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No. ICC-01/14-01/18

Date: 10 August 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Decision on the Yekatom Defence Motion for Disclosure of Screening Notes

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

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TRIAL CHAMBER V of the International Criminal Court in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 67(2) of the Rome Statute (the ‘Statute’) and Rules 76(1), 77 and 111 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Motion for Disclosure of Screening Notes’.

I. Procedural history and submissions

1. On 20 August 2019, the Yekatom Defence (the ‘Defence’) requested Pre-Trial Chamber II (the ‘PTC II’) to order the Office of the Prosecutor (the ‘Prosecution’) to disclose ‘all items encompassed by Rule 76 of the Rules [...], including [...] screening notes’.¹
2. On 3 September 2019, PTC II issued a decision whereby it instructed the Prosecution, *inter alia*, to disclose as soon as possible any screening notes for witnesses upon whom it intended to rely for confirmation purposes and, upon verification, ‘any additional screening notes within [its] possession that fall within the scope of rule 76 of the Rules’ (the ‘PTC Rule 76 Decision’).²
3. On 30 April 2020, the Defence requested the Chamber to order the Prosecution to disclose ‘all draft statements in its possession for witnesses it intends to call to testify’ pursuant to Rule 76 of the Rules (the ‘Draft Witness Statements Motion’).³ On 11 May 2020, the Prosecution responded to this motion, requesting the Chamber to reject it.⁴

¹ Motion for Disclosure of Rule 76 Material, ICC-01/14-01/18-285-Conf (public redacted version notified the same day, ICC-01/14-01/18-285-Red), paras 1, 31. *See also Corrigendum* of ‘Prosecution’s Response to the Yekatom Defence’s Motion for Disclosure of rule 76 Material’, 27 August 2020, ICC-01/14-01/18-295-Conf, ICC-01/14-01/18-295-Conf-Corr (with an annex) (*corrigendum* and annex notified on 11 September 2019), para. 5, where the Prosecution submitted, *inter alia*, that it would disclose the screening notes for witnesses whose statements were cited in its document containing the charges.

² Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions, ICC-01/14-01/18-315-Conf (public redacted version notified on 3 February 2020, ICC-01/14-01/18-315-Red), para. 40, p. 26.

³ Motion for Disclosure of Draft Witness Statements, ICC-01/14-01/18-500, paras 1, 11.

⁴ Prosecution’s Response to Yekatom Defence’s Motion for Disclosure of Draft Witness Statements (ICC-01/14-01/18-500), ICC-01/14-01/18-511, para. 18.

4. On 1 June 2020, the Chamber rejected the Draft Witness Statements Motion, finding that ‘statements made by [...] witnesses’ within the meaning of Rule 76(1) and recorded pursuant to Rule 111 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’ (the ‘Draft Witness Statements Decision’).⁵ Nonetheless, the Chamber recalled the Prosecution’s disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules.⁶
5. On 10 July 2020, and after having engaged in *inter partes* discussions,⁷ the Defence requested the Chamber to direct the Prosecution to disclose ‘all screening notes of all of its witnesses’ (the ‘Motion’).⁸ The Defence contends that the Prosecution ‘refuses to comply’ with the PTC Rule 76 Decision based on a misinterpretation of the Draft Witness Statements Decision, according to which screening notes would not fall within the meaning of ‘prior statements made by [...] witnesses’ under Rule 76(1) of the Rules because they have not been accepted or adopted by those witnesses.⁹
6. The Defence submits, in essence, that (i) according to the Court’s jurisprudence, screening notes must be disclosed pursuant to Rule 76 of the Rules when they reflect the witness’ answers to relevant questions about the case;¹⁰ (ii) they can contain ‘extensive information about the crimes charged’,¹¹ and are often ‘the first record of the witness’ version of the events, and therefore of particular importance when assessing the witness’ credibility’;¹² and (iii) where the Prosecution writes down the witness’ answers to questions about matters

⁵ Decision on the Yekatom Defence Motion for Disclosure of Draft Witness Statements, ICC-01/14-01/18-539, para. 18, p. 12.

⁶ Draft Witness Statements Decision, ICC-01/14-01/18-539, para. 25.

⁷ See ‘Letter from the Yekatom Defence addressed to the Office of the Prosecutor [ARY-2020-0141] dated 2nd July 2020’ and ‘Email from the Office of the Prosecutor addressed to the Yekatom Defence dated 7th July 2020’, Annex A to the Motion for Disclosure of Screening Notes, 10 July 2020, ICC-01/14-01/18-583-Conf-AnxA.

⁸ Motion for Disclosure of Screening Notes, ICC-01/14-01/18-583, paras 1, 22.

⁹ Motion, ICC-01/14-01/18-583, paras 1, 8.

¹⁰ Motion, ICC-01/14-01/18-583, para. 12.

¹¹ Motion, ICC-01/14-01/18-583, para. 14.

¹² Motion, ICC-01/14-01/18-583, para. 17.

relevant to the case, they are ‘a record of an oral statement of the witness’, regardless of whether this content is later confirmed or adopted by the witness.¹³

7. On 14 July 2020, the Prosecution requested the Chamber to reject the Motion¹⁴ on the basis, *inter alia*, that (i) Rule 76(1) of the Rules does not provide a ‘blanket entitlement to “all screening notes”’, which ‘are not *per se* “statements made by a witness”’ under this provision, as confirmed in the Draft Witness Statements Decision;¹⁵ and (ii) the Defence ‘fails to establish even on a *prima facie* basis [...] that the Prosecution has fallen short of its disclosure obligations’.¹⁶
8. The Prosecution further contends that the Defence mischaracterises its position as ‘a refus[al] to comply’, considering that it has made clear that it does not oppose the disclosure of screening notes, that ‘the vast majority of screening notes concerning [its] witnesses have already been disclosed, *inter alia*, under rule 77’ and that it continues to review and disclose materials in its possession under Rules 76 and 77 of the Rules and Article 67(2) of the Statute.¹⁷

II. Analysis

9. At the outset, the Chamber notes that Rule 76(1) of the Rules stipulates that ‘[t]he Prosecut[ion] shall provide the defence with the names of witnesses whom the Prosecut[ion] intends to call to testify and copies of any prior statements made by those witnesses’. The Chamber recalls its finding that ‘statements made by [...] witnesses’ within the meaning of Rule 76(1) and recorded pursuant to Rule 111 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’.¹⁸

¹³ Motion, ICC-01/14-01/18-583, para. 18.

¹⁴ Prosecution’s Response to Yekatom Defence’s Motion for Disclosure of Screening Notes (ICC-01/14-01/18-583), ICC-01/14-01/18-588 (the ‘Response’), paras 1, 23.

¹⁵ Response, ICC-01/14-01/18-588, paras 1-2. *See also* paras 19, 22.

¹⁶ Response, ICC-01/14-01/18-588, para. 20.

¹⁷ Response, ICC-01/14-01/18-588, paras 1, 16-18, 21.

¹⁸ Draft Witness Statements Decision, ICC-01/14-01/18-539, para. 18. *See also* paras 10, 14.

10. As regards screening notes, the Chamber recalls that these are notes prepared by the Prosecution on the basis of an initial contact or interview with a person in connection with an investigation.¹⁹ This initial contact or interview, also known as a ‘pre-assessment interview’, is conducted prior to taking a statement in order to, *inter alia*, assess the person as well as his or her account, and determine whether or not a statement is to be taken and recorded pursuant to Rule 111 of the Rules (or, eventually, Rule 112).²⁰ Thus, as settled by the Court’s jurisprudence, these pre-interview assessments are ‘a stage precedent to an interview when a formal statement is taken for the purposes of Rule 76(1) and Rule 111 of the Rules’.²¹
11. In this sense, the Chamber refers to the distinction, also established by the Court’s jurisprudence and set out in its Draft Witness Statements Decision, between (i) documents that ‘provide a certain record of the witness’s evidence approved by or coming from the witness’, and that witnesses themselves ‘have expressly agreed as reflecting their recollection of the relevant events’ (such as signed witness statements or an electronic recording of an interview); and (ii) documents that provide ‘a personal record’ by the investigator of what the witness said.²² Screening notes fall in this second category (together with investigator’s notes or unsigned witness statements).
12. Consequently, the Chamber is of the view that screening notes do not constitute ‘statements made by [...] witnesses’ under Rule 76(1) of the Rules, unless those witnesses are questioned about their knowledge of the case in the course of an investigation and they accept or adopt the screening notes as their own

¹⁹ See Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap 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, para. 16.

²⁰ See Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Defence Request for disclosure of pre-interview assessments and the Consequences of non-disclosure” (ICC-01/05-01/08-750-Conf), 9 April 2010, ICC-01/05-01/08-750-Red (the ‘Bemba TC Decision’), para. 31.

²¹ See Bemba TC Decision, ICC-01/05-01/08-750-Red, para. 31.

²² See Draft Witness Statements Decision, ICC-01/14-01/18-539, para. 13, *referring to* Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, transcript of hearing, 16 January 2009, ICC-01/04-01/06-T-104-ENG, p. 24, line 19 to p. 25, line 2. See also Bemba TC Decision, ICC-01/05-01/08-750-Red, para. 32.

knowledge (or their answers are otherwise recorded under Rule 112 of the Rules).

13. Nonetheless, the Chamber is mindful that screening notes may be disclosable under other statutory provisions. The Chamber recalls that the Prosecution continues to remain obligated to disclose any materials falling under Article 67(2) of the Statute and Rule 77 of the Rules.²³ In this regard, the Chamber notes the Prosecution's submissions that it does not oppose the disclosure of screening notes, that it has disclosed 'the vast majority [...], *inter alia*, under rule 77' and that it continues to review and disclose materials in its possession under Rules 76 and 77 of the Rules and Article 67(2) of the Statute.²⁴ Therefore, and absent any indication to the contrary, the Chamber is confident that the Prosecution is discharging its disclosure obligations in relation to screening notes in good faith.
14. Accordingly, the Chamber rejects the Motion.
15. Lastly, the Chamber notes that the Prosecution has not sought reclassification nor filed a public redacted version of filing ICC-01/14-01/18-295-Conf-Corr, which was filed confidentially in response to a motion with the same classification.²⁵ The Chamber, noting that a public redacted version of the concerned motion is on the record, directs the Prosecution to either seek reclassification or file a public redacted version of this filing.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Motion; and

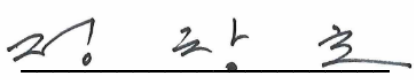
ORDERS the Prosecution to request reclassification of filing ICC-01/14-01/18-295-Conf-Corr, or file a public redacted version, within seven days of notification of this decision.

²³ See Draft Witness Statements' Decision, ICC-01/14-01/18-539, para. 25.

²⁴ Response, ICC-01/14-01/18-588, paras 1, 16-18, 21.

²⁵ See above paragraph 1, footnote 1.

Done in both English and French, the English version being authoritative.

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 10 August 2020

At The Hague, The Netherlands