

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER III

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Iulia Antoanella Motoc
Judge Haykel Ben Mahfoudh

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY

Public

**Public redacted version of “Prosecution’s Response to Defence’s Request for Disclosure
of Materials Relating to P-0455 (ICC-02/04-01/05-602-Conf)”
16 May 2025, ICC-02/04-01/05-604-Conf**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Prosecution respectfully requests Pre-Trial Chamber III (“Chamber”) to reject the Defence’s Request for Disclosure of Materials Relating to P-0455¹ in its entirety. The Prosecution has fully complied with its disclosure obligations relating to witness P-0455 and has further engaged in good faith *inter partes* discussions with the Defence to resolve any outstanding queries.

II. CONFIDENTIALITY

2. This Response is submitted confidentially under regulation 23bis(1) and (2) of the Regulations of the Court since it contains sensitive witness-related information and relates to a request of the same designation. A public redacted version will be filed as soon as possible.

III. SUBMISSIONS

Agreements and correspondence in relation to the interview with P-0455

3. There is no undisclosed material in the Prosecution’s possession in relation to the interview with P-0455 that warrants disclosure under rule 77 of the Rules of Procedure and Evidence or article 67(2) of the Statute. The Defence’s arguments are highly speculative, and fail to motivate how the content of the logistical correspondence between the Prosecution and P-0455’s [REDACTED] is material to its preparation within the meaning of rule 77, in terms of being directly connected to a live issue in the case.²

4. *First*, in relation to the existence of any undisclosed agreement between the Prosecution and P-0455, the Prosecution has already confirmed in *inter partes* discussions that, aside from the statement of limited use, “it remains the case to date that there are no other agreements between P-0455 and the Prosecution”.³ The Defence appears simply unprepared to accept this, as apparent from its Request, as well as its [REDACTED],⁴ and its representation that [REDACTED].⁵ However, the Defence proffers no basis to disbelieve these good faith representations made by the Prosecution. The Prosecution cannot give what it does not have.

5. *Second*, as to the conditions under which the interview was conducted, the Prosecution similarly maintains that there is no disclosable material in its possession. Having sought and

¹ ICC-02/04-01/05-602-Conf (“Request”).

² ICC-01/12-01/18-859-Red, paras. 9-10; ICC-02/04-01/15-1734, para. 22.

³ See Prosecution email of 30 April 2025 at Confidential Annex A to the Request.

⁴ See ICC-02/04-01/05-600-Conf-Anx.

⁵ See ICC-02/04-01/05-601-Conf, para. 2.

received clarification from the Defence about its requests on an *inter partes* basis,⁶ the Prosecution has conducted a review of its correspondence with P-0455's [REDACTED] pertaining to the interview. It is the Prosecution's assessment that, even under a very broad interpretation of materiality, none of the correspondence is material to Defence preparation under rule 77, nor potentially exonerating under article 67(2) in that it may affect the credibility of prosecution evidence. The Defence seeks disclosure of the correspondence on the basis that P-0455 "stood to benefit from his cooperation with the Prosecution, on matters as significant as [REDACTED]." ⁷ This basis is highly speculative, as there is nothing to suggest that the correspondence evinces any such benefit available to P-0455, or his apprehension of such. While it is incumbent on the Prosecution to make the assessment of whether material in its possession contains information material to the preparation of the Defence,⁸ it has no objection to providing this correspondence to the Chamber *ex parte* for review and its own determination.

6. *Third*, the Defence has failed to demonstrate how the logistical arrangements made to facilitate the interview give rise to disclosure obligations under the Court's statutory regime. It is unclear, and the Defence has made no attempt to motivate, how routine arrangements such as the Prosecution's booking of a room in which to hold the interview,⁹ would offer any insight – let alone a material insight – into "how the parties understood and reflected [P-0455's] agreement and cooperation".¹⁰

7. *Fourth*, the Chamber should reject outright the Defence's appeal to the question of "Why not?" and its attendant argument for transparency,¹¹ as wholly unsupported by the Court's statutory framework and jurisprudence on disclosure. While under no strict obligation to do so, the Prosecution has nevertheless communicated information to the Defence on how the interview came about "in the spirit of narrowing down litigable issues between the parties".¹² As to the Defence's claim that the Prosecution has "withheld" the date of P-0455's communicated agreement to be interviewed,¹³ it was through these *inter partes* communications that the Defence came to know that the Prosecution had written to P-0455's [REDACTED] requesting an interview in July 2022.¹⁴ The Defence did not inquire, and hence

⁶ See Prosecution email of 14 April 2025 and Defence email of 23 April 2025 at Confidential Annex A to the Request.

⁷ See Request, para. 8.

⁸ See ICC-01/14-01/18-539, para. 27; ICC-01/14-01/18-1438-Red, paras. 19, 22; ICC-01/12-01/18-777-Red, para. 18; ICC-02/05-03/09-443, para. 15; ICC-01/04-02/06-1330, para. 23.

⁹ See Request, para. 41.

¹⁰ See Request, para. 40.

¹¹ See Request, para. 43.

¹² See Prosecution email of 30 April 2025 at Confidential Annex A to the Request.

¹³ See Request, para. 37.

¹⁴ See Prosecution email of 30 April 2025 at Confidential Annex A to the Request.

the Prosecution did not inform them that the precise date of its request for interview was 7 July 2022, and that the date of P-0455's [REDACTED] positive response was 12 July 2022.

Audio-recording of P-0455's security questionnaire

8. The Defence seeks disclosure of the portion of interview dealing uniquely with P-0455's security situation: the biographical and security questionnaire (known as a "BSQ"). However, it has failed to demonstrate that P-0455's BSQ contains information that is material to its defence under rule 77 or potentially exculpatory under article 67(2).

9. The Prosecution conducts BSQs separately from the substantive part of the interview because they pertain to sensitive information about the witness's family and security situation, necessary for the Prosecution to give effect to its protection obligations under article 68(1).¹⁵ For this reason, they are not considered recorded statements for the purposes of rule 76 (as are the transcripts of the interview proper), and are not disclosed as such.¹⁶

10. This of course does not mean that the content of BSQs are exempt from disclosure in all circumstances. Where a BSQ contains information that is material to Defence preparation under rule 77 or potentially exculpatory under article 67(2), the Prosecution is obligated to disclose such information.¹⁷ However, as in all cases in which the Defence seeks additional disclosure, it is incumbent on the Defence to sufficiently demonstrate that the content of the requested BSQ is material to their preparation or that it would fall under article 67(2).¹⁸ The Defence has failed to do so in this case. In this context, it should be noted that the Defence cites the 12 February 2019 decision in the *Ongwen* case out of context,¹⁹ as Trial Chamber IX actually rejected the defence request based on, *inter alia*, "the absence of information suggesting that the Prosecution is withholding any genuine witness requests for assistance".²⁰

11. In the case of P-0455's BSQ, the Prosecution has reviewed the recording, and re-reviewed it following the Defence's *inter partes* request. As communicated in its email to the Defence,²¹ the Prosecution's assessment that the BSQ contains no disclosable material remained unchanged.

¹⁵ See ICC-01/12-01/18-777-Red, paras. 15-16.

¹⁶ ICC-01/04-02/06-840-Red, para. 54.

¹⁷ See ICC-01/04-02/06-840-Red, para. 54; ICC-01/12-01/18-777-Red, paras. 16-17.[REDACTED]

¹⁸ ICC-01/04-02/06-840-Red, para. 54.

¹⁹ ICC-02/04-01/15-1444 ("*Ongwen* Decision"), cited at Request, para. 47.

²⁰ *Ongwen* Decision, para. 18.

²¹ See Prosecution email of 14 April 2025 at Confidential Annex A to the Request.

12. In particular, the portions of the BSQ dealing with P-0455's [REDACTED]²² are of a routine nature, and do not provide any material upon which to base an argument that P-0455 stood to gain from his cooperation with the Prosecution. The Defence's argument in this regard that the portions of the BSQ dealing with P-0455's security [REDACTED] is material is therefore speculative and unconvincing.

13. The Prosecution maintains its assessment that the BSQ contains no material disclosable under rule 77 or article 67(2). It nevertheless remains prepared to submit the BSQ recording to the Chamber *ex parte* for review, should this assist in the Chamber's determination.

Audio/video recordings of P-0455's interview

14. The Defence's arguments as to why the disclosure of the audio/video recordings of P-0455's interview is warranted should likewise be rejected. Particularly at the confirmation stage, where the transcript of P-0455's interview is put forward as part of a larger body of evidence to substantiate the charges, there is no need for the Chamber, Parties and Participants to delve into such fine points as the witness's demeanour at interview.

15. It is well established practice that for persons interviewed pursuant to rule 112, the Prosecution may disclose the audio/video recording, or the transcript thereof.²³ However, the Defence has provided no basis to call into question the accuracy of the interpretation and transcription of P-0455's words, or otherwise to depart from the practice of disclosing the transcripts only. Moreover, as both the original Acholi words spoken by P-0455 and the oral interpretation into English are both transcribed in the transcripts disclosed, the Defence is already in the position to verify whether P-0455's evidence was adequately interpreted.

16. In particular, the Defence's desire to challenge P-0455's credibility at the confirmation hearing does not justify disclosure of the audio-video recordings. At confirmation stage, a pre-trial chamber is entitled to, according to a 30 May 2012 Appeals Chamber decision in *Mbarushimana*, "evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses."²⁴ However, it is also clear from the same Appeals Chamber decision,²⁵ and from the subsequent jurisprudence of Pre-Trial Chambers, that this

²² Contrary to the Defence's submission (*see* Request, para. 48), the Prosecution has never denied that the BSQ addressed P-0455 [REDACTED]. The Prosecution's *inter partes* representation referring to the witness's "[REDACTED]" must be read in the context of the exchange, as a response to the request as phrased in the second bullet point of the Defence's prior email, in which the words "[REDACTED]" are underlined. *See* Defence email of 23 April 2025 and Prosecution email of 30 April 2025 at Confidential Annex A to the Request.

²³ *See* ICC-01/14-01/18-535, para. 11; ICC-01/04-01/10-378, para. 22; ICC-01/09-01/11-T-137-Red, p. 16, ln. 20 – p. 17, ln. 3.

²⁴ ICC-01/04-01/10-514, para. 46 ("*Mbarushimana* Decision").

²⁵ *Mbarushimana* Decision, para. 46

assessment must occur keeping in mind the limited scope and purpose of the confirmation hearing pursuant to article 61(7): to determine “whether there is sufficient evidence to establish substantial grounds to believe that [the person] committed the crimes charged and therefore that the case brought by the Prosecutor warrants a trial.”²⁶

17. In the present case, it is unclear how the Defence’s ability – and ultimately the Chamber’s ability – to assess P-0455’s “demeanour, disposition, conduct, attitude and expression” has a bearing on the question of whether the Prosecution’s evidence as a whole is sufficient to warrant a trial. This is especially so when every proposition in the Prosecution’s Pre-Confirmation Brief²⁷ for which P-0455’s evidence is cited – including those singled out in the Defence’s Response²⁸ – is also substantiated by highly pertinent other documentary or witness evidence. Such evidence is expressly referenced in the Brief, but also contained throughout the extensive body of evidence contained on the Prosecution’s List of Evidence.²⁹

18. Finally, the Prosecution notes that the authorities cited by the Defence all relate to trial proceedings, and not even to the issue of disclosure of audio/video recordings of witness interviews. Trial Chamber III’s 4 February 2022 decision in *Gicheru* is erroneously referred to by the Defence as an order of the Pre-Trial Chamber.³⁰ This jurisprudence is therefore inapplicable to the current stage of proceedings. Trial Chamber III’s decision in *Gicheru* is also distinguishable from the present case in that: i) the video recording in question was a witness preparation session for which a preparation log but not the video recording had been disclosed;³¹ ii) the request for disclosure identified a particular issue arising from new information communicated in one portion of the preparation session;³² and based on this, iii) the Trial Chamber accordingly ordered disclosure of only the relevant portion of the recording.³³ As is customary in witness preparation practice, [REDACTED].³⁴

19. The Appeals Chamber’s 17 February 2012 decision in *Banda & Jerbo* is also not on point, as the cited portion simply refers to the fact that an audio/video recording under rule 111 provides a fuller and more accurate account of an interview than a written statement under rule

²⁶ ICC-02/05-01/20-433-Corr, para. 39 (*see further* paras. 37-38). *See also* ICC-01/09-01/20-153-Red, para. 32; ICC-01/14-01/21-218-Red, paras. 38-39.

²⁷ ICC-02/04-01/05-593-Conf (“Pre-Confirmation Brief”).

²⁸ *See* Request, para. 29, fns. 47-50.

²⁹ ICC-02/04-01/05-594-Conf-Anx. *See* Pre-Confirmation Brief, fn. 2: “In order to comply with the page limit as ordered... the Prosecution has limited itself to citing its best evidence to substantiate the charges. Nevertheless, the Prosecution relies on its simultaneously filed List of Evidence in its entirety”.

³⁰ ICC-01/09-01/20-278-Red (“*Gicheru* Decision”), cited in Request, paras. 34-35, fns. 59-62.

³¹ *Gicheru* Decision, paras. 1, 3.

³² *Gicheru* Decision, paras. 1-2.

³³ *Gicheru* Decision, para. 11.

³⁴ *See* ICC-02/04-01/05-579-Conf-AnxB, paras. 12-15.

112.³⁵ The Defence's invocation of the best evidence rule as expressed in a Prosecution request in *Bemba et al* is equally inapposite, relating as it did to a recorded meeting where neither the recording nor any transcript thereof had been provided.³⁶ Lastly, Trial Chamber I's words of caution in its 2 May 2022 *Kushayb* Decision, as is apparent from the portion cited, relate to the admission into evidence at trial of statements made by insider witnesses.³⁷ These decisions have no bearing on the present disclosure request.

IV. RELIEF REQUESTED

20. The Prosecution respectfully requests the Chamber to reject the Defence Request in its entirety.



Mame Mandiaye Niang, Deputy Prosecutor

Dated this 22nd day of May, 2025
At The Hague, the Netherlands

³⁵ ICC-02/05-03/09-295, paras. 27-28, cited in Request, para. 31, fn. 52.

³⁶ ICC-01/05-01/13/1738-Red (*see* para. 1), cited at Request, para. 31, fn. 53.

³⁷ ICC-02/05-01/20-680-Red, para. 14, cited in Request, para 31, fn. 54.