

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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
and Confidential *EX PARTE* Annex B only available to the Prosecution

Public Redacted Version of the “Yekatom Defence Request for Disclosure
of P-2580’s Phone Call Recording with the Prosecution”, 11 January 2024,
ICC-01/14-01/18-2294-Conf

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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INTRODUCTION

1. Counsel for Mr. Yekatom (“Defence”) requests the Chamber to order the Prosecution to disclose the audio recording of its phone conversation with P-2580 dated [REDACTED] (“Recording”).
2. The Defence submits that the Recording is subject to disclosure pursuant to Rule 77 of the Rules of Procedure and Evidence. As no exception to the disclosure obligation of the Prosecution exists, disclosure of the full Recording, instead of an investigation report mentioning its existence and part of its content, is warranted.

PROCEDURAL HISTORY

3. On 17 November 2023, the Prosecution disclosed an investigation report relating to a phone conversation between their Office and P-2580, which occurred on [REDACTED] (“Investigation Report”). It is added that the phone conversation was recorded.¹
4. On 6 December 2023, the Defence requested in *inter partes* discussions disclosure of the Recording.² The same day, the Prosecution rejected the request by indicating that all material information on this matter was disclosed through the Investigation Report.³
5. On 8 December 2023, the Defence requested the Prosecution to reconsider their refusal to provide the Recording on the basis that : (i) it informed the Prosecution on [REDACTED] that it received information as regards to misconduct of P-2580 with witnesses which occurred on [REDACTED], the day of his call with the Prosecution; (ii) P-2580’s own words are material to the

¹ CAR-OTP-00001992-R01 disclosed in Trial Rule 77 package 117.

² See Annex A : Email from the Defence to the Prosecution dated 6 December 2023 15:43.

³ See Annex A : Email from the Prosecution to the Defence dated 6 December 2023 17:05.

preparation of the Defence in order to have his tone and all the nuances of his words (or lack of) when he, per the Defence submission, lied to the Prosecution; (iii) the exact words exchanged with P-2580 are material for the preparation of the Defence in light of his misconduct throughout the case, as well as needed to present the recording to Defence's witnesses; and, (iv) the choice of only providing a synthesis through an Investigation Report is in opposition with the practice of the Prosecution as regards to [REDACTED] in which, in an identical situation, it elected to provide the audio recording of their conversation with the individual.⁴

6. On 8 December 2023, the same day, the Prosecution again refused to disclose the Recording. In its response the Prosecution indicated that it would not entertain disclosure requests on speculative assertions, as well as complained about the *inter partes* request being "*a pretext and vehicle to argue its case through the backdoor*".⁵
7. On 8 December 2023, the Defence reiterated that disclosure of the Recording was warranted, absent any restrictions pursuant to Rule 81(1) or (2) of the Rules, as the materiality of the conversation was established. It consequently requested the Prosecution to indicate the legal basis for their deviation of their disclosure obligation in order to streamline future litigation before the Chamber.⁶
8. On 22 December 2023, the Prosecution responded, indicating that, in their view, the Investigation Report "*fully explicates the nature of the conversation at issue*" and that "*the recording itself would have no material effect on the preparation of the*

⁴ See Annex A : Email from the Defence to the Prosecution dated 8 December 2023 11:37.

⁵ See Annex A : Email from the Prosecution to the Defence dated 8 December 2023 13:43.

⁶ See Annex A : Email from the Defence to the Prosecution dated 8 December 2023 17:40.

Defence".⁷ At no point has the Prosecution indicated that the Recording is not within its possession.

APPLICABLE LAW

9. Rule 77 of the Rules of Procedure and Evidence provides that:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

10. The Appeals Chamber held that the term "material to the preparation of the defence" be construed broadly, referring to all objects relevant for the preparation of the defence.⁸ As regards to the Prosecution's obligation, Pre-Trial Chamber II indicated that the overriding principle that full disclosure should be made and that non-disclosure is the exception to the rule.⁹ As such, when documents portions of which are deemed to contain information material to the preparation of the defence within the meaning of Rule 77 of the Rules should be disclosed in their entirety, with any appropriate redactions in accordance with the redaction protocol.¹⁰

SUBMISSIONS

11. The Defence argues that the Recording is material to its preparation (A), and that no exception to the disclosure obligation of the Prosecution exist in this instance (B).

⁷ See Annex A : Email from the Prosecution to the Defence dated 22 December 2023 at 17:13.

⁸ *Prosecutor v. Lubanga*, Appeals Chamber Decision on Mr Thomas Lubanga's request for disclosure, 11 April 2013, [ICC-01/04-01/06-3017](#), para. 10.

⁹ [ICC-01/14-01/18-169](#), para. 16.

¹⁰ *Prosecutor v. Ongwen*, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, [ICC-02/04-01/15-1734](#), para. 34.

A. On the materiality of the Recording for the preparation of the defence

12. The 17 November 2023 Investigation Report states clearly that the Prosecution is in possession of the Recording of a phone call between P-2580 and two investigators.
13. The Defence first notes that, by virtue of the disclosure of the Investigation Report pursuant to Rule 77, the Prosecution acknowledges that the call between their Office and P-2580 is material for the preparation of the Defence. This is further acknowledged by the *inter partes* discussions with the Prosecution which admits that the content of the conversation is material which is why they summarized it in an Investigation Report. The crux of the issue resides in the Prosecution's decision to merely disclose a brief Investigation Report which mentions the existence of the call and of the Recording, as well as a summary of its content, in lieu of the Recording as per its disclosure obligations.
14. As argued in its *inter partes* discussions with the Prosecution, the Defence is of the position that the Recording in its original form is material for its preparation pursuant to Rule 77 of the Rules.
15. At present, the Defence is only privy to a 1-page report in which the Prosecution provides a summary of the instruction provided to P-2580 by Prosecution investigators. Briefer still, the report summarises the purported response provided by P-2580 as follows:

“P-2580 mentioned that he understood the request well. However, he denies having made any interventions with these witnesses. On the contrary, he claims to no longer deal with this type of matter at all.”
16. No further context or detail is provided in relation to, *inter alia*, P-2580's demeanour or attitude during the conversation in order to determine whether or not further steps are required in order to safeguard Mr. Yekatom's fair trial rights. Further, there remains ambiguity as to the specific interventions and

witnesses understood to be denied by P-2580 or indeed what is meant by his claim that “he no longer deal(s) with this type of matter” i.e. which ‘type’ and the duration of his apparent claim?

17. Such context – which would only be apparent from the Recording itself – is evidentially material in the context of these proceedings.
18. Indeed, the Defence first recalls the concerning position of P-2580 in these proceedings, as an intermediary who has provided fabricated evidence in relation to witnesses linked to Count 29 and further, has interfered in the Defence investigations by dissuading potential witnesses from meeting with Defence representatives.¹¹ [REDACTED].¹² The Defence respectfully refers, as regard to P-2580’s implication in the case, to its extensive and detailed submissions provided in its “Request for the Exclusion of Fabricated Evidence.”¹³
19. Accordingly, it is the very phrasing in which P-2580 purported to deny the interventions put to him, as well as the tone and manner in which he responded which is material to the assessment and credibility of P-2580’s response. This is emphasised by the fact that it is the Defence’s position that P-2580 has sought to impede its investigations and in light of the fact that it is in the midst of presenting evidence concerning P-2580’s role in the conspiracy to produce fabricated evidence before this Chamber. The Recording itself would not only enable the Defence to undertake the relevant steps to preserve the presentation of its case in this respect but would further allow the Defence to determine whether or not further intervention is warranted with respect to pending litigation concerning the fabrication of evidence. In both instances, it is the Defence which is in the best position to make this determination.

¹¹ CAR-OTP-00001600-R01, para. 2.

¹² [REDACTED].

¹³ ICC-01/14-01/18-2240-Conf.

20. The date of the call, [REDACTED], is another clear indication that the Recording is material for the Defence's preparation, and thus disclosable. Indeed, the Defence informed the Prosecution on [REDACTED] that on the very same day i.e. [REDACTED], P-2580 was implicated with P-1974 in the gathering of "children of [REDACTED]" in which the youths were told that "(i) *they should not worry because* [REDACTED] ; (ii) [REDACTED] ; and (iii) [REDACTED].¹⁴ The Defence also informed the Prosecution [REDACTED] that another gathering was planned to be held, with the same individuals involved.
21. The fact that there are substantial grounds to believe that this gathering happened on the same day that P-2580 was purportedly denying to the Prosecution that he "made any interventions with these witnesses" and that he was no longer dealing "with this type of matter at all", is an indicia of the possibility that P-2580 lied during the call which was recorded.
22. It should be particularly noted that the Investigation Report merely indicates that after the Prosecution indicated to P-2580 to stop intervening towards victims and witnesses, he "*denied having made any interventions with these witnesses*" which (i) is in total contradiction with what he previously said to the Prosecution when he admitted having said [REDACTED],¹⁵ and (ii) is totally unclear as to whom P-2580 is referring to as regard to the specific mention of "these" witnesses.
23. Accordingly, given this particular circumstances, the Recording is material for the preparation of the Defence as P-2580's original words, their nuance or lack of, as well as his tone are important in order to fully assess his potential duplicity on the matter.

¹⁴ See Ex Parte Annex B, email sent from the Defence to the Prosecution dated [REDACTED].

¹⁵ CAR-OTP-00001600-R01, para. 2. See also CAR-OTP-2135-4188-R02, para. 15.

24. The materiality of the recording is also furthered by the fact that provision of the Recording would allow the Defence to present it to relevant Defence witnesses, whether in-court or as part of its investigations. The exact content of the conversation, which the Defence would have access to with disclosure of the Recording, could also lead, in light of the apparent indicia that P-2580 lied during this call, to new line of questions for the Defence witnesses. The Defence stresses that despite the call occurring on [REDACTED], and the Investigation Report being prepared the same day, the Prosecution withheld its disclosure until 17 November 2023, the deadline for the Defence submission of its List of Evidence and List of Witnesses, which prevented the Defence to investigate on this matter prior to this deadline.
25. Consequently, in light of the above, the Defence submits that the materiality of the Recording for its preparation is demonstrated, and that as a consequence its disclosure ordered.

B. On the absence of exceptions to the Prosecution's disclosure obligation

26. Given the content and importance of the conversation, the Investigation Report which merely provides an overview of the conversation, is evidently insufficient to discharge the Prosecution's disclosure obligation as regard to the content of the conversation.
27. In this regard, the deficiencies and lack of proper understanding of the conversation as "summarized" in the Investigation Report defeat the Prosecution's reliance on a Lubanga jurisprudence to justify the non disclosure of the Recording.¹⁶ Indeed, the Prosecution avers *that "[u]nder the Lubanga jurisprudence [...] when the provision of an item "would have no material effect ... [i]t*

¹⁶ See Annex A : Email from the Prosecution to the Defence dated 22 December 2023 at 17:13.

does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules".¹⁷

28. The Lubanga jurisprudence as cited by the Prosecution refers to a situation whereby the documents for which disclosure was sought were related to the presence of child soldiers in armed groups other than the one of the accused. Trial Chamber I found that disclosure of those documents was not warranted, as they would have no material effect on the preparation of the Defence, on the basis that (i) over 150 items of evidence containing information on the use of child soldiers in other armed groups had been disclosed;¹⁸ and (ii) the Prosecution was not disputing that other armed groups recruited and used child soldiers.¹⁹ In other words, disclosure would be superfluous.
29. Moreover, the Prosecution's reliance on the Lubanga jurisprudence is misguided when considered in the context of prior determinations of Trial Chamber I whereby it had expressed *"grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items."*²⁰ Whilst this concerned exculpatory material, the approach of Trial Chamber I - i.e. for full disclosure of material - has been adopted by this Court in relation to Rule 77 material. For example, as previously held by Trial Chamber IX, further to an Ongwen Defence request for disclosure of items of which only excerpts were disclosed, *"documents portions of which are deemed to contain information material to the preparation of the defence within the meaning of Rule 77 of the Rules should be disclosed in their entirety, with any appropriate redactions in accordance with*

¹⁷ *Ibid*, citing *Prosecutor v. Lubanga*, Decision on the prosecution's request for an order on the disclosure of tu quoque material pursuant to Rule 77, 2 October 2009, , [ICC-01/04-01/06-2147](#), para. 24.

¹⁸ *Prosecutor v. Lubanga*, Decision on the prosecution's request for an order on the disclosure of tu quoque material pursuant to Rule 77, 2 October 2009, [ICC-01/04-01/06-2147](#), para. 23.

¹⁹ *Prosecutor v. Lubanga*, Decision on the prosecution's request for an order on the disclosure of tu quoque material pursuant to Rule 77, 2 October 2009, [ICC-01/04-01/06-2147](#), para. 22.

²⁰ *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, [ICC-01/04-01/06-1401](#), para 60.

the redaction protocol".²¹ As the conversation contained in the Recording, or at the very least portion of it, are material for the preparation of the Defence, the Prosecutor should not be allowed to merely disclose a barely usable Investigation Report in lieu of the Recording. Moreover, in the present instance the Recording is unique as it would provide the response of P-2580 to allegations of improper witness interference, information which the brevity and vagueness of the Investigation Report does not reflect sufficiently for any meaningful use by the Defence. The Recording cannot be considered as superfluous.

30. In this regard, the Defence further highlights that the process of "summarizing" a conversation which occurred in a language other than the English language depicted in the Investigation Report necessarily alters the depiction of the conversation. It is recalled, as regard to witness P-0808, that it was only after the audio recording of his interview was played during the hearing that it was found out that the written journal article misinterpreted his words, which led the Presiding Judge to note that *"I may say, perhaps comment, it's indeed something different if you have the original, so to speak, and if you have it seen through the lens of a journalist"*.²² The Defence underlines that a similar approach is warranted in this instance in light of the Recording's existence, disclosure of the original audio recording of the conversation is the best way to ensure that the real meaning of the words spoken are understood.
31. The Defence further contends that no restriction to disclosure on the basis of Rule 81(1) or (2) apply in this instance.
32. Indeed, it is recalled that in relation to [REDACTED], the Prosecution sent an investigator [REDACTED] the conversation between their Office and

²¹ *Prosecutor v. Ongwen*, Decision on Defence Request for Remedies in Light of Disclosure Violations, 22 April 2020, , [ICC-02/04-01/15-1734](#), paras 33-34.

²² P-0808 : ICC-01/14-01/18-T-069-CONF-ENG CT at 15:31:58.

[REDACTED];²³ before disclosing those conversations in Rule 77 packages.²⁴

The situation of P-2580's recording is strictly similar : (i) a conversation between the Prosecution and another individual ; (ii) recorded without their knowledge; (iii) in the context of individuals linked to [REDACTED]; (iv) with investigation notes summarizing / synthetizing parts of the recorded conversation.

33. The position of the Prosecution, which disclosed the audio recording of [REDACTED] conversations with its investigators, demonstrates that the Recording is not considered as an internal document. Additionally, disclosure of the Recording would not "prejudice further or ongoing investigations" as (i) [REDACTED], and; (ii) [REDACTED].
34. The Prosecution should not be allowed to apply a double standard in this case where it discloses recorded conversations when it investigates [REDACTED], but withheld a similar conversation when it applies to one of its intermediary (P-2580) who fabricated evidence and interfered with the Defence's investigations.

CONCLUSION

35. In light of the above, the Defence respectfully requests the Chamber to find that no exception to the disclosure obligation of the Prosecution exists as regard to the Recording. Consequently, it should order the Prosecution to disclose the Recording due to the materiality of its content and of the impossibility for the Prosecution to discharge of its obligation by the disclosure of Investigation Report.

CONFIDENTIALITY

²³ See [REDACTED]; see also [REDACTED].

²⁴ See [REDACTED], [REDACTED], [REDACTED].

36. The present request is filed on a confidential basis due to references to confidential information related to P-2580. A public redacted version will be filed forthwith. Annexes A and B are also classified as confidential and confidential *Ex Parte* only available to the Prosecution as they relate to *inter partes* discussions with the Prosecution and contain confidential information on Defence's investigations.

RELIEF SOUGHT

37. In light of the above, the Defence respectfully requests Trial Chamber V to:
- ORDER the Prosecution to disclose the Recording of its [REDACTED] phone conversation with P-2580.

RESPECTFULLY SUBMITTED ON THIS 20th DAY OF FEBRUARY 2024



Me Mylène Dimitri
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