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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

**Public Redacted Version of “Urgent request for access to evidentiary materials in possession of the Office of the Prosecutor”, 10 October 2022,
ICC-01/14-01/18-1604-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. Pursuant to article 67(2) of the Rome Statute (“Statute”) and rule 77 of the Rules of Procedure and Evidence (“RPE”), the Defence for Mr. Alfred Rombhot Yekatom (“Defence”) hereby respectfully submits to the Trial Chamber an urgent request to obtain temporary access to three Facebook accounts presently in the possession of the Office of the Prosecutor (“OTP”).
2. After *inter partes* communications with the OTP, the Defence submits that the confirmation of the presence or absence of certain communications to or from the accounts of [REDACTED] (P-1839), Habib BEINA, and [REDACTED] (P-0487) may be of an exculpatory nature, and is also material to the preparation of the Defence. Furthermore, under the modalities proposed hereinafter, limited access to the accounts in order to obtain such confirmation would not be prejudicial to the privacy rights of these individuals.

PROCEDURAL HISTORY

3. On 7 October 2020, the OTP disclosed to the Defence document CAR-OTP-2122-6129-R01, titled “*Investigation Report: Review of Facebook Material of CAR-OTP-P-1839*” (“Report”) as part of its Rule 77 disclosure package 15. Therein is explained that P-1839 voluntarily disclosed to OTP investigators the credentials and password of her Facebook account and granted them authorisation for access, extraction, and collection of any material contained within. The Report also contains a list of keywords used to identify relevant information contained within the account, including in the messages function.¹
4. On 21 February 2022, the Defence sent a disclosure request to OTP for Facebook materials related to witnesses P-0487 and P-1077, as well as Habib BEINA. *Inter*

¹ CAR-OTP-2122-6129-R01.

alia, the presence or absence of private and public communications by BEINA that could be characterised as expressing anti-Muslim sentiment was argued to be material to the preparation of the Defence, in light of the OTP's pleaded allegations as to Mr Yekatom's "essential contributions" to the charged crimes – namely, his promotion of Habib BEINA to a "position of authority" in the group, despite his "publicly expressed intention to commit violence against Muslim civilians".² As to P-0487, the Defence argued that given the contradictions between his statements and that of other witnesses, especially regarding [REDACTED], this material could affect his credibility, thus being both potentially exculpatory and material to the preparation of the Defence.³

5. On 18 March 2022, the OTP communicated to the Defence that after review of the Facebook profile contents of P-1839, P-0487 and Mr. Habib BEINA, it found no further material warranting disclosure.⁴
6. On 21 March 2022, the Defence inquired to the OTP whether this conclusion meant that no expressions of anti-Muslim sentiment were present in Habib BEINA's Facebook account, and, in the affirmative, if this meant that the OTP conceded this as an agreed fact.⁵
7. On 23 March 2022, the OTP refused to agree that no such sentiment was expressed in BEINA's profile.⁶
8. On 20 September 2022, the Defence sent to the OTP letter ARY-2022-0237 asking to be granted an opportunity to inspect or review the material contained in the Facebook accounts of P-1839, P-0487 and Mr. Habib BEINA. This proposition was partly grounded in the OTP's avowed difficulties in comprehending both

² See, [ICC-01/14-01/18-723-Conf](#), para. 362.

³ Letter ARY-2022-0204 sent to the Prosecution from the Defence on 21 February 2022 at 18:51.

⁴ See Email to the Defence from Prosecution on 18 March 2022 at 08:13.

⁵ See Email to the Prosecution from Defence on 21 March 2022 at 13:02.

⁶ See Email to the Defence from Prosecution on 23 March 2022 at 09:10.

the content and significance of material extracted from Facebook as a result of their scope and language,⁷ as it has repeatedly argued itself before this Chamber.⁸ The Defence also proposed modalities to ensure that the material would remain in the possession of the OTP during this review, such as the conduct of the process on an OTP computer, and the possibility of the presence of an OTP team member. Any information identified during this process would then be subject to a formal disclosure request.⁹

9. On 28 September 2022, the Defence followed up on this communication.¹⁰
10. On 5 October 2022,¹¹ given the absence of a response, the Defence followed up once more, and the OTP responded that the request was denied on grounds that the determination of materiality lies solely with the OTP.¹²

APPLICABLE LAW

11. Article 67(2) of the Rome Statute:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

12. Rule 77 of the RPE:

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.

⁷ Letter ARY-2022-0237 sent to the Prosecution from the Defence on 20 September 2022 at 10:27.

⁸ [ICC-01/14-01/18-1330-Conf](#), para. 11; [ICC-01/14-01/18-1285-Conf](#) para. 17.

⁹ Letter ARY-2022-0237 sent to the Prosecution from the Defence on 20 September 2022 at 10:27.

¹⁰ See Email to the Prosecution from Defence on 28 September 2022 at 17 :27.

¹¹ See Email to the Prosecution from Defence on 5 October 2022 at 11:16.

¹² See Email to the Defence from Prosecution on 5 October 2022 at 16:28.

SUBMISSIONS

A. Preliminary issue: OTP disclosure obligation

13. As a prefatory consideration, the Defence reiterates that the question of the materiality of evidence is subject to a *prima facie* standard.¹³ Contrary to the Prosecutor's statements to the effect that not all relevant information is material to the preparation of the Defence,¹⁴ the Appeals Chamber in *Lubanga* stated that the phrase has to be "understood as referring to all objects that are relevant for the preparation of the defence".¹⁵ This formulation has since been firmly consecrated in jurisprudence.¹⁶
14. Furthermore, the obligation to disclose all material elements lies solely on the OTP, independently from any request by the Defence.¹⁷ This is grounded in that neither article 67(2) nor rule 77 RPE should be construed in a way to force the Defence to divulge its defences and strategies to the Prosecution,¹⁸ which would amount to a violation of the accused's fundamental rights under article 67(1) of the Statute.¹⁹

¹³ *Banda*, AC, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"](#), ICC-02/05-03/09-501, 28 August 2013, para. 42.

¹⁴ See Email to the Defence from Prosecution on 16 June 2022 at 16:20.

¹⁵ *Lubanga*, AC, ["Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008"](#), ICC-01/04-01/06-1433, 11 July 2008, para. 77.

¹⁶ See for instance *Ntaganda*, AC, [Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses"](#), ICC-01/04-02/06-1330 20 May 2016, para. 23 ; *Ongwen*, TC IX, [Decision on Disclosure Issues Arising Out of First Status Conference](#), ICC-02/04-01/15-457 07 June 2016, para. 4 ; *Banda*, TC IV, [Public Redacted Decision on the prosecution's request for non-disclosure or redactions of material relating to Witnesses 304,305,306 and 312](#), ICC-02/05-03/09-265-Red 28 February 2012, para. 19 ; *Ruto & Sang*, TC V(A), [Decision on Defence Request for Disclosure of Information Relating to the Mungiki](#), ICC-01/09-01/11-1465, 25 August 2014, para. 12.

¹⁷ *Banda*, AC, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"](#), ICC-02/05-03/09-501, 28 August 2013, para. 34 *in fine*; *Al Hassan*, PTC I, ["Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve"](#), ICC-01/12-01/18-460-Red2, 18 November 2019, para. 66-67.

¹⁸ *Lubanga*, AC, ["Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008"](#), ICC-01/04-01/06-1433, 11 July 2008, para. 50.

¹⁹ *Al Hassan*, PTC I, ["Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve"](#), ICC-01/12-01/18-460-Red2, 18 November 2019, para. 66.

15. As such, the Defence wishes to express its deep concerns over what appear to be inapposite standards increasingly applied by the OTP to *inter partes* disclosure requests in relation to the “materiality” standard, requiring demonstration by the Defence that surpasses its *prima facie* onus, and requiring the Defence to provide its specific strategy in order to convince the OTP of its “necessary”²⁰ nature.²¹ While the Defence is free to choose to disclose lines of inquiries or strategies to guide the OTP’s evaluation of the elements in their possession, it has no obligation to do so.²² Furthermore, it can be rightfully expected that the OTP be mindful of all subjectively foreseeable strategies, given their article 54(1)(a) obligation to investigate incriminating and exonerating circumstances equally²³ and their paramount obligation to provide the Defence with *all* materials materially pertinent to their preparation.²⁴

B. The Contents of the Facebook Accounts are Subject to Disclosure

16. The Defence submits that the contents of the Facebook accounts of Habib BEINA, [REDACTED] (P-1839) and [REDACTED] (P-0487) are subject to the OTP’s disclosure obligation under article 67(2) of the Statute and/or rule 77 RPE.
17. This request comes in the context of the mass disclosure pursuant to rule 77 of Facebook messages of other individuals associated with the Anti-Balaka, including but not limited to OTP witnesses. The Defence would hereby note that much of the communications shared in these instances were of a private nature and content, the bulk of which being thoroughly immaterial²⁵ to the Defence, and yet voluntarily disclosed. The Prosecution's *en masse* disclosure of

²⁰ See Email to the Defence from Prosecution on 8 September 2022 at 18:49.

²¹ For instance, see Email to the Defence from Prosecution on 18 March 2022 at 08:13.

²² *Al Hassan*, PTC I, ‘[Décision relative aux observations de la défense en vertu de la règle 122-3 du Règlement de procédure et de preuve](#)’, ICC-01/12-01/18-460-Red2, 18 November 2019, para. 66.

²³ *Bemba*, PTC III, [Corrigendum to Decision on the Prosecutor’s Request to Convene a Status Conference](#), ICC-01/05-01/08-102-Corr-tENG, 22 September 2009, para. 8.

²⁴ *Banda*, AC, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”](#), ICC-02/05-03/09-501, 28 August 2013, paras. 34, 40.

²⁵ See for example CAR-OTP-2131-9750; CAR-OTP-2131-4210.

clearly irrelevant conversations is at odds with unduly restrictive interpretation of its disclosure obligations of Facebook accounts of individuals who are critical to the Prosecution's case and extremely close to Mr. Yekatom at relevant time. This would appear to suggest a selective interpretation of the materiality of Facebook information.

- i) *The Contents of Habib BEINA's Account May be Exculpatory Pursuant to Art. 67(2) of the Statute, and are Material to the Preparation of the Defence Pursuant to Rule 77 RPE*
 - a. The absence of anti-Muslim communications on BEINA's account would tend to mitigate the guilt of the accused

18. The Defence contends that the absence of any anti-Muslim sentiment in Habib BEINA's private and public Facebook communications is exonerating to Mr. Yekatom, therefore warranting immediate disclosure.
19. Habib BEINA's importance to the allegations of this case can be exemplified by his regular mentions throughout such documents as the Decision on the Confirmation of Charges²⁶ and the Prosecution's Trial Brief²⁷. Paragraph 363 of the Trial Brief is of particular interest. It partly predicates Mr. Yekatom's criminal responsibility upon his promotion of Habib BEINA despite his alleged *avowed* intent to commit harm against Muslim civilians. This is used to support the OTP's allegations as to Mr. Yekatom's "essential contributions" to the crimes.²⁸

YEKATOM promoted his elements, including OUANDJIO, Habib BEINA, MOMOKAMA, and Aristide BEINA to positions of authority within his Group, and through which they committed crimes. YEKATOM kept them in key positions despite their publicly expressed intention to commit violence against Muslim civilians. 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

²⁶ [ICC-01/14-01/18-403-Conf-Corr](#), paras 83, 84, 87.

²⁷ [ICC-01/14-01/18-723-Conf](#), paras 86, 322, 356-358, 363, 403, 406-408.

²⁸ *Id.*, para. 355.

and those who had previously assisted in the commission of crimes against Muslim civilians.²⁹

20. The Prosecution's contention to the effect that Habib BEINA's communications and their nature do not inform the charges is thus misguided, as the OTP relies on such public communications for that very purpose, and given that Facebook itself is an important means of personal and public communication.
21. Therefore, the importance of this information, which can either incriminate Mr. Yekatom or mitigate his guilt, lies also in whether or not such 'anti-Muslim' messages exist. If they don't, this evidence can be part of the Defence's strategy to mitigate Mr. Yekatom's alleged guilt by itself or through its use against the OTP allegations laid out at paragraph 13 of this request.
22. The Prosecution's refusal to disclose or let the Defence review the contents of the accounts is all the more problematic in that while it acknowledges not finding messages with anti-Muslim sentiments, it will not judicially agree to this fact. The logic underlying the OTP's response places the Defence in a Catch-22 of sorts: the absence of such messages precludes disclosure, which means that the Defence cannot verify (and later affirm as fact) that such messages are absent.
23. This manifestly absurd situation is the result of the reliance by the Prosecutor on out-of-context extracts of judgements in *inter partes* communications, which do not reflect the wider state of jurisprudence on the issue of disclosure. While this issue has partly been raised before,³⁰ the repeated and increasing use of these judgements to justify unduly stringent interpretations of disclosure warrants discussing the situation anew.

²⁹ *Id.*, para. 363 [emphasis added].

³⁰ [ICC-01/14-01/18-1373-Conf](#), para. 5.

24. In both the ARY-2022-0204 and ARY-2022-0237 responses, reference is made to the decision of the Single Judge in *Al Hassan*³¹ and that of Trial Chamber IX in *Ongwen*.³² A noteworthy point is that the former decision is a reiteration of a previous Single Judge decision in the same case, which was itself solely based on the *Ongwen* paragraph concurrently used by the OTP.³³
25. Neither the *Al Hassan* and *Ongwen* decisions justify the interpretation the OTP makes of them once considered in context. In the former, worries about a “fishing expedition” were raised given the Defence’s request for disclosure of every record of formal or informal correspondence with any national authority, on the grounds of obtaining “a general picture of the cooperation and assistance between the national authorities and the Prosecution.”³⁴ The Single Judge’s conclusions are thus a reciprocation of the low threshold of materiality, in that the Single Judge was demanding, in requests whose purpose is to obtain a better general understanding of a point of trial, demonstration of at least *some* link between an element of the case and the understanding requested.³⁵ As for the latter *Al Hassan* decision, its open nature as a reminder of the previous ruling makes its direct use of limited relevance, especially since the precise finding used therein is little more than an *obiter dictum* in the context of that specific decision.³⁶
26. As for *Ongwen*, a similar distinction must be raised, in that the Defence argued no connection to the case at hand whatsoever, except that material from the same organism it sought disclosure of an entire database from had previously

³¹ *Al Hassan*, TC X, [Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali](#), ICC-01/12-01/18-859-Red, 5 January 2021, para. 9-10.

³² *Ongwen*, TC IX, [Decision on Defence Request for Remedies in Light of Disclosure Violations](#), ICC-02/04-01/15-1734, 22 April 2020, para. 22.

³³ *Al Hassan*, TC X, [Decision on Defence motion seeking disclosure of Prosecution’s correspondence with national authorities](#), ICC-01/12-01/18-768-Red, 5 January 2021, para. 13, fn 20.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Al Hassan*, TC X, [Decision on Defence request for disclosure of material related to Mr Al Hassan’s arrest and detention in Mali](#), ICC-01/12-01/18-859-Red, 5 January 2021, paras 9-10.

been used in Court. There was no link to any witness argued, nor a purpose of better understanding the context or charges.³⁷

27. The use of these decisions by the Prosecution to limit disclosure in the present case, as well as previous ones, is therefore inappropriate. The present Defence requests are unequivocally linked to the case. Moreover, requiring disclosure of the contents of a Facebook account is sufficiently specific in that context, as is the information that the Defence desires to obtain therein. Conceptually, the contents of one Facebook account are much closer to the disclosure of Call Data Records, than to any communication a party might have had with any national authority, and as such cannot be inferred to be a “fishing expedition”.

b. The communications held by Mr. Yekatom’s second-in-command are material to the preparation of the Defence

28. In addition to being of an incriminating or mitigating nature, the Defence submits that the contents of Habib BEINA’s Facebook account are material to the preparation of the Defence. Indeed, 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.³⁸ The contents of the contemporary private communications of Mr. Yekatom’s deputy are, in the Defence’s estimations, highly relevant to its preparation in the sense conferred by the Appeals Chamber in *Lubanga*,³⁹ and will allow for a better understanding of the context of isolated video statements by Habib BEINA which have repeatedly been relied on by the Prosecution during its examination of witnesses.

³⁷ *Ongwen*, TC IX, [Decision on Defence Request for Remedies in Light of Disclosure Violations](#), ICC-02/04-01/15-1734, 22 April 2020, para. 22.

³⁸ *Lubanga*, TC I, ‘[Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses](#)’, ICC-01/04-01/06-2624, 12 November 2010, para. 17, citing ICTY, *Prosecutor v. Zejnir Delalic et al.*, Case No. IT-96-21, Trial Chamber, [Decision on the Motion by the Accused Zejnir Delalic for the Disclosure of Evidence](#), 26 September 1996, para. 7.

³⁹ *Lubanga*, AC, ‘[Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008](#)’, ICC-01/04-01/06-1433, 11 July 2008, para. 2.

ii) *The Contents of P-1839's Account are Material to the Preparation of the Defence Pursuant to Rule 77.*

29. The Defence submits that P-1839's primordial role in these proceedings [REDACTED] makes her Facebook account of marked relevance to the preparation of the Defence for her testimony. Moreover, the way in which this account was obtained by the OTP makes disclosure of its contents presumptively material to the Defence, which presumption the Prosecution has so far failed to overturn.
30. Contrary to the two other persons discussed in this request, the Prosecution was volunteered the credentials and passwords of her Facebook account by P-1839 during her article 55(2) interview of [REDACTED].⁴⁰ When Facebook required her to change her password for security purposes, she communicated them anew to the OTP.⁴¹ Following this, the contents of the account were extracted and analysed.⁴²
31. In *Bemba*, the Trial Chamber found that information, documents and evidence obtained from a Prosecution witness will be material to the preparation of the Defence in most situations, which is even truer of material produced contemporaneously with the relevant events.⁴³ The Court concluded to the effect that there is a presumption of materiality for such witness-provided documents, subject to two exceptions:

Thus, items obtained from a prosecution witness will presumptively be material to the defence's preparation for that witness' testimony - and possibly for other purposes as well - unless those items (i) are truly repetitive in the sense that they are duplicates; or (ii) bear no connection to the events relevant to the charges, such as items of a purely personal nature.⁴⁴

⁴⁰ CAR-OTP-2072-1191-R01, lines 25-84.

⁴¹ CAR-OTP-2122-6129-R01.

⁴² *Id.*

⁴³ *Bemba*, TC III, '[Redacted Version of Decision on the "Defence Motion for Disclosure Pursuant to Rule 77"](#)', ICC-01/05-01/08-1594-Red, 29 July 2011, para. 22.

⁴⁴ *Id.*, para. 23 *in fine*.

32. Discussing a “fair sample” argument made by the Prosecution, the Court further warned the OTP of overly subjective determinations of materiality on the grounds that these will create an “unacceptable risk that the defence may be deprived of materials to which it is entitled as a result of incorrect judgment calls”.⁴⁵ This risk is exacerbated, given the Prosecutor is not aware of Defence strategy, and is not entitled to inquire about it at this stage.⁴⁶
33. Cognizant of P-1839’s [REDACTED], the Defence argues that the materiality itself is not affected during the determination of the Chamber while assessing the first limb of the “two fold test”.⁴⁷ Firstly, the rule 77 threshold is not meant in itself for the protection of victims or vulnerable parties, but rather *inter alia* to protect the Defence from the Prosecution providing excessive amounts of irrelevant disclosure, thus menacing the fairness of trial.⁴⁸ As written within rule 77 itself, restrictions to disclosure of materially relevant materials will be made following rules 81 or 82.
34. Secondly, P-1839 was fully aware that the contents of her Facebook account and communications were susceptible to be disclosed to the Defence *inter alia*, a possibility to which she expressed her understanding and consent.⁴⁹
35. Lastly, the Defence notes that given the request only targets materials that date from the time of the charges or shortly after, this request would not affect P-1839’s security, [REDACTED].

⁴⁵ *Id.*, para. 23.

⁴⁶ *Id.*

⁴⁷ [ICC-01/14-01/18-1578-Red](#), para. 24.

⁴⁸ See also *Bemba*, PTC III, [Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#), ICC-01/05-01/08-55, 31 July 2008, para. 67.

⁴⁹ CAR-OTP-2072-1191-R01, lines 58-75.

iii) *The Contents of [REDACTED]Account is Potentially Exculpatory Pursuant to Art. 67(2) of the Statute, and are Material to the Preparation of the Defence Pursuant to Rule 77 RPE*

a. The contested extent of [REDACTED]'s implication in Mr. Yekatom's group makes his communications likely to affect his credibility as a Prosecution witness

36. The Defence submits that the contents of P-0487's account may affect the credibility of his evidence, and are thus subject to the OTP's disclosure obligation pursuant to article 67(2).

37. P-0487's credibility is an especially important matter in this case, as the extent of [REDACTED] is subject to contestation by other witnesses. Therefore, the materials contained in P-0487's account will provide information and written statements by the witness which, on their own or in conjunction with other evidence, will allow the Defence to challenge the witness' credibility. Following the preceding discussion on the disclosure of Defence strategy, and considering TC II's findings of law in *Katanga*, the Defence submits that it is not obliged to provide specific allegations of contradictions to be allowed to have its right to disclosure fulfilled.⁵⁰

b. The hierarchical superiority of [REDACTED] and his participation in certain key events makes the contents of his communications material to the preparation of the Defence

38. By the same token, the contemporary nature of the evidence contained within the Facebook account of P-0487 is relevant to the preparation of the Defence, in that it is likely to provide stronger contextual comprehension by Mr. Yekatom of the interpersonal relations [REDACTED]. This is of further nature to aid the Defence in preparing for the examination of other related witness, as well as vet and analyze the testimony and credibility of potential Defence witnesses. In any event, the direct and indirect information to such elements as the whereabouts,

⁵⁰ *Katanga*, TC II, '[Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P - 219](#)', ICC-01/04-01/07-2309-Red-tENG, 28 October 2010, para. 4.

contacts and relations of P-0487 are in and of themselves relevant to the preparation of the Defence. Indeed, P-0487 [REDACTED].

C. Alternatively, the Modalities of Review Proposed by the Defence are the Least Prejudicial Alternative

39. The Defence notes the absence of any allegations towards the sought material being barred from disclosure by rules 81 and 82 in the *inter partes* communications held with the OTP. However, if the Court does not agree with the preceding submissions on the Facebook accounts of some or all of Habib BEINA, P-1839 or P-0487, the Defence contends that the alternative it provided the Prosecution with in ARY-2022-0237 would be the option least prejudicial to the rights of Mr. Yekatom, especially bearing in mind the second limb of the “two fold test”.⁵¹
40. Specifically, the Defence made the suggestion to the Prosecutor that an OTP computer could be made available to specific Defence team member(s), under OTP supervision, so the Defence could review the contents of the Facebook accounts for specific messages, which would then be the object of disclosure requests. In this respect, no information would come in possession of the Defence, prior to any latter requests being made.
41. The Defence contends this process would resolve several issues raised previously. Contrary to alternatives such as providing research terms or key words directly to the Prosecutor, there would be no infringement upon the right to silence and to a fair trial of Mr. Yekatom by way of forcing the disclosure of Defence strategies and lines of investigation. On the contrary, requiring the Defence to provide the Prosecution with lists of keywords for further research in accounts that contain information material to the preparation of the defence would be forcing such an impermissible disclosure of its strategy.⁵²

⁵¹ [ICC-01/14-01/18-1578-Red](#), para. 24.

⁵² See *supra*, para. 15.

42. The Defence submits that the fact the Defence will not be in possession of any private material to P-0487 sufficiently alleviates concerns as to his right to privacy. The Defence does not esteem that either Habib BEINA or P-1839 have a reasonable expectation to privacy on their accounts, given the latter consented to the possibility it became evidence, and the former is deceased.
43. Furthermore, this process would be more efficiently carried out by the Defence, given the admission of the Prosecutor. As the OTP themselves argued:

This case is complex, and the messages contained in the Facebook accounts are voluminous and difficult to decipher. The interlocutors use French shorthand and/or slang (for example, 'slt' for 'salut'), making the collection difficult to search electronically. In addition, they use code-names and/or nick-names, and the relevance of the various interlocutors depends sometimes on a further analysis of their relationship and/or independent communications with the Accused or other actors in the case. In short, given the vast amount of information contained in the Facebook records, the significance of the messages is therefore not always immediately clear.⁵³

44. Given the presence of material and likely exculpatory information in the account contents of BEINA, P-1839 and P-0487, the Prosecution's concerns over the significance of Facebook records not being always immediately clear to them is worrying. Should the Prosecution only belatedly come to the realisation that the accounts in question contained material and/or exculpatory information, there is a real risk that irremediable prejudice be occasioned to the fairness of these proceedings.
45. The Prosecution further alleged therein that "Given their relationship to the persons and subject matter of the conversations, the Defence has always been in a better position than the Prosecution to recognise the materiality of the information."⁵⁴ While this argument was erroneous in that context given Mr. Yekatom had no significant relation to the target witnesses, the Defence

⁵³ [ICC-01/14-01/18-1285-Conf](#), para. 17; this argument was upheld by the Trial Chamber in [ICC-01/14-01/18-1597-Conf](#), para. 12.

⁵⁴ [ICC-01/14-01/18-1285-Conf](#), para. 22; this argument can also be found in [ICC-01/14-01/18-1330-Conf](#), para. 27.

considers it more applicable in the present case, as the persons whose accounts would be reviewed are people to whom Mr. Yekatom was once close and knew well.

CONCLUSION

46. In conclusion, the contents of the Facebook accounts tied to Habib BEINA, P-1839, and P-0487 both contain exonerating evidence, and/or are material to the preparation of the Defence. The disclosure of the contents of these accounts is proportionate. Therefore, the Defence submits that the disclosure is warranted.
47. If the Chamber decides otherwise, the alternative process for review and disclosure proposed by the Defence is the least prejudicial option to the rights of Mr. Yekatom, bar full disclosure, and should be implemented.

CONFIDENTIALITY AND URGENCY

48. The present request is filed as an urgent request considering the shortly upcoming testimony of P-1839 for which the disclosure of relevant contents of her Facebook accounts are necessary to prepare a full examination. As *inter partes* requests for disclosure are the first instance of contact, the Defence had to wait for the OTP to respond to its requests regarding this matter before considering its options as it attempted to first resolve the matter *inter partes* before seizing the Chamber, which prompted follow-ups to the original email, as set out at paragraph 7 of this request.
49. This Urgent Request is filed on a confidential basis due to references to protected witnesses and their position at the relevant time of the charges. A public redacted version will be filed as soon as possible.

RELIEF SOUGHT

50. In light of the above, the Defence respectfully requests the Trial Chamber V to:

ORDER the disclosure of the contents of the Facebook accounts in possession of the OTP linked to Habib BEINA, P-1839 and P-0487;

or, in the alternative;

ORDER the OTP to provide to the Defence access to the aforementioned accounts for review of their contents; and

ORDER that any submissions in response to this request be filed within a shortened deadline at the discretion of the Chamber.

RESPECTFULLY SUBMITTED ON THIS 18th DAY OF OCTOBER 2022⁵⁵



Me Mylène Dimitri
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The Hague, the Netherlands

⁵⁵ The Defence thanks Legal Intern Mr. Tobie Raphael Godue for his precious assistance in the drafting of this filing.