

ANNEX 52

Public Redacted

Version

From: Trial Chamber V Communications
Sent: 24 October 2022 11:52
To: [REDACTED] OTP CAR IIB; Trial Chamber V Communications; D29 Yekatom Defence Team; D30 Ngaissona Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: Decision on the Yekatom Defence Response to the Prosecution Request concerning Clarification of Decision ICC-01/14-01/18-1626-Conf - Re. P-1839

Dear Counsel,

The Single Judge takes note of the Yekatom Defence's email below, in which it (i) responds to the Prosecution's request seeking clarification of Decision ICC-01/14-01/18-1626-Conf (the 'Prosecution Request') and (ii) requests that the Chamber 'clarify that its order to review again the content of P-1839's Facebook account and "to ensure that the Defence indeed has been provided with all disclosable material" (ICC-01/14-01/18-1626-Conf, para. 14) relates to the entire account which amount to 194.000 items' (the 'Yekatom Defence Request').

The Single Judge, however, notes that he already provided the clarification sought in the Prosecution Request (see email from the Chamber, 24 October 2022, at 09:01), and does not consider that the issues raised by the Yekatom Defence in its email warrant reconsideration of this decision.

Accordingly, the Yekatom Defence Request is rejected.

Kind regards, TC V

From: [REDACTED]
Sent: 24 October 2022 09:04
To: OTP CAR IIB [REDACTED]; Trial Chamber V Communications [REDACTED]; D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV [REDACTED] V44 LRV Team [REDACTED] V45 LRV Team [REDACTED]; Associate Legal Officer-Court Officer [REDACTED]
Cc: [REDACTED]
Subject: RE: ICC-01/14-01/18-1626-Conf - Re. P-1839

Dear Trial Chamber V,
Dear all,

The Yekatom Defence ("Defence") takes note the Prosecution's email which requires clarification regarding the scope of the Chamber's order to review again the content of P-1839's Facebook account and "to ensure that the Defence indeed has been provided with all disclosable material" (ICC-01/14-01/18-1626-Conf, para. 14). The Defence is particularly concerned by the content of this email and its implication regarding the process of review of material made by the Prosecution to determine whether or not it remains in possession of material falling within its disclosure obligation.

First, the Defence is of the view that details contained in this email should have been brought to the Chamber's attention in the Prosecution's response to the Defence original request (ICC-01/14-01/18-1609,

“Response”). Indeed, it appears from the email that after a first assessment following the collection of the Facebook account, only 308 “possibly relevant items” were selected out of 194.000 “discrete data files”; the remaining hundreds of thousands of items do not appear to have been reviewed since 2020 as *“the Extracted Material is in a different format than that of data for Facebook accounts acquired after P-1839’s. To review the contents of the account efficiently requires the conversation [of] the data to a new format”*.

This information appears to contradict the Prosecution’s assertions in its Response that *“the Prosecution has considered the Defence’s prior requests and carefully reviewed the information sought in that light”*, and more specifically for P-1839 that *“the Prosecution has specifically assessed the material sought in light of the claims put forward by the Defence [...] Having undertaken such a review, the Prosecution has assessed that the contents of the account have been fully disclosed to the extent that they are material and/or otherwise disclosable”* (Response, paras. 6, 31-32).

Even if deemed not contradictory, the extent of the material extracted from P-1839’s account, and the fact that the “reviews” undertaken by the Prosecution were limited to only 308 items declared possibly relevant and not to the entirety of the account, should have been at the very least brought to the Chamber’s attention.

Second, the Defence understands from both the Prosecution’s email and investigation report (CAR-OTP-2122-6129) that following a search with keywords undertaken on 13 May 2020 and 19 August 2020 (CAR-OTP-2122-6129 at 6130), the vast majority of P-1839’s account has never been reviewed for more than two years.

The Prosecution have been found to have violated its disclosure obligation multiple times in the past, with the Chamber being *“troubled by the number of times the Prosecution has so far breached its disclosure obligations. It expects the Prosecution to tackle its statutory obligations more diligently in the future”* (ICC-01/14-01/18-1202-Conf, para. 23). It was also ordered, to *“review the evidence in its possession, and confirm on the record that all documents falling within its disclosure obligations have indeed been disclosed”* (ICC-01/14-01/18-1202-Conf, para. 22).

With this context in mind, the Defence is particularly concerned with the apparent lack of review of the entirety of P-1839’s Facebook account for more than two years, despite the beginning of the trial and the examination of witnesses. The Prosecution should diligently continue to review, throughout the whole trial and in light of new facts that emerged, bearing in mind the Defence case and the strategy put forward, whether the situation items that were deemed as not disclosable pursuant to Article 67(2) or Rule 77 changed. This is in line with the Chamber’s “Decision Setting the Commencement Date of the Trial” which underlined the fact that *“[t]he Prosecution may – and in some cases, must – continue disclosing materials after this date [final disclosure deadline]”* (ICC-01/14-01/18-589, para. 10); and with jurisprudence from the Appeals Chamber who ruled that *“the Appeals Chamber can only comment generally that the ordinary expectation as set out in the Statute and the Rules of Procedure and Evidence is that the Defence would be entitled to receive any additional material in the possession or control of the Prosecutor which a line of defence has revealed as exculpatory in nature, regardless of the stage at which the defence was raised”* ([ICC-01/04-01/06-1433 OA11](#), para. 53), which the Defence respectfully submits implies an ongoing assessment of the undisclosed material in possession of the Prosecution during the course of the trial.

Third, the Defence recalls that in its 20 September 2022 letter (ARY-2022-0237) it suggested to the Prosecution a solution regarding P-1839’s account : allow a member of the Defence to *“inspect or review the undisclosed Facebook accounts of P-1839, P-0487 and of Mr. Habib BEINA. This inspection would be conducted on a Prosecution computer, and if necessary in the presence of someone of your team, which would ensure that the material would stay entirely within your possession”*. The Prosecution rejected this proposition on 5 October 2022, indicating that *“having reviewed the material given the Court’s jurisprudence and the facts of the case, we believe we have properly discharged our statutory disclosure obligations”*.

While the extent of this review is now in question, as detailed above, the Defence underlines that this suggestion would have allowed a thorough review of the entirety of P-1839's Facebook account and prevent the situation which we are now facing, a few days before P-1839's testimony.

Consequently, in light of the above, the Defence respectfully requests the Chamber to clarify that its order to review again the content of P-1839's Facebook account and "to ensure that the Defence indeed has been provided with all disclosable material" (ICC-01/14-01/18-1626-Conf, para. 14) relates to the entire account which amount to 194.000 items.

Should material information be found and disclosed the Defence reserves its right to request P-1839 to be recalled.

Kind regards,

Case manager – Yekatom Defence

From: OTP CAR IIB [REDACTED]
Sent: 22 October 2022 12:04
To: Trial Chamber V Communications [REDACTED] D29 Yekatom Defence Team
 [REDACTED] D30 Ngaissona Defence Team
 [REDACTED] V44 LRV Team OPCV [REDACTED]; V44 LRV Team
 [REDACTED] V45 LRV Team [REDACTED] Associate Legal Officer-Court Officer
 [REDACTED] >
Cc: OTP CAR IIB [REDACTED]
Subject: ICC-01/14-01/18-1626-Conf - Re. P-1839
Importance: High

Dear Trial Chamber,

Dear All,

The Prosecution seeks clarification with respect to the Single Judge's 20 October 2022 order "to review the *contents* of P-1839's Facebook account and provide the Defence with all disclosable documents, including those regarding the Prosecution's obtaining and extracting of information and/or material from [the account] ... by 24 October 2022" (ICC-01/14-01/18-1626-Conf, p. 8). Although the Prosecution considers that the Order does not contemplate a re-review of the entirety of P-1839's Facebook account, but instead the possibly 'relevant' information extracted from it which the Prosecution subsequently assessed as not disclosable, we consider that a clarification is necessary.

To be sure, a complete *re*-review of the contents of P-1839's entire Facebook profile cannot be achieved in a handful of days. P-1839's Facebook account covers an extended period. The review conducted on records responsive to an extensive keyword-based extraction (comprising 91 terms), involved over 187GB of data comprising around 194,000 discrete data files ("Extracted Data"). This manual review took several months to complete. As such, we do not believe the Order intends a re-review on this scale, nor that it is necessary given the propriety of the underlying review procedure documented in the investigation report CAR-OTP-2122-6129, disclosed on 7 October 2020.

We have consulted extensively with members of our Forensic Science Section ("FSS") involved in obtaining the Extracted Material, and have been informed that the process used a software tool that is no longer supported. Thus, the Extracted Material is in a different format than that of data for Facebook accounts acquired after P-1839's. To review the contents of the account efficiently requires the conversion the data to a new format which, although an entirely automated process, will take several days to run – given system processing speeds and barring crashes, or other likely technical challenges.

As noted, the Extracted Material was initially reviewed to identify information of possible relevance to the case to be further assessed for *disclosure* purposes ("Possibly Relevant Items"). About 308 items were assessed as such, registered in Ringtail, and then reviewed for disclosure. Of the 308 Possibly Relevant Items, 161 were assessed as

‘material’ in that they fell into an appropriate disclosure category (i.e., Rule 77, INCRIM, or PEXO) and disclosed to the Defence in October and November 2020.

The Prosecution is presently re-reviewing the 147 undisclosed Relevant Items, pending the Chamber’s clarification. We will inform the Parties and Participants by Monday if there are additional documents material to the preparation of the Defence or “*significantly* helpful to an understanding of *important* inculpatory or exculpatory evidence” (ICC-01/14-01/18-1626-Conf, para. 10).

Should the Chamber clarify that the order intends that the Prosecution undertake the re-review the entirety of P-1839’s Facebook account, this would require a significant extension of time, as the duration of the file conversion process is unclear given the volume of the data-set - 187GB comprising about 200,000 individual files, to be followed by a time-consuming and resource intensive assessment.

We await the Chamber’s further clarification and guidance. Thank you.

Kind regards,

Kweku Vanderpuye

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