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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD NGAÏSSONA*

Confidential

Prosecution's Response to the Yekatom Defence Urgent request for access to evidentiary materials in possession of the Office of the Prosecutor (ICC-01/14-01/18-1604-Conf)

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. Trial Chamber V ("Chamber") should reject the 10 October 2022 Yekatom Defence request for access to evidentiary materials ("Request").[1]

2. The Request fails to demonstrate the materiality of Facebook records regarding P-1839, P-0487 and Habib BEINA warranting inspection pursuant to rule 77 of the Rules of Procedure and Evidence or disclosure pursuant to article 67(2). It is moreover speculative, lacking in factual substantiation, and at odds with the settled jurisprudence of the Court.

3. Further, having considered the Defence's assertions regarding the purported relevance of the records as conveyed in *inter partes* communications and argued in the Request, the Office of the Prosecutor ("Prosecution") has assessed that they are not material or otherwise disclosable.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), this document is filed as "Confidential" as it responds to a document bearing this classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

5. The Request simply re-hashes the Defence's previous disagreements with the established jurisprudence of this Court concerning the issue of 'materiality' within the meaning of rule 77.[2] As the Prosecution has stated in *inter partes* communications and

[1] ICC-01/14-01/18-1604-Conf.
[2] *See* ICC-01/14-01/18-1373, paras. 2, 5-6; *see also* ICC-01/14-01/18-1354-Conf, para. 18, *et seq.*

previous filings, the Court's jurisprudence places the burden squarely on the Defence to demonstrate the materiality of the information sought in this circumstance.

6. As noted, the Prosecution has considered the Defence's prior requests and carefully reviewed the information sought in that light. Having done so, it has reasonably concluded that the objects sought are not material, and duly communicated this to the Defence.

A. The Court's jurisprudence does not require disclosure/inspection

7. In the *Ntaganda* case, the Appeals Chamber confirmed that "rule 77 of the Rules leaves to the Prosecutor the assessment of whether objects are 'material to the preparation of the defence'."[3] This Chamber has similarly confirmed that rule 77 "requires *the Prosecution to decide* which material in its possession is relevant to the Defence, and provide the latter with such material."[4] That the Defence disagrees with the Prosecution's good faith assessments is not determinative, nor does it create any entitlement to a unilateral review, disclosure, or inspection.

8. Indeed, in respect of a previous similar Defence request, this Chamber confirmed that the Prosecution is not obliged:

> "to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection'."[5]

Thus, the statutory framework requires that, when seizing a Chamber of a disclosure demand, the Defence carries the onus to show materiality with specificity.[6]

[3] ICC-01/04-02/06-1330 OA3, para. 23.
[4] ICC-01/14-01/18-1438-Conf, para.19.
[5] ICC-01/14-01/18-1438-Conf, para.19.
[6] ICC-01/12-01/18-768-Conf, para. 13.

i. Materiality must be demonstrated

9. As defined and articulated, *inter alia*, in the *Ongwen*, *Al Hassan*, *Bemba*, and *Lubanga* cases, rule 77 'materiality' is not shown by unsubstantiated and conclusory claims. Nor is it "[ ] shown by making general allegations."[7]

10. The Defence's contention that "it can be rightfully expected that the OTP be mindful of *all subjectively* foreseeable [Defence] strategies" in assessing the disclosability of items in its possession is wrong. To the contrary, the Prosecution can only be held to determine the *objective* materiality of information within its possession or control. It cannot anticipate the value to the Defence of information that is not *objectively* reasonable, nor is it obliged to do so. Thus, when the significance of the information sought is not foreseeable or readily ascertainable, it is incumbent on the Defence to sufficiently demonstrate its *prima facie* materiality and/or exculpatory nature.

11. For instance, the Prosecution has previously noted, information that is objectively incriminating – that undermines the Accused's character or integrity, or establishes his dishonesty, so as to damage his ability to testify credibly in his own Defence, cannot be information that the Prosecution is reasonably expected to assess as 'potentially exonerating'.[8] Information which confirms an Accused's knowledge of the presence of children among members of his armed group, his interaction with them, and his disposition, control, and exploitation of their presence – if not for military purposes, for his personal gain — is not objectively '*exculpatory*', even if it might be to the mind of the Defence. For reasons such as this, the regulatory framework assigns the burden of demonstrating the materiality of disclosure requests to the Defence. However, although the threshold is low, it requires substantiation.

[7] ICC-01/12-01/18-768-Red, para. 13.
[8] *Contra,* ICC-01/04-01-/18-1142-Conf, para. 71.

ii. Disclosure is not unlimited

12. As several Chambers have observed, as well as the Appeals Chamber, "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the specific circumstances of the case."[9] Moreover, although broad, "the prosecution's disclosure obligations under Rule 77's materiality prong are broad. Those obligations are not, however, unlimited."[10]

13. Demonstrating 'materiality' for rule 77 purposes requires more than merely claiming its *potential* or *possible* relevance without more. Rather, there must be a proper showing that the information is actually and presently necessary to address a consequential issue in the proceedings. The French version of the rule conveys the impetus of the provision, characterising the requisite standard as "*nécessaires à la préparation de la défense de l'accusé.*"[11]

14. Thus, as stated in the *Ongwen* case, and followed in the *Al Hassan* case:[12]

> "[…] it is not sufficient to indicate that the database 'may potentially' include information … without anything further such as a direct connection to the charges or a live issue in the case, this would not in and of itself amount to information 'material to the preparation of the Defence' within the meaning and for the purposes of Rule 77 of the Rules. Bearing in mind the above, the Chamber is not satisfied that the Defence has met the low threshold under Rule 77 of the Rules to show that the database would have been 'material to the preparation of the Defence' in the sense of undermining the Prosecution case or supporting a line of argument of the Defence."[13]

15. Similarly, in the *Bemba* case, Trial Chamber III observed that:

[9] *See* ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42; *see also* ICC-01/14-01/18-1438-Conf, para. 9.
[10] ICC-02/05-03/09- 501, para. 38; *see* ICC-01/14-01/18-1438-Conf, para. 9.
[11] *See Règle 77 du règlement de procedure et de prevue* (emphasis added).
[12] *See* ICC-01/12-01/18-859-Red, paras 9-10;
[13] ICC-02/04-01/15-1734, para. 22 (emphasis added); *see* ICC-02/05-03/09-501 OA4, paras. 38-39, 42.

> "An item will be considered material to the preparation of the defence if it would "undermine the prosecution case or support a line of argument of the defence" or "*significantly* assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case."[14]

iii. Provision of objects sought must have a material effect

16. In the *Lubanga* case, Trial Chamber I held that, where the disclosure of the object sought "would have no material effect", "[i]t does not, therefore, fall into the scope of the disclosure obligations under Rule 77 of the Rules[15] (absent some other material purpose).

17. Here, the Request simply reiterates the Defence's disagreement with settled case law,[16] particularly the principles pronounced by the Appeals Chamber governing the assessment of disclosable information, that:

> "Article 67 (2) of the Statute requires disclosure of evidence which the Prosecutor *believes* meets the criteria set out therein. Similarly, rule 77 of the Rules leaves to the Prosecutor the assessment of whether objects are "material to the preparation of the defence" and their inspection should thus be permitted."[17]

The Prosecution's assessments regarding the disclosability of the records sought have been duly considered and determined both in view of the nature of the case and the claims presented by the Defence.

[14] ICC-01/05-01/08-3070, para. 23 (emphasis added).
[15] *See* ICC-01/04-01/06-2147, 23-24.
[16] *See* ICC-01/14-01/18-1604-Conf, paras. 24 -27 (regurgitating the Defence arguments advanced in ICC-01/14-01/18-1373).
[17] ICC-01/04-02/06-1330 OA3, para. 23 (emphasis supplied).

B. The Facebook Records are not within the scope of rule 77 or article 67(2)

i. Habib BEINA Facebook records

18. The assertion that the contents of Habib BEINA's account may be exculpatory and/or material to the preparation of the Defence is purely speculative. Moreover, it is wholly unsubstantiated.

19. Initially, the Prosecution observes that the assertion that Habib BEINA was Yekatom's "second-in-command"[18] was the subject of a proposed agreed fact which the Defence rejected, yet now seeks to advance here as an adopted tenet in support of its claim of materiality.[19]

20. In substantive response to the Defence position, it is clear that it is predicated on inferences without any factual basis. The Request provides that: "given his primordial importance in the case, it can be inferred that the contents, time, and other properties of BEINA's interactions on Facebook are of a nature to corroborate testimony, assist rebuttal of other witnesses, or uncover admissible evidence."[20] The assertion that the information sought is disclosable essentially arises from an assumption that it is. The reasoning is patently circular.

21. If for instance, BEINA were communicating outside the timeframe of the events and about a subject matter having nothing to do with the case, no such inference could be drawn. The Request advances a *theory* without any foundation in fact. Rather, the fact is that one of BEINA's accounts was created on 27 March 2017 and contains no messages; which upends the Defence's thesis and exposes the conjecture which underpins the Request.

[18] ICC-01/14-01/18-1604-Conf, p. 9.
[19] *See* ICC-01/14-01/18-811-Conf-AnxA-Corr, items E.2, E.8.
[20] ICC-01/14-01/18-1604-Conf, para. 28.

22. The Defence's insistent refusal to accept the Prosecution's assessment of material in accordance with its statutory duties, does not render the information sought disclosable or accessible. The Request fails to put forward any factual assertions for the claims that it advances, such as that the Defence has information from a purported interlocutor of BEINA that they communicated about the relevant events via Facebook at any point in time.

23. In respect of BEINA's second account dated 31 July 2014, as noted, the Prosecution has reviewed it in light of the Defence's correspondence and duly assessed that it does not contain material information. Combined with its contrived inferences, the absence of any substantiated basis for the assertions is fatal to the Request.

24. The conclusory assertion that "the absence of any anti-Muslim sentiment in Habib BEINA's private and public Facebook communications is exonerating to Mr. Yekatom"[21] is incongruous. This is underscored by two things:

25. *First*, BEINA's unequivocal and public statement that:

> *"S'ils ne veulent pas démissionner dans trois jours, on va faire le ... le génocide en RCA. Je suis bref dans mon [phon.] decision.*[22]*"*

Facebook conversations having nothing to do with the events at issue in this case and which do not therefore express BEINA's sentiments regarding Muslims one way or another are in no way 'exonerating', much less 'material.'

[21] ICC-01/14-01/18-1604-Conf, para. 18.
[22] CAR-OTP-2107-1539, 1540, lns.13-15 (emphasis added).

26. *Second*, the absence of information in Facebook communications does not negate or undermine the *substantiated allegations* in the Prosecution's Trial Brief, and submitted evidence that:

> "For example, at the YAMWARA School Base, deputy Habib BEINA, MOMOKAMA, and ranking members of YEKATOM's Group openly voiced their intention to 'slaughter' the Muslim population, pregnant women and babies included. Yet, YEKATOM rewarded these members of his Group, by retaining them and those who had previously assisted in the commission of crimes against Muslim civilians"[23]

Why events transpiring in public at the YAMWARA School Base in December 2013 would be recorded in a Facebook account opened in July 2014 is, as a matter of reasoning, unclear. In any case, the Request lacks any plausible or specific explanation.

27. The *same* holds true with respect to the proposition that ranking members of Yekatom's Group openly voiced their anti-Muslim animus. Such as Max MAIDANA, who on camera and in YEKATOM's presence described how elements would fire teargas into the homes of Muslims, and kill them:

> *"pour que ils puissent sortir et puis … étouffer. Et puis dès qu'ils sortent, on les tue […] même les petits enfants aussi, on les tue"*[24]

28. The Defence arguments appear to betray a misapprehension of the Court's regulatory framework. As such, its Request amounts to a thinly veiled and poorly justified 'fishing expedition'.[25]

[23] ICC-01/14-01/18-1604-Conf, para. 19 (*partially* citing a proposition in the Prosecution's Trial Brief ICC-01/14-01/18-723-Conf, para. 363).
[24] CAR-OTP-2107-1547, 1548, ln.9-18 (emphasis added).
[25] *Contra*, ICC-01/14-01/18-1604-Conf, para. 27.

ii. P-1839 Facebook records

29. In respect of P-1839, the Request is equally unpersuasive.

30. *First*, there is no 'presumption of materiality' within the framework or text of the Statute or Rules. Moreover, the Request misreads the *Bemba* case,[26] which is framed in the context of the specific items demanded, notably: "[…] the Chamber starts from the premise that the Requested Items – with two possible exceptions set out in the next paragraph – were presumptively material."[27]

31. Even if there were such a presumption – and by virtue of the Appeals Chamber's confirmation that assessments must be made (and obviously shown) on a case-by-case basis, there cannot be – the Prosecution has specifically assessed the material sought in light of the claims put forward by the Defence, as noted above.

32. Having undertaken such a review, the Prosecution has assessed that the contents of the account have been fully disclosed to the extent they are material and/or otherwise disclosable. Thus, approximately 160 items were duly provided to the Defence.

33. In failing to meet the minimal threshold warranting *further* disclosure or inspection of the Facebook entries concerning P-1839, the Defence's arguments concerning the inapplicability of rule 77 to the protection of witnesses is inapposite.

iii. P-0487 Facebook records

34. As regards the Facebook contents of P-0487, the Request fails here as well, advancing the same unsubstantiated claims regarding the contents of the account. The

[26] ICC-01/14-01/18-1604-Conf, para. 31.
[27] ICC-01/05-01/08-1594-Red, para. 22.

Defence's contentions are simply imagined and based on circular arguments lacking factual substantiation for any part of the assertions made.

35. Although the Defence clearly need not divulge its litigation strategy, it nevertheless has a burden to specify and substantiate the basis of its requests for disclosure. Hence, Chambers have held that the Defence:

> "[…] should be specific and must demonstrate materiality of the information sought pursuant to Article 67(2) of the Statute or Rule 77 of the Rules and particularly *how* the information has a direct connection to the charges or a live issue in this case."[28]

36. Here, the Defence *supposes* the contemporary nature of the contents of the communications. In fact, the account at issue was opened on 28 August 2016. Moreover, it contains no signs of activity thereafter.

37. This circumstance epitomises the Defence's lack of justification for the demands and assertions made in the Request.

38. On account of the Defence's refusal to accept the well-established jurisprudence of the Court, the Request has occasioned yet another unfortunate instance of unnecessary litigation in this case.

C. Modalities of proposed inspection

39. Finally, as no right of inspection of the Facebook records sought lies, the Defence's submissions on the modalities of its proposed review should be summarily dismissed.

[28] ICC-01/12-01/18-768-Red, para. 13 (citations omitted) (emphasis added).

IV. CONCLUSION

40. For the reasons above, the Prosecution requests that the Chamber reject the Request.

Karim A. A. Khan KC, Prosecutor

Dated this 13th day of October 2022
At The Hague, The Netherlands