

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **14 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public**

**Prosecution's Response to Yekatom Defence's Motion for Disclosure of Screening  
Notes (ICC-01/14-01/18-583)**

**Source:** Office of the Prosecutor

**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 Alfred Yekatom**

Ms Mylène Dimitri  
Mr Peter Robinson

**Counsel for Patrice-Edouard Ngaïssona**

Mr Geert-Jan Alexander Knoops

**Legal Representatives of Victims**

Mr Dmytro Suprun  
Mr Abdou Dangabo Moussa  
Ms Elisabeth Rabesandratana  
Mr Yaré Fall  
Ms Marie-Edith Douzima-Lawson  
Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**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**

**Other**

## I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the YEKATOM Defence’s Motion for Disclosure of Screening Notes.<sup>1</sup> The Motion misapprehends and misapplies the Court’s jurisprudence. Contrary to YEKATOM’s rehashed arguments, rule 76(1) of the Rules of Evidence and Procedure (“Rules”) confers no blanket entitlement to the disclosure of screening notes. Further, the Prosecution does not oppose the disclosure of these notes under rule 77 or article 67(2) where appropriate. That is evident from the Prosecution’s disclosure of the vast majority of screening notes concerning its witnesses to date. The Motion thus fails.

## II. SUBMISSIONS

### A. Rule 76(1) provides no blanket entitlement to ‘all screening notes’

a. Screening notes are not *per se* ‘statements made by a witness’

2. Although a witness’ statement *may* encompass, *inter alia*, a screening note within the meaning of rule 76(1), not all screening notes constitute “statements *made by* [...] [a] witness[ ]” under the rule. The Motion confuses this fundamental premise, and in so doing ignores the basic tenets regarding the construction of rule 76(1), as explained in the Chamber’s recent Decision regarding the disclosure of draft statements (“Rule 76 Decision”).<sup>2</sup>

3. The Rule 76 Decision is abundantly clear on the two salient issues underpinning the rule’s application, namely: (a) what is the meaning of a “statement[ ]”; and (b) what is the meaning of “*made by* [...] [a] witness[ ]”. The

---

<sup>1</sup> ICC-01/14-01/18-583 (“Motion”).

<sup>2</sup> ICC-01/14-01/18-539.

former is not in contest and well-established in the Court's jurisprudence.<sup>3</sup> The latter is squarely addressed in the Rule 76 Decision and settles the matter in this case.

4. In seeking disclosure of "all screening notes"<sup>4</sup> on the same flawed basis underlying his motion to obtain disclosure of "all draft statements"<sup>5</sup>, YEKATOM persists in ignoring the determinative condition for the application of rule 76(1) — that is, that the statement in question be "made by" the witness.

5. In the Rule 76 Decision, the Chamber held 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.*"<sup>6</sup> In the context of draft statements, this is clear enough. A statement can only be fairly attributed to and therefore, 'made by' a witness, when they accept or adopt it as their own, or where it is otherwise audio or video recorded<sup>7</sup> (*i.e.*, where its attribution is not contestable). In the context of screenings, the circumstances in which they are normatively conducted further underscore and justify the Chamber's rationale.<sup>8</sup>

6. As is well known, witness screenings are the product of a preliminary investigative step, a precursor to the taking of a statement altogether. For this reason, they are generally more removed from attribution to a witness than are draft statements. The exclusion of draft statements as within the contemplation of rule 76(1), where a witness has not accepted or adopted their contents, holds especially true for screening notes. Similarly, the Chamber's observation in the Rule 76

---

<sup>3</sup> See ICC-02/05-03/09-295, para. 22 ("the term "statement" as used in rule 76 is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded"); see ICC-01/14-01/18-539, para. 22 (noting that the *Banda and Jerbo* Appeal Decision (ICC-02/05-03/09-295) "referred only to the forms of recording witness statements provided for in Rules 111 and 112 of the Rules and found that the term 'statement' is 'broad' under Rule 76 of the Rules in the sense that it can be disclosed in any of the said forms"); see also ICC-01/04-02/06-904, para. 29.

<sup>4</sup> ICC-01/14-01/18-583, para. 1 and 8.

<sup>5</sup> ICC-01/14-01/18-500, para. 11.

<sup>6</sup> ICC-01/14-01/18-539, para. 18 (emphasis added).

<sup>7</sup> ICC-01/14-01/18-539, para. 14.

<sup>8</sup> See *e.g.*, ICC-01/14-01/18-539, paras. 16 and 17.

Decision that, “prior statements show how the witness’s version of events has evolved, while draft witness statements cannot serve this purpose”,<sup>9</sup> applies just the same to screening notes.

7. The Defence concedes:

“[s]creening 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”.<sup>10</sup>

However, YEKATOM’s attempt to distinguish screening notes from draft statements in this way is misguided,<sup>11</sup> and the Defence again misses the point of the Rule 76 Decision.

8. For all intents and purposes, the question here is not whether a screening note might be a *statement*, but whether it has been ‘*made by*’ the witness (even if it is) to trigger the application of rule 76(1). In this respect, there is not much distinction between the circumstances underlying a draft statement and a screening note. If anything, a witness is given a greater opportunity to acknowledge and accept the contents of a draft statement than that of a screening note which, as noted, is merely a preliminary investigative step to identify individuals from whom to potentially obtain a statement.

9. Moreover, the Motion fails to advance, much less allege, any fact or circumstance otherwise establishing any fair attribution of the contents of screening notes to witnesses. Absent any acceptance or acknowledgment of the contents of a

---

<sup>9</sup> ICC-01/14-01/18-539, para. 19.

<sup>10</sup> ICC-01/14-01/18-583, para. 21; *see also* ICC-01/14-01/18-583, para. 20 (“a screening note is a stand-alone statement that is *never presented to the witness for adoption or correction*”) (emphasis added).

<sup>11</sup> ICC-01/14-01/18-583, para. 20.

screening note by the witness or an audio or video recording of the screening, there could be no clearer instance in which rule 76(1) simply would not apply.

b. Pre-Trial Chamber II's 3 September 2019 disclosure order is unavailing

10. YEKATOM's reliance on a 3 September 2019 Pre-Trial Chamber II Order directing the Prosecution to disclose "any screening notes for witnesses upon whom [it] intends to rely *for confirmation purposes* as soon as possible"<sup>12</sup> is unavailing.

11. The Motion's reliance on the 3 September 2019 Order is misplaced, not only because the Defence misapprehends it, but also because it in no way binds this Chamber as an Order of the Pre-Trial Chamber attendant to matters of pre-confirmation disclosure.

12. *First*, the Motion omits to mention that the 3 September 2019 Order expressly concerned the disclosure of "screening notes within [the Prosecution's] possession *that fall within the scope of rule 76 of the Rules.*"<sup>13</sup> The latter qualification is obviously dispositive.

13. *Second*, nothing in the 3 September 2019 Order contradicts this Chamber's determination of the requirements of rule 76(1) – specifically, that to be disclosable under the rule, the statement at issue must have been '*made by*' a witness the Prosecution intends to call to testify.

14. *Third*, the 3 September 2019 Order pertains to the process leading up to the confirmation hearing, which comprises a self-contained evidentiary proceeding distinct from that of a trial. Consequently, evidence which may be disclosable in one proceeding may not be in the other. Thus, rule 76(1) may apply to the statements of

<sup>12</sup> ICC-01/14-01/18-583, para. 3 (citing, ICC-01/14-01/18-315-Conf, para. 40 ("3 September 2019 Order") (emphasis added)).

<sup>13</sup> ICC-01/14-01/18-315-Conf, para. 40 (emphasis added).

*different* witnesses, just as there may be differences in the assessment of material necessary for the preparation of the confirmation proceedings versus a trial. Likewise, article 67(2) evidence which may affect the credibility of a witness at the confirmation hearing will not do so when the witness is not called for trial. Thus, the Defence's attempt to conflate the two phases (i.e., confirmation and trial) so as to exploit the 3 September 2019 Order in this circumstance is unavailing.

15. *Fourth* and in any event, the Statute clearly does not bind the Trial Chamber to preliminary rulings issued by a Pre-Trial Chamber in the context of the confirmation process or the proceedings prior thereto.<sup>14</sup>

c. The Motion mischaracterises the Prosecution's position – the vast majority of screening notes have already been disclosed

16. The Defence's resort to mischaracterising the Prosecution's position as a "refus[al] to comply" (i.e., "to disclose all screening notes of all of its witnesses"<sup>15</sup>) is transparent, and unfortunate.

17. In its 2 July 2020 discussions with the Defence, the Prosecution distinguished between the application of rule 76, rule 77, and article 67(2),<sup>16</sup> as may apply to the disclosure of witness statements. The Chamber has similarly recognised this important distinction.<sup>17</sup> Thus, the Prosecution made clear that it did not oppose the disclosure of screening notes, but rather, that screening notes were not *per se* within the ambit of rule 76(1). That said, while disclosure may not be appropriate under rule 76(1) for certain screening notes, others may very well fall under a separate provision and disclosed accordingly (which is indeed what has transpired here).

---

<sup>14</sup> See e.g., article 64 (delineating the powers of the Trial Chamber, including independently to determine disclosure issues); see also rule 122(3) and (4) of the Rules (underscoring the distinction between the two phases).

<sup>15</sup> ICC-01/14-01/18-583, paras. 1 and 8.

<sup>16</sup> See ICC-01/14-01/18-511, para. 16.

<sup>17</sup> See ICC-01/14-01/18-539, paras. 24 and 25.

Moreover, the Defence was clearly informed that the Prosecution had undertaken and continues to undertake the review of screenings for exactly these purposes.<sup>18</sup>

18. Here, the vast majority of screening notes concerning the Prosecution's witnesses have already been disclosed<sup>19</sup>, *inter alia*, under rule 77, as appropriate. Certain remain under review for rule 81(2) purposes. Maintaining clear distinctions regarding the rights and obligations attendant to rules 76 and 77, and article 67(2) is vital to a reliable system of disclosure at the Court. Blurring these provisions will lead to continued confusion, inefficiency, and risks rendering the Court's disclosure practice unworkable.

19. Again, as a matter of principle, it is as "unfair" to impute the contents of a screening to witness who has not adopted or accepted it as their own as it is to impute the contents of a draft statement.<sup>20</sup> To hold otherwise would run contrary to the logic and rationale of Rule 76 Decision.

## **B. The Motion advances no *prima facie* alternative basis for the disclosure of screening notes**

20. Like YEKATOM's previous motion for the disclosure of draft statements,<sup>21</sup> this Motion too fails to establish even on a *prima facie* basis, that the Prosecution has fallen short of its disclosure obligations.<sup>22</sup> The Defence's observation that "[r]ule 76

<sup>18</sup> See ICC-01/14-01/18-583-AnxA, p. 4.

<sup>19</sup> The Prosecution has disclosed a total of 159 screenings to date, including screenings in respect of witnesses it intends to call at trial, as identified in its Preliminary Witness List (ICC-01/14-01/18-553). Only 14 screenings concerning witnesses the Prosecution intends to call at trial are yet to be disclosed. Eight of these cannot be disclosed at present due to security issues under rule 81(4), or issues under rule 81(2). The remaining six are currently being reviewed with a view to disclosure in the next disclosure packages.

<sup>20</sup> ICC-01/14-01/18-539, para. 17 (noting, "[it is only] [...] (after the witness had a chance to review what precisely is recorded in his or her 'formal statement' and agreed with its content), [that] an investigator's summary of the witness's evidence qualifies as a 'statemen[t] made by [that] witness[s]' under Rule 76(1) of the Rules").

"it is impossible (and certainly unfair to the witness) to assume that the content of a statement has been accepted by the witness as being true, accurate and, most importantly, as his or her own")

<sup>21</sup> ICC-01/14-01/18-500.

<sup>22</sup> See ICC-01/14-01/18-539, para. 26.



material for previously undisclosed witnesses did not include screening notes for [15 Prosecution Witnesses]”<sup>23</sup> is insufficient.

21. As previously noted and communicated to the Defence, both in the context of its 2 July 2020 *inter partes* meeting and as indicated thereafter in writing,<sup>24</sup> the Prosecution continues to review and disclose materials in its possession under the applicable rules, as appropriate. This, as noted, necessarily includes an evaluation of the witnesses’ statements pursuant to rules 76 and 77, as well as article 67(2).

22. Notwithstanding the above, the Motion is exclusively and fatally grounded in the generalised assertion of an entitlement to ‘all screening notes’ contrary to the Rule 76 Decision, and further, advances no substantiated alternative basis for disclosure.

### III. CONCLUSION

23. For the above reasons, the Prosecution requests the Chamber to reject the Motion.



---

**Fatou Bensouda, Prosecutor**

Dated this 14<sup>th</sup> day of July 2020  
At The Hague, The Netherlands

---

<sup>23</sup> ICC-01/14-01/18-583, para. 9.

<sup>24</sup> See ICC-01/14-01/18-583-AnxA, p. 4.