

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **10 July 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 with Confidential Annex A

Motion for Disclosure of Screening Notes

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully move, pursuant to Rule 76 of the Rules of Procedure and Evidence, for another order directing the Prosecution to disclose all screening notes of all of its witnesses. Although the Pre-Trial Chamber issued such an order,¹ the Prosecution now refuses to comply, contending that a recent decision of the Trial Chamber justifies the non-disclosure of screening notes. The Trial Chamber is respectfully requested to correct the Prosecution’s misinterpretation of its decision and to order the immediate disclosure of all screening notes.

RELEVANT PROCEDURAL HISTORY

2. On 20 August 2019, the Defence filed its Motion for Disclosure of Rule 76 Material. It requested the Pre-Trial Chamber to order the Prosecution to disclose all screening notes for witnesses it relied upon at the confirmation hearing.²
3. On 27 August 2019, the Prosecution responded by agreeing to disclose the 108 screening notes of witnesses it intended to rely on during the confirmation hearing.³
4. On 3rd September 2019, the Pre-Trial Chamber ordered the Prosecutor to provide any screening notes for witnesses upon whom she intends to rely for confirmation purposes as soon as possible.⁴
5. On 30 April 2020, the Defence filed its Motion for Disclosure of Draft Witness Statements. It contended that draft witness statements fell within Rule 76.⁵

¹ [ICC-01/14-01/18-315-Conf](#), para. 40; Public redacted version: [ICC-01/14-01/18-315-Red](#).

² [ICC-01/14-01/18-285-Conf](#), paras. 14-19; Public redacted version: [ICC-01/14-01/18-285-Red](#).

³ [ICC-01/14-01/18-295-Conf-Corr](#), para. 5. The Prosecution has never filed a public redacted version of this response. It is requested to do so at or before the time it files a response to the present motion.

⁴ [ICC-01/14-01/18-315-Conf](#), para. 40; Public redacted version: [ICC-01/14-01/18-315-Red](#).

⁵ [ICC-01/14-01/18-500](#).

6. The Prosecution responded on 11 May 2020 contending that draft witness statements did not fall within Rule 76.⁶
7. On 1st June 2020, the Trial Chamber issued its Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements (“Decision on Draft Statements”).⁷ The Chamber found that draft witness statements did not fall within Rule 76. It opined that:

Consequently, the Chamber is of the view that ‘statements made by [...] witnesses’ within the meaning of Rule 76(1) of the Rules are made only when those witnesses are questioned about their knowledge of the case in the course of an investigation, and only once they accept or adopt it as their own knowledge. This understanding does not contradict the abovementioned Court’s jurisprudence, and is in line with the Appeals Chamber’s finding in *The Prosecutor v. Bosco Ntaganda* (the ‘Ntaganda case’) that the Prosecution’s disclosure obligations under Rule 76(1) of the Rules do not extend to statements that are completely unrelated to the witness’s knowledge of the case.”⁸

8. The Defence contacted the Prosecution on 30 June 2020 and proposed a meeting to discuss disclosure issues with an eye towards resolving as many of them as possible before the Status Conference. Indeed, many pending issues were resolved. However, during the course of the *inter partes* meeting on 2nd July 2020, the Prosecution informed the Defence that it would no longer disclose all screening notes of its witnesses because it interpreted the above-quoted language from the Chamber’s decision on Draft Witness Statements as an indication that screening notes did not fall within Rule 76 because they were not “accepted or adopted as their own knowledge” by the witnesses.
9. The parties exchanged written views on this issue but were unable to resolve the dispute before the Status Conference.⁹ The Prosecution’s recent disclosure of

⁶ [ICC-01/14-01/18-511](#).

⁷ [ICC-01/14-01/18-539](#).

⁸ *Id.*, para. 18.

⁹ A copy of the parties’ exchange is attached as Annex A.

Rule 76 material for previously undisclosed witnesses did not include screening notes for Witnesses P-0458, P-2352, P-2353, P-2329, P-2082, P-2083, P-2511, P-1716, P-2270, P-1786, P-2467, P-2682, P-2698, P-2652 and omitted one screening note for P-1558.¹⁰

10. At the Status Conference of 9 July 2020 the Chamber invited the Defence to file written submissions. These are those submissions.

RELEVANT PROVISION

11. 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

12. A “screening note” is a report, notes, or transcript of an interview with a potential witness to determine if the witness has information relevant to the Prosecution’s investigation.¹¹ Trial Chambers in the *Ruto* and *Ntaganda* cases have held that information from screening of Prosecution witnesses must be disclosed pursuant to Rule 76 when they reflect the witness’ answers to relevant

¹⁰ Referred to in CAR-OTP-2093-0574, para. 1.

¹¹ *Prosecutor v. Ruto & Sang*, [Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions](#), 20 May 2013, ICC-01/09-01/11-743-Red, para. 16.

questions about the case.¹² In fact, in *Ruto and Sang*, the Chamber specifically rejected “the Prosecution’s argument that it was not obligated to disclose full screening notes of all of its trial witnesses.”¹³

13. The *ad hoc* Tribunals have consistently included preliminary statements taken from witnesses within the definition of a « statement » that must be disclosed, holding that the disclosure rule is not limited to final, official statements taken from a witness.¹⁴
14. Screening notes can contain extensive information about the crimes charged. One screening note that has been disclosed provides an example of the type of substantive information provided during a screening exercise. In this 30-pages transcript of a recorded screening interview, the witness provided information about his activities during the 5 December 2013 attack in Bangui,¹⁵ his contact with the Anti-Balaka group in the weeks that followed,¹⁶ the structure of the Anti-Balaka group and identities of its leaders,¹⁷ and his contacts with representatives of former President Bozizé.¹⁸
15. Some screening notes allege events attributed to Mr. Yekatom that do not appear in the witness’ subsequent statement.¹⁹ Other screening notes attribute

¹² *Prosecutor v. Ruto & Sang*, [Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions](#), 20 May 2013, ICC-01/09-01/11-743-Red, para. 20; *Prosecutor v. Ntaganda*, [Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses](#), 16 October 2015, ICC-01/04-02-06-904, para. 29.

¹³ *Prosecutor v. Ruto & Sang*, [Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions](#), 20 May 2013, ICC-01/09-01/11-743-Red, para.20.

¹⁴ *Prosecutor v. Haradinaj et al*, Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81, 18 November 2011, No. IT-04-84bis-T, para. 27; *Ngirabatware v. Prosecutor*, [Decision on Augustin Ngirabatware’s Motion for Sanctions for the Prosecution and for an Order of Disclosure](#), 15 April 2014, No. MICT-12-29-A, at para. 15; *Prosecutor v. Karemera et al*, [Decision on Disclosure of Witness Reconfirmation Statements](#), 23 February 2005, No. ICTR-98-44-PT; *Prosecutor v. Karemera et al*, [Decision on Joseph Nzirorera’s Seventeenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures](#), 20 February 2008, No. ICTR-98-44-T, para. 10.

¹⁵ CAR-OTP-2042-4970 at 4991-92.

¹⁶ CAR-OTP-2042-4970 at 4992.

¹⁷ CAR-OTP-2042-4970 at 4993.

¹⁸ CAR-OTP-2042-4970 at 4994 to 4997.

¹⁹ CAR-OTP-2093-0574-R01 vs CAR-OTP-2105-0195-R01.

crimes to the Seleka, only to have the witness later attribute those same crimes to Mr. Yekatom.²⁰

16. On some occasions, screening notes were used by the Prosecution investigators to point out a contradiction or inconsistency between the witness' first account during the screening and his or her second account of events set out in his/her statement.²¹
17. A screening note is often the first record of the witness' version of the events, and therefore of particular importance when assessing the witness' credibility. The ICTY Appeals Chamber has recognised that the record of the first interview with a witness is of the highest value because it is most likely to capture the witness's recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence.²²
18. A screening note, where the Prosecution writes down the witness' answers to questions about matters relevant to the case, is indeed a record of an oral statement of the witness. The fact that it is not later confirmed or adopted by the witness may be relevant to its probative value as impeachment, but does not take it out of the definition of a "statement".
19. Given the consistent precedents in this Court in the *Ruto* and *Ntaganda* cases, finding that screening notes fall within Rule 76, the Defence does not believe that the Chamber intended to depart from these precedents in its Draft Statements Decision. Rather, that decision appears to be limited to earlier drafts of a statement that is ultimately read back to and adopted by the witness in a statement that is disclosed under Rule 76. The Chamber expressly indicated that "it is not of the view that previous or draft versions of the **same interview**,

²⁰ CAR-OTP-2046-0650 vs CAR-OTP-2121-2788, paras. 57-114.

²¹ CAR-OTP-2112-0036, at 0060 para. 135; CAR-OTP-2077-0520, at 0526, para. 37.

²² *Niyitegeka v. Prosecutor*, [Judgement](#), 9 July 2004, No. ICTR-96-14-A, at para. 33.

prepared during the Initial Questioning, constitute ‘prior statements’ made by that witness under Rules 76(1) of the Rules.”²³

20. The Defence’s view that the Chamber did not intend to depart from these well-established precedents concerning screening notes is re-enforced by the Chamber’s statement that “this understanding does not contradict the abovementioned Court’s jurisprudence [...]”²⁴ and the Chamber’s framing of the issue:

this is the first time that a Chamber of this Court has been seized of the question of whether draft statements of the same interview constitute ‘prior statements made by [that] witness[s]’ under Rule 76(1) of the Rules.²⁵

21. Screening notes, unlike draft statements, are the product of a separate interview of the witness which is not presented to the witness for his or her adoption. This distinction between draft statements and screening notes is an important one. A final signed statement can be seen to rule out the previous draft, while a screening note is a stand-alone statement that is never presented to the witness for adoption or correction. The presence of a read-back procedure for a statement was critical to the Chamber’s determination that draft statements did not fall under Rule 76,²⁶ and is a crucial distinction that requires a different result for screening notes.

CONCLUSION

22. It is respectfully requested that the Trial Chamber hold that the Prosecution is obligated to disclose the screening notes of all of its witnesses, notwithstanding that the screening notes have not been corrected or adopted by the witness.

²³ [ICC-01/14-01/18-539](#), para. 20.

²⁴ [ICC-01/14-01/18-539](#), para. 18.

²⁵ [ICC-01/14-01/18-539](#), para. 12.

²⁶ *Id.*, para. 16.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF JULY 2020



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