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**No. ICC-01/14-01/18
Date: 29 May 2020**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

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 Request for Disclosure of Witness Statements
in their Original Language**

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(2) and (3)(c) and 67 of the Rome Statute (the ‘Statute’) and Rule 76(3) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Request for Disclosure of Witness Statements in their Original Language’.

I. Procedural history and submissions

1. On 29 April 2020, and as it had previously announced,¹ the Yekatom Defence (the ‘Defence’), filed its motion to require the Office of the Prosecutor (the ‘Prosecution’) to ‘disclose a recording or transcript of its witnesses that contains the original answers of the witness’ (the ‘Request’).² The Defence raises this issue in respect of three Sango-speaking witnesses whose interviews were audio recorded and conducted by the Prosecution in French with the assistance of a Sango interpreter (the ‘Interviews’).³ It claims that the Prosecution has only provided it with ‘the French translation and not the witness’ original answers in Sango nor the questions in Sango put to the witness’.⁴
2. The Defence argues, *inter alia*, that by only providing the French translation, the Prosecution ‘is depriving the Defence of learning what the witness actually said’.⁵ The Defence adds that instead, it is being forced to rely on a translation that ‘may or may not be accurate’.⁶ The Defence requests the Chamber to find that the definition of the word ‘original’ in Rule 76(3) of the Rules requires the Prosecution to ‘disclose the words used by the witness in the language in which the words were spoken, not a translation of those words into some other language’.⁷

¹ Yekatom Defence Submissions for First Status Conference, ICC-01/14-01/18-472, paras 30-32.

² Motion for disclosure of witness statements in their original language, ICC-01/14-01/18-498, para. 13.

³ Request, ICC-01/14-01/18-498, para. 2.

⁴ Request, ICC-01/14-01/18-498, para. 8.

⁵ Request, ICC-01/14-01/18-498, para. 10.

⁶ Request, ICC-01/14-01/18-498, para. 10.

⁷ Request, ICC-01/14-01/18-498, para. 12.

3. On 8 May 2020, the Prosecution responded that the Request should be dismissed as premature and that the Defence is not entitled to the underlying audio recordings of witness interviews in the circumstances (the ‘Response’).⁸ The Prosecution indicates that the Interviews were audio recorded as per Rule 112 of the Rules.⁹ The full French and English audio of the Interviews, including the consecutive interpretations of the witnesses’ responses, were subsequently transcribed but not the Sango portions of the Interviews.¹⁰ The Prosecution explains that (i) it has limited resources, (ii) Sango is not a working language of the Court, and (iii) transcribing these portions ‘would be of marginal utility to the transcribed interpretation of the witnesses’ evidence’, given the resource-intensive nature of this task.¹¹

4. The Prosecution argues that Rule 76 of the Rules pertains only to those witnesses that it intends to call to testify and, since it has not made a final determination of who it will call, the Request is premature and ‘should be denied on that basis alone’.¹² Alternatively, the Prosecution asserts that there is no legal basis for the Defence to additionally receive the audio recordings.¹³ The Prosecution argues that Rule 76(3) of the Rules does not entitle the Defence to the underlying audio recordings of witness interviews without limitation and, since the language of the rule does not specify the form of the ‘original’ statement that must be made available, this rule ‘does not exclude the provisions of transcripts *in lieu* of audio recordings’.¹⁴ It adds that requiring disclosure of underlying audio recordings of witness interviews as a matter of right is not reflected in the practice of other cases before the Court.¹⁵ Furthermore, the Prosecution submits that (i) requiring disclosure of the audio material would impose an undue burden on the Prosecution;¹⁶ (ii) disclosure of transcriptions *in*

⁸ Prosecution’s Response to Yekatom’s Motion for Disclosure of Witness Statements in their original language, ICC-01/14-01/18-498, ICC-01/14-01/18-510.

⁹ Response, ICC-01/14-01/18-510, para. 2.

¹⁰ Response, ICC-01/14-01/18-510, para. 3.

¹¹ Response, ICC-01/14-01/18-510, para. 3.

¹² Response, ICC-01/14-01/18-510, para. 7.

¹³ Response, ICC-01/14-01/18-510, para. 20; *see also* paras 8-10.

¹⁴ Response, ICC-01/14-01/18-510, para. 8.

¹⁵ Response, ICC-01/14-01/18-510, para. 9; *see also* para. 10.

¹⁶ Response, ICC-01/14-01/18-510, paras 11-12.

lieu of audio recordings causes no unfair prejudice to Mr Yekatom;¹⁷ and (iii) less burdensome means could adequately address any founded claim for further disclosure.¹⁸

II. Analysis

5. Rule 76 of the Rules provides, in its relevant parts:

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.

6. The Single Judge notes that the Request concerns disclosure, either in form of transcripts or audio recordings, of the original Sango questions and answers in the Interviews with witnesses P-0965, P-1402 and P-2173, which were audio-recorded in accordance with Rule 112 of the Rules¹⁹ and transcribed in 40 transcripts.²⁰ The Prosecution confirms that it provided the transcripts of these interviews ‘as interpreted or translated into French’ to the Defence, but not the corresponding transcription in Sango.²¹ The Chamber notes that since these interviews were audio recorded, a record of the questions and answers in original Sango exists.

7. The Single Judge recalls that the Appeals Chamber has held that ‘audio- or video-record of the questioning of a person’ under Rule 112 of the Rules are ‘records of statements that are potentially subject to disclosure’ pursuant to Rule 76 of the Rules where the Prosecution ‘intends to call the person to testify as a witness’.²²

¹⁷ Response, ICC-01/14-01/18-510, paras 13-16.

¹⁸ Response, ICC-01/14-01/18-510, paras 17-19.

¹⁹ Response, ICC-01/14-01/18-510, para. 2.

²⁰ Response, ICC-01/14-01/18-510, para. 12.

²¹ Response, ICC-01/14-01/18-510, para. 14.

²² *The Prosecutor vs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, 17 February 2012, ICC-02/05-03/09-295 (the ‘*Banda and Jerbo Appeals Judgment*’), para. 2; *see also* paras 27-28.

8. In this regard, the Single Judge notes that the Prosecution has not yet provided a list of witnesses that it intends to call at trial, nor has it indicated in its Response whether or not it intends to call the three witnesses that are the subject of the Request. In this context, the Chamber also notes the reduced scope of the charges following the Confirmation Decision and its potential implications for the Prosecution's witness list.
9. For these reasons, the Single Judge rejects the Request as premature. The Single Judge notes, however, that he has considered the delays in trial preparation thus far due to the Coronavirus pandemic and the accused's right to a fair and expeditious trial and to have adequate time to prepare his defence and has therefore requested the Prosecution to file a preliminary list of witnesses.²³
10. Further, in order to avoid future litigation on the matter, the Single Judge will also address the issue of the scope of disclosure under Rule 76(3) of the Rules. The Single Judge notes that Rule 76(3) of the Rules mandates the disclosure of statements of witnesses that the Prosecution intends to call to testify, whereas Rules 111 and 112 of the Rules provide for the form in which statements need to be collected, in general and in certain particular circumstances.²⁴
11. Should the Prosecution decide to call certain witnesses to testify its obligations under Rule 76(3) of the Rules also include disclosing the original Sango portions of their interviews, in the respective forms mandated by Rules 111 and 112 of the Rules.²⁵ In this respect, the Single Judge finds that the questions originally posed in Sango and the answers provided in response by the witness in Sango fall under the definition of 'original' pursuant to Rule 76(3) of the Rules. Therefore, for persons interviewed pursuant to Rule 112 of the Rules, the Prosecution must disclose either the audio/video recording, or the transcript thereof, including the original Sango portions of these interviews.²⁶ This applies

²³ See Order to provide a Preliminary Witness List, 22 May 2020, ICC-01/14-01/18-528.

²⁴ *Banda and Jerbo Appeals Judgment*, ICC-02/05-03/09-295, para. 26.

²⁵ *Banda and Jerbo Appeals Judgment*, ICC-02/05-03/09-295, para. 27.

²⁶ *Banda and Jerbo Appeals Judgment*, ICC-02/05-03/09-295, para. 28; see further *Prosecutor vs. Callixte Mbarushimana*, Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, paras 20-22.

to the audio/video recordings or transcripts of Interviews with P-0965, P-1402 and P-2173, respectively, if the Prosecution decides to call them. Accordingly, the disclosure of only the French translations of such recordings or transcripts would not be sufficient to satisfy the requirements of Rule 76(3) of the Rules. Finally, the Single Judge underlines that Rule 76(3) of the Rules does not mandate the Prosecution to disclose the relevant information in all forms, should it exist in more than one.²⁷

12. The Single Judge notes the Prosecution's resource concerns regarding the provision of audio recordings, which also extend to 'other Sango interviews currently in the Prosecution's possession pending disclosure' and other 'Sango language interviews the Prosecution may need to conduct in the future'.²⁸ In this respect, the Single Judge recalls the Prosecution's ongoing disclosure obligations and also that it is obliged to make every effort to ensure that investigations are completed in a sufficiently timely manner to enable any transcriptions to be prepared in advance of the disclosure deadlines to be set by the Chamber.²⁹

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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



Judge Bertram Schmitt

Single Judge

Dated 29 May 2020

At The Hague, The Netherlands

²⁷ *Banda and Jerbo Appeals Judgment*, ICC-02/05-03/09-295, para. 27.

²⁸ Response, ICC-01/14-01/18-510, para. 12.

²⁹ See also Trial Chamber VI, *Prosecutor vs. Bosco Ntaganda*, Decision on Prosecution application for delayed disclosure, 2 April 2015, ICC-01/04-02/06-537-Red2, para. 44.