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Date: **08 May 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's Motion for Disclosure of  
Witness Statements in their original language, ICC-01/14-01/18-498**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests that Trial Chamber V (“Chamber”) reject YEKATOM’s Motion for Disclosure of Witness Statements in their original language (“Motion”).<sup>1</sup> The Motion is premature and further fails because the Defence is not entitled to the underlying audio recording in the circumstances.

## II. PROCEDURAL BACKGROUND

2. The Prosecution disclosed three interview transcripts of Sango-speaking witnesses to the Defence between 30 July and 16 August 2019. Prosecution investigators conducted these interviews in either English or French with the assistance of a Sango interpreter. The interviews were audio recorded in accordance with rule 112 of the Rules of Procedure and Evidence (“Rules”).

3. The Prosecution’s Language Services Unit (“LSU”) subsequently transcribed the full French and English audio of these interviews, including the consecutive interpretations of the witnesses’ responses. The Sango portions of these interviews were not transcribed because (1) Sango is not a working language of the Court, and (2) given LSU’s limited resources, and the intensive resources required in such a task, doing so would be of marginal utility to the transcribed interpretation of the witnesses’ evidence. Notably, French translations were also provided for the English portions of the interviews. The original transcriptions were duly disclosed subject to limited redactions authorised pursuant to the applicable Protocol.<sup>2</sup>

4. On 13 December 2019, the Defence requested disclosure of the audio recordings of these three interviews. On 12 March 2020, the Prosecution declined this request,

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<sup>1</sup> ICC-01/14-01/18-498.

<sup>2</sup> ICC-01/14-01/18-64-Red.

indicating that the Defence already had quality-controlled, transcribed statements in French<sup>3</sup> — a language in which the Accused is proficient.<sup>4</sup>

5. On 2 April 2020, the Prosecution confirmed in writing to the Defence its position that the Rules do not create an absolute entitlement to audio material underlying a transcribed statement. In that communication, the Prosecution also clarified that it would consider disclosing, *inter alia*, portions of the audio recordings upon a particularised Defence request, based on any identified material inconsistencies or incomprehensible portions of the transcripts.

6. On 29 April 2020, the Defence filed the Motion, but did not raise such any issues regarding the nature and quality of the transcripts or of the circumstances of the corresponding interviews.<sup>5</sup>

### III. SUBMISSIONS

#### A. The Motion should be dismissed as premature

7. As indicated in its *inter partes* communications with the Defence<sup>6</sup> and its submission for the first status conference,<sup>7</sup> the Prosecution has not made a final determination of witnesses it will call to testify at trial. The plain reading of Rule 76 indicates that it pertains to “...witnesses whom the Prosecutor intends to call to testify...”<sup>8</sup> Should the Prosecution decide not to rely on any of the three witnesses in question, the Motion will be rendered moot. Thus, the Motion invokes rule 76 prematurely, and should be denied on that basis alone.

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<sup>3</sup> Emails available upon request.

<sup>4</sup> ICC-01/14-01/18-56-Red, p. 9.

<sup>5</sup> ICC-01/14-01/18-498.

<sup>6</sup> Emails available upon request.

<sup>7</sup> ICC-01/14-01/18-474-Red, para. 15.

<sup>8</sup> Rule 76(1).

## **B. The Defence is not entitled to the underlying audio of witness interviews**

8. Rule 76(3) does not entitle the Defence to the underlying audio recordings of witness interviews without limitation. This is even more so, when the Defence has already been provided original transcripts and translations in a working language of the Court, and one in which the Court has deemed the Accused proficient for such purposes. The plain language of rule 76(3) does not specify the form of the “original” statement that must be made available, and thus does not exclude the provision of transcripts *in lieu* of audio recordings.

9. Although there is no definitive jurisprudence on this issue, it has not been the practice in other cases before this Court that rule 76(3) requires the disclosure of underlying audio recordings of witness interviews as a matter of right.<sup>9</sup> To this extent, the statutory framework provides no absolute right to the provision of a rule 76(3) statement in any particular *form*.

10. The case law cited in the Motion does not squarely address the issue at hand. For instance, the Motion references a Prosecution filing in the *Banda and Jerbo* case indicating that transcripts of witness interviews were disclosed in the languages in which the interviews were conducted - usually English, and the language used by the witness.<sup>10</sup> However, the referenced filing refers to the Prosecution’s ability to transcribe the language used by the witness, unlike in this case. Here, as noted, the Sango portions of the interviews were not transcribed because of legitimate resource constraints and the marginal utility of doing so where the consecutive interpretation of the witnesses’ evidence was transcribed; and because Sango is also not a working language of the Court. Nowhere in the *Banda and Jerbo* case or related litigation is there an indication that the Defence is *entitled* to the underlying audio recording of such interviews.

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<sup>9</sup> See, e.g. the practice in the *Ongwen* and *Gbagbo and Blé Goudé* cases.

<sup>10</sup> Motion, para. 8 (citing OTP filing in the *Banda and Jerbo* case: ICC-02/05-03/09-343, fn. 3)

- a. Requiring disclosure of the audio material would impose an undue burden

11. Disclosure in the context of a criminal trial requires the balancing of competing statutory rights and obligations. This rationale, for instance, underlies rule 81, and similarly justifies the prohibition of overbroad disclosure requests. Accordingly, it is incumbent upon a Chamber to reconcile divergent and competing statutory interests in administering the disclosure process, including with regard to the expeditious and fair conduct of the proceedings as between the Prosecution and the Defence. The balance of equities disfavours disclosure of audio material of witness interviews as an undue burden as a matter of principle, and in the particular circumstances of this case.

12. The disclosure of lengthy audio recordings of witness interviews is a highly resource-intensive process. For example, the three interviews that are subject of the Defence motion include forty different transcripts<sup>11</sup> covering approximately eleven days of interviews. The implementation of necessary redactions to audio material under the Redaction Protocol (which attends to the Court's article 68 obligations and rule 81 interests)<sup>12</sup> requires the assignment of a legally qualified staff member, with the assistance of an interpreter and technical staff, to review these recordings in real time, and likely repeatedly. This resource concern applies not only to the three Sango interviews mentioned in the Defence request, but other Sango interviews currently in the Prosecution's possession pending disclosure, as well as those Sango language

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<sup>11</sup> See e.g., CAR-OTP-2046-0022, CAR-OTP-2046-0024, CAR-OTP-2046-0032, CAR-OTP-2046-0037, CAR-OTP-2046-0049, CAR-OTP-2046-0051, CAR-OTP-2046-0055, CAR-OTP-2046-0072, CAR-OTP-2046-0090, CAR-OTP-2046-0108, CAR-OTP-2046-0122, CAR-OTP-2046-0134, CAR-OTP-2046-0147, CAR-OTP-2046-0150, CAR-OTP-2046-0166, CAR-OTP-2046-0182, CAR-OTP-2046-0195, CAR-OTP-2046-0213; CAR-OTP-2070-0369; CAR-OTP-2070-0396; CAR-OTP-2070-0415; CAR-OTP-2070-0446; CAR-OTP-2070-0467; CAR-OTP-2070-0494; CAR-OTP-2070-0518; CAR-OTP-2099-0822; CAR-OTP-2099-0841; CAR-OTP-2099-0862; CAR-OTP-2099-0890; CAR-OTP-2099-0912; CAR-OTP-2099-0935; CAR-OTP-2099-0960; CAR-OTP-2099-0975; CAR-OTP-2099-0986; CAR-OTP-2099-1010; CAR-OTP-2099-1038; CAR-OTP-2099-1045; CAR-OTP-2099-1069; and CAR-OTP-2099-1094.

<sup>12</sup> ICC-01/14-01/18-64-Red.

interviews the Prosecution may need to conduct in the future.<sup>13</sup> Furthermore, this resource concern is not limited to this case. As the Defence noted, this ruling could impact other cases at the Court,<sup>14</sup> and therefore has the potential to substantially affect limited Prosecution resources in the future.

b. Disclosure of transcriptions in lieu of audio recordings causes no unfair prejudice

13. In contrast to the burden of disclosing audio recordings, which may also transcend additional witnesses as noted, there is no unfair prejudice to the Defence in receiving disclosure of original transcripts of witness interviews instead.

14. As the Motion makes clear, since August 2019, the Defence has possessed transcripts of the three witnesses' interviews, as interpreted or translated into French.<sup>15</sup> As such, the transcripts are made available in a language in which the Pre-Trial Chamber, having expressly considered article 76(3), deemed the Accused proficient for the purposes of these proceedings.<sup>16</sup> Moreover, as the interpretations and translations were conducted by certified language professionals recruited and accredited jointly by the Registry and the Prosecution, they are presumptively accurate and reliable.<sup>17</sup> For these reasons alone, the provision of the three transcripts satisfies the Prosecution's disclosure obligations.

15. The Defence demand for the audio recordings of the interviews rests on a speculative assumption that the transcriptions may contain inaccuracies or inconsistencies in the meaning of the witnesses' evidence.<sup>18</sup> However, as is the case

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<sup>13</sup> See ICC-01/14-01/18-474-Red, paras. 11 and 22 (noting the Prosecution has not yet finalized its investigation). Despite the travel restrictions from the current global pandemic, the Prosecution hopes to be able to conduct additional witness interviews, which may be in the Sango language.

<sup>14</sup> ICC-01/14-01/18-498, para. 13.

<sup>15</sup> ICC-01/14-01/18-498, para. 8.

<sup>16</sup> ICC-01/14-01/18-56-Red, p. 9; ICC-01/14-01/18-65-Red, para. 16.

<sup>17</sup> ICC-01/14-01/18-56-Red, para. 16; ICC-01/14-01/18-48-Conf, para. 24.

<sup>18</sup> See ICC-01/14-01/18-498, para. 10.

with other speculative disclosure requests, the Motion neither meets the threshold for disclosure under rule 77, which requires a “particularised explanation of the materiality of the requested items”<sup>19</sup>, nor under article 67(2), which requires more than a “hypothetical” possibility.<sup>20</sup> As such, denying disclosure of the requested audio material does not cause any unfair prejudice.

16. Further, the Motion’s reference to a singular ICTR case in which an interpretation error was discovered<sup>21</sup> is unavailing. That case is irrelevant to the accuracy of the interpretations or transcriptions provided in *this* case.

- c. Less burdensome means can adequately address any founded claim for further disclosure

17. As noted above, on 2 April 2020, in an effort to strike a reasonable and fair balance of the Parties’ competing statutory interests on an *inter partes* basis, the Prosecution invited the Defence to identify any inconsistencies or incomprehensible portions of the three transcribed interviews that may necessitate further review or disclosure. Specifically, the Prosecution indicated its willingness to conduct further review and/or disclosure were the Defence to present a founded belief that the interpretations were inaccurate or the circumstances of the interviews irregular, based either on information or reasons that appear in any material part of the transcripts going, for instance, to their tenor, incongruity, or incomprehensibility. From these intrinsic indicia alone, the Defence can identify any *material* anomalies which may reasonably justify a request for further disclosure.

18. Accordingly, the Prosecution proposed to review those specific portions of the interpretations for accuracy, or disclose limited and identified portions of the audio, as necessary. Doing so on a considered and *ad hoc* basis would satisfy the interests of

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<sup>19</sup> ICC-01/05-01/13-1156, para. 10.

<sup>20</sup> See ICC-02/04-01/15-1444, para. 19.

<sup>21</sup> ICC-01/14-01/18-498, para. 11.



disclosure, while reasonably lessening the burden of redacting and disclosing underlying audio recordings of witness statements wholesale. It is worth noting, that the Defence has not yet identified any such portions of the relevant transcripts. The Motion fails to show that the original transcripts provided are materially incomplete or inaccurate, so as to justify the additional disclosure of the underlying audio.

19. Significantly, there is precedent for a measured approach regarding the disclosure of audio recordings of witness statements. For instance, in the *Gbagbo* and *Blé Goudé* case, the Court ordered disclosure of the underlying audio of a witness interview conducted in Liberian English and English only after the Defence had identified inaccuracies in the French translation.<sup>22</sup>

20. In sum, the Motion should be dismissed as premature. Alternatively, it fails to establish any cognisable legal basis for the disclosure of such audio material. Given the heavy burden the Prosecution faces in reviewing and redacting the audio files in this case, and in future cases, as well as the lack of prejudice to the Defence given the availability of the French transcripts of the relevant interviews, the Chamber should adopt a measured approach that is predicated on, and limited to, the requirements of rule 77 and article 67(2), rather than a blanket approach to the disclosure of such underlying audio material as a function of rule 76(3).

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<sup>22</sup> ICC-02/11-01/15-T-98-Red-ENG WT, p.6, line 8 - p. 10, line 18.

#### IV. RELIEF SOUGHT

21. For the above reasons, the Prosecution requests the Chamber to deny the Motion in full.



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**Fatou Bensouda, Prosecutor**

Dated this 08<sup>th</sup> day of May 2020  
At The Hague, The Netherlands