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Date: **3 June 2022**

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

**Public Redacted Version of 'Yekatom Defence Response to Prosecution's
Bar Table Motion of 17 February 2022', 31 March 2022, ICC-01/14-01/18-
1341-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. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby partially responds to the Prosecution's 'Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889'.¹
2. The Defence takes no position on the admissibility of CAR-OTP-2131-1012.
3. The Defence opposes the admission into evidence of Facebook messages in relation to which the Prosecution has not established *prima facie* relevance; and messages in relation to which the Prosecution did not elicit information regarding their relevance and probative value during the testimony of P-0889.
4. The Defence provides further item-specific submissions in the Annex attached to this Response.

PROCEDURAL HISTORY

5. On 17 February 2022 at 10:44, the Prosecution sent an email to the Defence teams, informing them of its intention to file a bar table motion in respect of 21 Facebook items, and seeking 'contemporaneous' *inter partes* indications of the Defence teams' positions as to their admissibility.²
6. At 13:00, in response, the Defence informed the Prosecution that it would seek *in limine* dismissal of any such motion on the basis that the approach of seeking 'contemporaneous' *inter partes* indications was contrary to the Chamber's Initial Directions.³

¹ [ICC-01/14-01/18-1285-Conf](#). The Defence here responds to the Prosecution's request for submission from the bar table of eight items, pursuant to the Chamber's email Decision of 1 March 2022.

² See, Email from Prosecution to Defence teams of 17 February 2022 at 10:44.

³ See, Email from Yekatom Defence to Prosecution of 17 February 2022 at 13:00.

7. At 13:22, the Prosecution filed the 'Request for leave to add 21 Items to the List of Evidence and their Submission from the Bar Table, and to extend the estimated examination time for P-0889' ('Initial Request').
8. At 17:57, the Single Judge directed the participants to file responses to the Initial Request by 24 February 2022.⁴
9. At 19:40, the Defence partially responded to the Initial Request, seeking dismissal in limine, and requesting an extension of time to respond with respect to the Prosecution's request for admission from the bar table of 21 Facebook items (within the Initial Request), until 25 March 2020.⁵
10. On 18 February 2022, the Chamber suspended *sine die* the response deadline with respect to the Prosecution's bar table application.⁶
11. On 1 March 2022, the Chamber instructed the Parties to respond, by 31 March 2022, to the Prosecution's bar table motion with respect to eight items (within the 21 Facebook items) in relation to which the Chamber granted leave for late addition to the List of Evidence ('Request').⁷
12. On 1 March 2022, the Chamber instructed the Parties to respond, by 31 March 2022, to the Prosecution's bar table motion with respect to eight items in relation to which the Chamber granted leave for late addition to the List of Evidence ('Request').⁸

APPLICABLE LAW

13. Article 54(1) states in relevant part,

⁴ See, Single Judge's email Order of 17 February at 17:57.

⁵ See, Email from Defence to Trial Chamber V of 17 February at 19:40.

⁶ See, Trial Chamber V's email Order of 18 February 2022 at 13:41.

⁷ See, Trial Chamber V's email Decision of 1 March 2022 at 18.21.

⁸ Trial Chamber V's email Decision of 1 March 2022 at 18.21.

The Prosecutor shall:

- (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
- (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, [...] and
- (c) Fully respect the rights of persons arising under this Statute.

14. Article 64 states in relevant part,

- (1) The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
- (2) The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

15. Article 67(1) states in relevant part,

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge [...];
- (b) To have adequate time and facilities for the preparation of the defence [...];
- [...]
- (e) To examine, or have examined, the witnesses against him or her[.]

16. Article 69 states in relevant part,

- (3) The parties may submit evidence relevant to the case, in accordance with article 64.
- [...]
- (4) The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that

such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

17. Rule 64(1) states in relevant part,

An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber.

SUBMISSIONS

18. The Defence notes that while reference is made in the Initial Request to the Prosecution's Request for Assistance ('RFA'), in response to which the Irish authorities transmitted the Facebook items, the Prosecution makes no reference to the Irish authorities' RFA response, if any, that accompanied the items.⁹ It is submitted that the RFA response could affect the Chamber's assessment of the probative value of the tendered Facebook items – not only because it comprises an integral part of their chain of custody, but also because any information as regards the Facebook's records' search and/or production procedure (e.g. the parameters applied) could conceivably impact their reliability.

I. Preliminary issue: the Prosecution failed to comply with the Initial Directions.

19. In light of the Chamber's 1 March 2022 Email setting a deadline for responses to the Request, the Defence withdraws its request that the Prosecution's Initial Request be dismissed *in limine*.¹⁰

20. However, the Defence maintains its position that the 'contemporaneous' *inter partes* consultation approach is contrary to the Chamber's Initial Directions and respectfully refers the Chamber to its previous submissions in this regard.¹¹ As such, the Defence respectfully seeks a direction from the Chamber so as to

⁹ [ICC-01/14-01/18-1285-Conf](#), para. 7.

¹⁰ See *supra*, para. 9.

¹¹ See, Email from Defence to Trial Chamber V of 17 February 2022 at 19.40.

ensure that in future, the Prosecution will provide sufficient time for *inter partes* consultations ahead of filing any bar table applications.

II. The Chamber is empowered to admit select portions of the tendered Facebook Conversations.

21. The Chamber has previously affirmed its inherent power to allow the admission into evidence of a portion(s) of a document, holding that ‘it cannot be excluded that there may be circumstances warranting that only part(s) of a single item be submitted into evidence’.¹²
22. This power is concomitant with the Chamber’s duty to ensure that the trial is fair and expeditious, and that it is conducted with full respect for Mr Yekatom’s rights.¹³
23. It is submitted that the Chamber should apply this power to the Facebook conversations tendered in the Request (‘Conversations’). The Conversations comprise 192 pages of messages, and an average page contains 6 to 7 individual messages. On a conservative estimate therefore, the Prosecution seeks the admission into evidence of over 1,100 individual Facebook messages through this Request. Further, the Conversations tendered in this Request represent the mere tip of the iceberg in this regard. On the basis of previous Prosecution attempts to tender Facebook conversations in their entirety;¹⁴ as well as the Prosecution’s most recent request for late amendment to its List of Evidence, in which it seeks the addition of 98 Facebook conversations;¹⁵ it can be anticipated that the total number of individual Facebook messages to be tendered by the Prosecution will number in the tens of thousands.

¹² See e.g., Trial Chamber V’s Email Decision on Submitted Materials for P-2841, 2 July 2021.

¹³ Article 64(2).

¹⁴ See, Email from Defence to Trial Chamber V of 18 May 2021, at 20:25.

¹⁵ [ICC-01/14-01/18-1330-Conf](#).

24. Nor is there any reasonable basis to consider each Facebook conversation as indivisible for the purposes of admission. A Facebook conversation comprises the totality of messages exchanged between two Facebook accounts over a certain period of time. In this respect, a given Facebook conversation is analogous to the entirety of emails exchanged between two email accounts over a certain period of time. Severing select Facebook messages or exchanges for the purposes of their admission into evidence is thus no more artificial than would be to tender select emails or email threads.
25. The lack of relevance of the 1,100-plus Facebook messages, and the prejudice that would be occasioned to the fairness of these proceedings should they be tendered in their entirety, are addressed in detail below. More broadly however, the interests of judicial economy and expeditiousness should preclude the wholesale admission of Facebook conversations, so as to ensure that the trial record is not unduly flooded with tens of thousands of pages of irrelevant material, and by extension, to ensure that the Parties, Participants, and the Chamber are not obliged to needlessly expend resources reviewing and analysing such material.

III. The Prosecution has not established the relevance of the Conversations in their entirety; and their admission as such would prejudice Mr Yekatom's fair trial rights.

26. The Defence opposes the admission of Facebook messages in relation to which the Prosecution has not provided specific submissions as to relevance ('Unaddressed Messages').
27. At the outset, the Prosecution's failure to establish the relevance of each tendered Message is contrary to its basic statutory obligation as the moving party.¹⁶

¹⁶ Article 69(3); see also, Rule 64(1).

28. It is not suggested by the Prosecution that the relevance of each Conversation, in its entirety, arises from the very fact that P-0889 was in contact with his interlocutors during the time period in question. On the contrary, as is evident from the Request, the Prosecution argues the relevance of specific exchanges, by reference to specific page numbers.¹⁷ Nor can it be reasonably suggested that each Conversation is imbued with relevance, in its entirety, merely by virtue of the fact that certain messages within that Conversation appear sufficiently relevant for the purposes of admission.
29. As previously argued,¹⁸ allowing the admission into evidence of over 1,100 Unaddressed Messages, without any indication as to their purported relevance to the Prosecution case, would occasion multi-faceted prejudice to Mr Yekatom's interlinked right to effective defence preparations and his right to notice;¹⁹ to his right to examine witnesses brought against him; and more broadly, his right to fair and expeditious proceedings.
30. The tendering of Facebook conversations wholesale obliges the Defence to review and analyse vast quantities of Facebook messages, without having been provided any indication as to the manner and purpose for which the Prosecution intends to rely on them against Mr Yekatom. This review process would likely have a knock-on effect, potentially requiring a diversion of resources into Defence investigations into the subject-matter and various interlocutors of certain conversations. Should the Request be granted as such, this highly resource-intensive review process would likely need be repeated at the final arguments stage, to the extent that the Prosecution eventually provides its case as regards the relevance of these 1,100 Unaddressed Messages (in

¹⁷ [ICC-01/14-01/18-1285-Conf-Anx.](#)

¹⁸ See, Email from Defence to Trial Chamber V of 18 May 2021, at 20:25.

¹⁹ See, *Prosecutor v. Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15-1562, 17 July 2019, para. 69.

addition to the tens of thousands of Facebook messages that are anticipated to be eventually tendered by the Prosecution).

31. In *Ongwen*, Trial Chamber IX dismissed defence arguments that the ‘Submission System’ was contrary to procedural fairness, relying *inter alia* on the fact that the Prosecution had ‘filed a detailed Trial Brief explaining how it intended to prove its allegations and how each item of (actual and prospective) evidence relates to the corresponding factual allegations described in the charges’; and further, noted that,

specific indications as to the purported relevance and probative value of evidence were also given in the filings through which each batch of items of documentary evidence has been submitted by the Prosecution in the course of the trial, and to which the Defence has been able to respond throughout the proceedings providing its own views.²⁰

32. These countervailing safeguards relied upon by Trial Chamber IX do not apply with regard to the Unaddressed Messages. Instead, the Defence is in the dark as to how the Prosecution intends to rely on these messages against Mr Yekatom; and presumably will remain so until the Prosecution files its closing brief, at the close of the Parties’ respective cases. It will thus not be in a position to have addressed them through the Prosecution’s presented evidence – including via examination of Prosecution witnesses who might have been in a position to address the messages – contrary to Mr Yekatom’s statutory rights.
33. Nor can it be argued that the Defence was in a position to examine P-0889 on the Unaddressed Messages. It would be contrary to fairness to expect the Defence to have to second-guess the Prosecution’s intentions, as to how it intends to rely on these messages, if at all; and further, to expend its limited cross-examination time on that uncertain basis.

²⁰ *Prosecutor v. Ongwen*, Trial Judgment, [ICC-02/04-01/15-1762-Red](#), 4 February 2021, para. 245.

34. Granting the admission of the Unaddressed Messages would also entail a de facto reversal of the evidentiary burden, in that the Defence would be obliged to disprove the admissibility of these messages.²¹ In addition, expecting the Parties to (re-)litigate the admissibility of these messages, i.e. to raise objections and/or arguments regarding their relevance and probative value, at a later stage would be contrary to the requirements of Rule 64(1).²²

IV. Messages not put to the witness are not admissible from the bar table.

35. The Defence does not oppose the formal submission of Facebook messages which were discussed with P-0889 during his recent testimony.
36. However, it would be contrary to the interests of justice to allow the submission into evidence of Facebook Messages that were not specifically put to P-0889, as the Prosecution has failed to elicit sufficient context for the messages for their probative value and relevance to be considered to have been established.
37. It cannot be suggested that these messages speak for themselves in terms of their meaning and context – and by extension, their *prima facie* relevance and probative value. Indeed, the Prosecution's interpretation of a number of Facebook Messages was repeatedly demonstrated to be materially incorrect, when put to P-0889; which in turn demonstrates that the Prosecution's arguments regarding the relevance of these messages are in fact unfounded.
38. For instance, the Prosecution interpreted the witness's reference to [REDACTED] in CAR-OTP-2133-2741 as reference to Mr Ngaïssona, arguing that the conversation 'shows that upon his return to BANGUI, NGAISSONA

²¹ See also, *Prosecutor v. Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", [ICC-01/05-01/08-1386](#), 3 May 2011 ('Bemba Appeals Judgment'), paras 71-73.

²² See also, where the Presiding Judge held that 'Bar table applications shall contain [...] a short description of the asserted relevance and probative value pursuant to Rule 64(1) of the Rules', [ICC-01/14-01/18-631](#), para. 62.

was (already) considered [REDACTED].²³ Yet when taken to the message in question, P-0889 clarified – Prosecution Counsel’s leading question notwithstanding – that [REDACTED].²⁴

39. Similarly, the Prosecution argues that CAR-OTP-2133-8109 ‘shows [...] that there were weapons held at NGAISSONA’s warehouse in March-April 2013’.²⁵ However, P-0889 explained that at the time, [REDACTED].²⁶ Notably, as the Prosecution would be aware, a witness in the *Saïd* case, who herself witnessed the Seleka’s pillaging of Mr Ngaïssona’s warehouse in March 2013, has provided information [REDACTED] and, by extension, contradicting the Prosecution’s interpretation of this message.²⁷
40. In a similar vein, the Prosecution argues that CAR-OTP-2131-5154 demonstrates that ‘the Youth who joined the Anti-Balaka expressed [...] anti-Muslim rhetoric [...] without any differentiation between Seleka and Muslims.’²⁸ Yet P-0889 explained that [REDACTED].²⁹ This information from P-0889 provides highly relevant context for the messages, and strongly supports his comments to the effect that [REDACTED]; and by extension, demonstrates the superficial nature of the Prosecution suggestion that P-0889 did not differentiate between Seleka and Muslims.
41. This message was one of three Conversations that the Prosecution seeks to rely upon to establish what it claims is ‘anti-Muslim rhetoric’ on the part of P-0889.³⁰ Notably, Prosecution Counsel did not put any of these messages to P-0889 during his examination, in what was clearly a deliberate strategy that aimed at preventing P-0889 from providing an explanation for these messages – and by

²³ Annex, Item #18.

²⁴ ICC-01/14-01/18-T-108-CONF-ENG, 50:9-52:23.

²⁵ [ICC-01/14-01/18-1285-Conf-Anx](#), p. 7 (Item #20).

²⁶ ICC-01/14-01/18-T-108-CONF-FRA, 26:5-28:8.

²⁷ [CAR-OTP-2032-0753-R01](#), paras 31-33.

²⁸ [ICC-01/14-01/18-1285-Conf-Anx](#), p. 2 (Item #4).

²⁹ ICC-01/14-01/18-T-111-CONF-FRA, 22:20-24:11.

³⁰ See also, [ICC-01/14-01/18-1285-Conf-Anx](#), pp 5-6 (Item #13, #14).

extension, preventing the Chamber to hear said explanation. As the Chamber will recall, it was not until his examination by the Defence (and his subsequent impeaching by Prosecution counsel during re-examination) that P-0889 [REDACTED].³¹

42. Moreover, during his evidence, P-0889 [REDACTED]:

[REDACTED].³²

43. Notably, this is not the first such warning: the Chamber will recall the testimony of P-2841, who was questioned extensively on the reliability of information exchanged in Facebook messages, and who stated that during the crisis, '[g]iven the speed [...] with which information was being shared, a lot of the information was not always verified', and that '[i]t was very difficult to get the correct information.'³³

44. A further, highly pertinent illustration of the danger of relying on documentary evidence that appears to 'speak for itself' is that of P-0808. As the Chamber will recall, during P-0808's examination, Prosecution Counsel sought to have him confirm comments attributed to him in a press article, purportedly made in relation to Anti-Balaka attacks on Muslim civilians.³⁴ P-0808 denied having made these comments; and his denial was validated when he was shown a video of the interview in question, showing P-0808 repeatedly refuting any suggestion that Muslims were the target of the Anti-Balaka movement.³⁵ Critically, the Prosecution expressly – and in the event, misguidedly – relied on this misquote in its Document Containing the Charges, in support of its claim that 'The highest ranks of the Anti-Balaka leadership

³¹ ICC-01/14-01/18-T-111-CONF-FRA, 22:16-36 :12.

³² ICC-01/14-01/18-T-108-CONF-FRA, 48:11-17; see also, ICC-01/14-01/18-T-108-CONF-ENG, 44:7-11.

³³ ICC-01/14-01/18-T-030-CONF-ENG, 9:20-11:23.

³⁴ ICC-01/14-01/18-T-069-CONF-ENG, 59:15-63:4.

³⁵ ICC-01/14-01/18-T-069-CONF-ENG, 59:15-63:4, 81:4-86:14 ; see also, [CAR-OTP-2118-4151](#) (video) and [CAR-OTP-2135-0915](#) (transcript).

expressed and promoted the group's policy [of violently targeting the Muslim population in western CAR]'.³⁶

45. Serious questions remain as to the Prosecution's decision to rely on the press article misquoting P-0808, instead of the video of the interview; as well as the implications of this strategic Prosecution decision with regard to its statutory duty to assist the Chamber in establishing the truth.³⁷ Setting them aside however, the example of P-0808 vividly illustrates that the interests of justice dictate that a witness's comments should be elicited in relation to documentary evidence produced or provided that a Party intends to tender in these proceedings.
46. The Defence is not here suggesting that the Chamber is, or should be, formally bound by the 'best evidence rule'; nor is it suggesting that evidence is inadmissible unless tendered through a witness. However, experience in these proceedings show the critical importance of eliciting contextual, first-hand, testimonial evidence in relation to documents that might otherwise be considered to 'speak for themselves' in terms of their reliability and their meaning.
47. More broadly, it is submitted that authenticating documentary evidence via a witness who produced or provided that evidence is more conducive to allowing a more comprehensive appreciation of its reliability, authenticity and probative value. Any questions or challenges in relation to the reliability of that document can be addressed directly to the witness him/herself, who is thus granted the opportunity to explain, clarify, or defend that document's probative value, in a natural and spontaneous manner, in the presence of the Parties and the Chamber. The upshot of this procedure is that both the calling and non-calling

³⁶ [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 95

³⁷ See especially, ICC-01/14-01/18-T-069-CONF-ENG, 62:3-63:4, 81:4-82:18.

party are in a better position to make meaningful submissions on the relevance and probative value of such evidence, pursuant to Rule 64;³⁸ likewise, the Chamber is in a better position to make any rulings thereon and more broadly, to perform its truth-seeking function.

48. In addition, establishing a preference for documentary evidence to be authenticated via a witness wherever possible has wider benefits for the expeditiousness of proceedings. It reduces the need for the Defence to call witnesses, or submit its own evidence in a bar table motion of its own, given the opportunity to address such issues with a witness on the stand, and to tender evidence through that witness via the significantly less-resource-intensive submission procedure.
49. Support for the establishing such a preference can also be found in the jurisprudence of the Court. In *Ntaganda*, Trial Chamber VI expressly held that any party wishing to tender evidence from the bar table was obligated to provide, in its application, ‘the reason for not tendering the item through a witness’;³⁹ and further, subsequently held that ‘any documentary evidence should, where possible, be admitted through a witness, and the absence of authentication by a witness may impact on the Chamber’s admissibility assessment’.⁴⁰ The same direction with respect to bar table applications,

³⁸ See also, where Trial Chamber IX held in relation to the manner of introduction of documentary evidence, that ‘[t]he material issue is that the Prosecution clearly submits the materials to the Chamber in such a manner that the Defence can raise any issues under Rule 64 of the Rules’, *Prosecutor v. Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, [ICC-02/04-01/15-795](#), 28 March 2017, para. 14.

³⁹ *Prosecutor v. Ntaganda*, Decision on the conduct of proceedings, [ICC-01/04-02/06-619](#), 2 June 2015, para. 52.

⁴⁰ *Prosecutor v. Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, [ICC-01/04-02/06-1838](#), 28 March 2017, para. 13; see also, para. 46, where Trial Chamber VI subsequently denied a Prosecution request for the admission of a number of documents, noting *inter alia* the lack of justification for the Prosecution’s failure to have introduced them through a witness; see also, where Trial Chamber VI denied admission of documents on a similar basis, *Prosecutor v. Ntaganda*, Public redacted version of ‘Decision on Defence request for admission of evidence from the bar table’, [ICC-01/04-02/06-2201-Red](#), 31 January 2018, paras 57, 61, and 63.

requiring a moving party to indicate the reason(s) for not tendering a document through a witness, was issued by Trial Chamber V(A) in *Ruto & Sang*.⁴¹

50. Likewise, in *Katanga & Ngudjolo*, Trial Chamber II also held that ‘the fact that evidence is being tendered without authentication by a witness may be an important factor in the Chamber's assessment of its admissibility’.⁴² More broadly, in that case, Trial Chamber II set out the following factors to be considered in an assessment of bar table motions:

- a. The nature and origin of the documentary evidence;
- b. The relevance of the information contained in the document [...];
- c. Whether the content of the document is easily understandable or requires further explanation or interpretation;
- d. If the information pertains exclusively to the historical background and/or contextual elements of the case, the nature and precision of the information contained in the document, as well as whether it is the only evidence on the matter or whether there are alternative sources of information on the same issue;
- e. The original purpose for which the document was created and to whom it was addressed. [...];
- f. Whether it is possible to ascertain from the content of the document itself what its sources are and whether they can be easily verified;
- g. Whether it is possible to ascertain the method used to compile and process the information contained in the document; [and],
- h. Whether there are any doubts as to the authenticity of the document.⁴³

51. It cannot be controversial that these factors would best elucidated through a witness who produced or provided such documentary information.

52. Again, the Defence is not requesting that the Chamber implement inflexible rules regarding admissibility of documentary evidence. However, in the

⁴¹ *Prosecutor v. Ruto & Sang*, Decision on the Conduct of Trial Proceedings (General Directions), [ICC-01/09-01/11-847-Corr](#), 9 August 2013, para. 27.

⁴² *Prosecutor v. Katanga & Ngudjolo*, Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), 17 December 2010, para. 12.

⁴³ *Prosecutor v. Katanga & Ngudjolo*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, [ICC-01/04-01/07-1665-Corr](#), 1 December 2009, para. 100.

interests of basic fairness, and in light of the Prosecution's duty to assist the Chamber in establishing the truth, the Prosecution should not be given the unfettered choice as to whether a witness's pertinent evidence on a document's relevance and probative value should be elicited, on the basis of its own strategic interests. In other words, the Prosecution should be effectively precluded from omitting to ask questions to a witness in relation to documentary evidence it seeks to rely on, simply because the Prosecution is afraid that the witness's answers may not align with its case.

53. On the contrary, the Prosecution should be obliged to provide a reasonable justification as to why it chose not to allow a witness to provide contextual, authenticating information regarding documentary evidence it seeks to rely upon; and absent any such reasonable justification, its failure to do so should strongly militate against the admission of that evidence.
54. This obligation should be applied to the Request. As the above examples illustrate, context provided by a witness – in this case, P-0889 – is critical for a full appreciation of a document's relevance and probative value. Moreover, the Defence notes that the Prosecution has repeatedly sought to emphasise the fact that Facebook conversations are 'difficult to decipher', as they contain shorthand, slang, code-names and nick-names, in seeking to justify requests for their untimely addition to the List of Evidence.⁴⁴ The Prosecution has also argued that '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' – a claim that is vividly illustrated by the example of P-0889's Muslim interlocutor, set out above.⁴⁵

⁴⁴ [ICC-01/14-01/18-1285-Conf](#), para. 17; see also, [ICC-01/14-01/18-1330-Conf](#), para. 11; see also, *supra*, para. 49, at (c).

⁴⁵ [ICC-01/14-01/18-1285-Conf](#), para. 17.

55. It be claimed that the Prosecution did not have sufficient time to take P-0889 to the messages in question. Not only was the two-hour time limit for P-0889's examination-in-chief of the Prosecution's own choosing – the Prosecution relied on this specific time limit, and the concomitant time-saving, as a factor in favour of its Rule 68(3) application in respect of P-0889;⁴⁶ this fact alone should bar any opportunistic claim that the Prosecution was limited by time constraints. Moreover, as the Chamber will recall, Prosecution Counsel spent 30 minutes – a quarter of this time limit – taking P-0889 through [REDACTED];⁴⁷ and an additional few minutes taking P-0889 through the [REDACTED], during which exercise the Presiding Judge noted, in relation to the relevance of the names being put to P-0889, [REDACTED].⁴⁸

V. The Prosecution will not be unduly prejudiced by the non-admission of the Conversations in their entirety.

56. With regard to the Unaddressed Messages and/or the messages not discussed with P-0889: it can be understood from the Prosecution's failure to plead their relevance and/or to put them to P-0889, that their non-admission at this stage would not unduly prejudice the Prosecution.

CONFIDENTIALITY

57. This Response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

58. In light of the above, the Defence respectfully requests that Trial Chamber V:

⁴⁶ [ICC-01/14-01/18-1170-Conf](#), paras 19-21; see, where the Chamber expressly relied on these time savings in deciding to grant this application, [ICC-01/14-01/18-1226-Conf](#), para. 30.

⁴⁷ See, ICC-01/14-01/18-T-108-CONF-ENG, 8:12-17:18.

⁴⁸ See, ICC-01/14-01/18-T-108-CONF-ENG, 39:7-41:7.

DIRECT the Prosecution to initiate *inter partes* consultations sufficiently ahead of filing any bar table applications in future; and,

DENY the Request with respect to the following Conversations:

CAR-OTP-2131-5154 (with the exception of p. 5155);

CAR-OTP-2131-6832 (with the exception of pp 6835, 6837-6839, and 6843);

CAR-OTP-2132-7226 (with the exception of pp 7228 and 7235-7236);

CAR-OTP-2132-7764 (with the exception of pp 7770-7771);

CAR-OTP-2133-2735 (with the exception of pp 2736-2737);

CAR-OTP-2133-2741 (with the exception of p. 2760); and,

CAR-OTP-2133-8109 (with the exception of p. 8111).

RESPECTFULLY SUBMITTED ON THIS 3rd DAY OF JUNE 2022



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands