established by the ICTY Appeals Chamber in the *Blaškić* case, and adopted by Trial Chamber VII in the

¹ ICC-01/14-01/18-500 (“Request”).

² Request, paras. 7, 11.

³ Or, in French, “*véridique pour autant que je sache et que je m’en souviens*”.

Bemba, et al. case, emphasises the requirement of “due procedure” in defining a “witness statement”, specifically:

“the usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, *which is recorded through due procedure in the course of an investigation into the crime.*”⁴

4. Rule 76 should be understood in a similar context. In this vein, the Court’s statutory framework specifically establishes the “due procedure” regarding the taking of witness statements.

5. Rule 111(1) sets out these requirements and the imperative of recording “formal statements made by any person who is questioned in connection with an investigation or with proceedings.” Notably, the rule further expressly provides that the record “must be signed by the person who is questioned.” This act of signing is no perfunctory requirement because it transforms the investigators’ understanding of the witness’s evidence into a *statement* factually and legally attributable to the witness. Trial Chamber III in the *Bemba* case emphasised this distinction when considering whether “screening” notes or other investigator’s notes were subject to disclosure under rule 76(1). Such notes are merely a “personal record – not the witness’s – of what the latter said” whereas, by contrast, a signed witness statement or an electronic recording of an interview “provide a certain record of the witness’s evidence *approved by or coming from* the witness.”⁵ That acceptance or “approval” is dispositive of the necessary attribution of the statement to the witness for rule 76 purposes.

⁴ *Prosecutor v. Blaškić*, IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15 (emphasis added); cited in ICC-01/05-01/13-1227, para. 9, fn. 9 (with same emphasis added).

⁵ ICC-01/05-01/08-750, para. 32 (emphasis added), citing from Trial Chamber I in *Lubanga* at ICC-01/04-01/06-T-104-ENG ET WT, page 24, line 19 to page 25, line 2. In the context of memory refreshing, Trial Chamber I went on to state: “The presumption will be that unsigned statements are not shown to witnesses, because the lack of a signature casts doubt over whether the witness accepted the contents as accurate.” (page 25, lines 3-5).

6. There are good practical reasons why an unsigned draft cannot be attributed to a witness under rule 76. *First*, rule 111 interviews are usually conducted over the course of several days in an evolving process, which must be recorded in a coherent narrative. *Second*, such interviews often require interpretation, which may call for subsequent clarification of the witness's responses or the investigators' questions. For these reasons, a draft of the witness's statement as understood by the investigator (interviewer) must be read back to the witness. The "read-back" procedure ensures that investigators, through follow-up questions or further clarifications, incorporate the witness's responses to fully reflect the meaning and content of their evidence. It provides an assurance that the witness is given a meaningful opportunity to review the contents of the statement in deciding whether to accept or adopt its final contents as their own. Normatively, this is only complete upon the witness's signed acknowledgement averring the accuracy and truthfulness of the statement.

7. Finally, no international criminal jurisprudence persuasively supports a general, open-ended obligation under rule 76(1) to disclose draft versions of a witness's statement. The Defence's reliance on the jurisprudence of this Court and of the ICTR, insofar as it seeks to assert such an obligation, is inapposite.

- a. The Appeals Chamber's holding in *Banda & Jerbo*, that rule 76 required disclosure of prior statements "irrespective of the form in which they are recorded",⁶ referred only to the different forms of recording under rule 111 (*i.e.* a signed record) and rule 112 (*i.e.* an audio- or video-recording).⁷
- b. Trial Chamber VI's reasoning in *Ntaganda*, that statements for the purposes of rule 76(1) "may include screening notes, interview notes

⁶ ICC-02/05-03/09-295, para. 23, cited in Request, para. 8.

⁷ See ICC-02/05-03/09-295, para. 23.

and investigators' notes",⁸ appears to be based on a misapprehension of the Appeals Chamber's holding in *Banda & Jerbo* and was not followed on appeal. The Appeals Chamber considered the Trial Chamber's reasoning to be "sparse" and conducted its own analysis, from which it expressly excluded the issue of "form".⁹ Trial Chamber VI's decision is therefore of limited value. Even taken at its highest, it does not establish a general obligation to disclose draft versions of witness statements.

- c. The portions of the *Niyitegeka* and *Nizeyimana* decisions on which the Defence relies concern the substance of witness statements (*i.e.* questions put and answers given),¹⁰ not their *form*. These decisions therefore do not endorse a general obligation to disclose draft versions of witness statements. To the contrary, *Niyitegeka* emphasises the importance of "due procedure" in producing a record of the interview,¹¹ and *Nizeyimana* adopts the *Blaškić* definition of a statement under the ICTR equivalent to rule 67(1).¹²

8. Indeed, STL jurisprudence militates against any general obligation for the Prosecution to disclose draft versions of witness statements. In a decision published on 23 March 2018 in the *Ayyash, et al.* case, the STL Trial Chamber clarified that the legal principles it had previously established in interpreting its equivalent provision

⁸ See ICC-01/04-02/06-904, para. 29, cited in Request, para. 7.

⁹ See ICC-01/04-02/06-1330, paras. 15 and 17.

¹⁰ *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004, para. 33, cited in Request, para. 8; *Prosecutor v. Nizeyimana*, ICTR-00-55C-PT, Decision on Urgent Defence Motion for Disclosure of Prior Statements, 31 January 2011, para. 8, cited in Request, para. 10.

¹¹ *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004, para. 32 ("As soon as possible after the interview has been given, the witness must have the chance to read the record or to have it read out to him or her and to make the corrections he or she deems necessary and then the witness must sign the record to attest to the truthfulness and correctness of its content to the best of his or her knowledge and belief. A co-signature by the investigator and interpreter, if any, concludes such a record.").

¹² *Prosecutor v. Nizeyimana*, ICTR-00-55C-PT, Decision on Urgent Defence Motion for Disclosure of Prior Statements, 31 January 2011, para. 4 ("The Appeals Chamber has explained that in the context of Rule 66(A)(ii) of the Rules, a witness statement is an 'account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.'").

to rule 76(1) “fall short of a ruling that the Parties have a positive obligation to maintain or disclose every subsequently-corrected version of a draft statement in every situation.”¹³ There is no reason to establish such an obligation, in the abstract, at this Court.

B. The Request makes no showing that the Prosecution has failed to comply with its disclosure obligations under rule 76

9. The rare instances in international criminal jurisprudence in which the Prosecution has been ordered to disclose earlier versions of witness statements or analogous documents have been case-specific. Moreover, they have been based on a *prima facie* showing that the Prosecution has fallen short of its disclosure obligations on grounds *other* than merely that the statement at issue was a “prior statement”, as rule 76 contemplates.

10. For instance, in the *Haradinaj* case, an ICTY Trial Chamber granted a request for a record of the changes made to one statement of one particular witness, upon a showing by the Defence.¹⁴ The witness’s subsequent statement referred to corrections made by the witness during a first interview, but these changes were not apparent in the corresponding statement.¹⁵

11. An STL Trial Chamber’s decision of 2 June 2017 in the *Ayyash, et al.* case, ordering disclosure of the draft statements and reports prepared by one witness, was also made upon a showing by the Defence.¹⁶ In that case, the disclosed reports

¹³ *Prosecutor v. Ayyash, et al.*, STL-11-01/T/TC, Decision denying Merhi Defence Request relating to Prosecution Disclosure Obligations, 23 March 2018, paras. 16, 17, 34 (“23 March 2018 *Ayyash, et al.* Decision”).

¹⁴ *Prosecutor v. Haradinaj*, IT-04-84bis-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in respect of Witness 81, 18 November 2011, para. 39.

¹⁵ *Prosecutor v. Haradinaj*, IT-04-84bis-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in respect of Witness 81, 18 November 2011, para. 3.

¹⁶ *Prosecutor v. Ayyash, et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents concerning Witness PRH230, 2 June 2017, paras. 75-79 (“2 June 2017 *Ayyash, et al.* Decision”).

produced by the witness were labelled with version numbers indicating that earlier, undisclosed versions of those reports were in existence.¹⁷

12. The rationale apparent in both the *Haradinaj* decision and the 2 June 2017 *Ayyash, et al.* Decision, as well as in the *El Sayed* and *Brima* decisions referenced, is that the Defence would not otherwise be privy to any apparent inconsistencies or changes made by the witness during the evolution of the statement.

- a. In the *Haradinaj* case, ICTY Trial Chamber II held “(t)he fundamental issue presented by [the] Motion is not the disclosure of earlier drafts of a witness’s final statement, but *rather the disclosure of any inconsistent statements by a witness.*”¹⁸
- b. Similarly in the *Brima, et al.* case, Trial Chamber II of the SCSL found no failure in the Prosecution’s disclosure obligations where an investigator’s notes containing the witness’s evidence were destroyed after being transferred to written witness statements.¹⁹ This, according to the Trial Chamber, was because there was nothing before it “which would entitle it to conclude that the Prosecution has concealed or destroyed material it was obliged to disclose.”²⁰
- c. In the STL’s jurisprudence, the Appeals Chamber’s decision in *El Sayed* warned of the risk that an investigator may “sanitize the original account of the witness”, to find that “(b)oth the Trial Chamber and the

¹⁷ *Prosecutor v. Ayyash, et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents concerning Witness PRH230, 2 June 2017, para. 2.

¹⁸ *Prosecutor v. Haradinaj*, IT-04-84bis-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in respect of Witness 81, 18 November 2011, para. 36 (emphasis added).

¹⁹ *Prosecutor v. Brima, et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes pursuant to Rules 66 and/or 68, 4 May 2005, paras. 17-18.

²⁰ *Prosecutor v. Brima, et al.*, SCSL-04-16-T, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators’ Notes pursuant to Rules 66 and/or 68, 4 May 2005, para. 19.

opposing party are entitled to know how the *witness's* version has evolved.”²¹ As noted above at paragraph 8, the Trial Chamber has since clarified in its 23 March 2018 *Ayyash, et al.* Decision that this does not necessarily give rise to an obligation to maintain or disclose earlier versions of witness statements.²² Indeed, in that decision, the Trial Chamber denied a Defence request for draft witness statements where there was no suggestion that the account had evolved or “that the changes made were anything more than the correction of minor errors.”²³

13. Significantly, the Request — confined as it is to rule 76 — is based solely on an unsubstantiated assertion of a general entitlement to the disclosure of draft witness statements *per se*, under that provision. This is without support, and the Request otherwise fails to make a *prima facie* showing of any alternative basis for such disclosure.

14. The jurisprudence referenced above moreover suggests that where the evolution of the witness’s account, including any inconsistencies or changes, is faithfully recorded and disclosed in his or her statement, there is no basis under rule 76(1) to order disclosure of earlier versions of that statement.²⁴

15. By contrast, the Prosecution’s approach to taking statements adequately addresses the concerns expressed in the ICTY, STL and SCSL decisions referenced.

²¹ *In the matter of El Sayed*, CH/AC/2011/01, Decision on Partial Appeal by Mr El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011, para. 87; adopted in *Prosecutor v. Ayyash, et al.*, STL-11-01/T/TC, Decision on Merhi Defence Request for Disclosure of Documents concerning Witness PRH230, 2 June 2017, para. 12(ii).

²² *Prosecutor v. Ayyash, et al.*, STL-11-01/T/TC, Decision denying Merhi Defence Request relating to Prosecution Disclosure Obligations, 23 March 2018, para. 34.

²³ *Prosecutor v. Ayyash, et al.*, STL-11-01/T/TC, Decision denying Merhi Defence Request relating to Prosecution Disclosure Obligations, 23 March 2018, para. 34.

²⁴ *See, in particular, Prosecutor v. Haradinaj*, IT-04-84bis-T, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in respect of Witness 81, 18 November 2011, para. 37 (“The Chamber underlines that the Prosecution has a general duty to make a record of any inconsistencies in a witness’s account. For this reason, the Prosecution must ensure that any inconsistencies in a witness’s account made during an interview with the OTP are clearly recorded and disclosed to the Defence pursuant to Rules 66(A)(ii) and 68(i)”).

This approach, as informed by rule 111, is in accordance with the Court's "due procedure" and ensures that a faithful record of the witness's account is recorded.

16. While the Prosecution accepts that disclosure of earlier versions of a witness's statement may be disclosable on a case specific basis when they are material to the preparation of the Defence under rule 77, or where they may comprise PEXO under article 67(2), no general rule requiring the disclosure of draft statements arises under rule 76(1). The Request thus fails to make any showing that the Prosecution has breached any obligation under this provision.

C. Defence's Request is premature at this stage of proceedings

17. Finally, the Defence's Request is premature. As previously noted, the Prosecution has not finalised its list of witnesses for trial, and the disclosure deadline for the purposes of trial has yet to be set. The Request thus invokes rule 76 prematurely, and should be denied on that basis alone. The Prosecution incorporates its arguments on this point as set out in its Response to Yekatom's Motion for Disclosure of Witness Statements in their original language, filed on 8 May 2020.²⁵

²⁵ ICC-01/14-01/18-510, para. 7.

III. CONCLUSION

18. For the above reasons, the Prosecution requests the Chamber to reject the Request.



Fatou Bensouda, Prosecutor

Dated this 11th day of May 2020
At The Hague, The Netherlands