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Date: 20 October 2022

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Urgent Yekatom Defence Request to Access Materials in
Possession of the Prosecution**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Article 67(2) of the Rome Statute (the ‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Urgent Yekatom Defence Request to Access Materials in Possession of the Prosecution’.

I. Procedural history

1. On 10 October 2022, the Yekatom Defence (the ‘Defence’) filed an urgent application concerning the Facebook accounts linked to Habib Beina, P-1839 and P-0487 (the ‘Accounts’), requesting that the Chamber order the Office of the Prosecutor (the ‘Prosecution’) to (i) disclose the content of the Accounts (the ‘Disclosure Request’) or, alternatively, (ii) allow the Defence to review the content of the Accounts to subsequently make specific disclosure requests (the ‘Access Request’ and, jointly, the ‘Request’).¹
2. On 11 and 12 October 2022,² respectively, the Common Legal Representatives of Victims of Other Crimes and the Ngaïssona Defence indicated that they do not intend to file a response.³
3. On 13 October 2022, the Prosecution responded to the Request, submitting that it should be rejected.⁴

¹ Urgent request for access to evidentiary materials in possession of the Office of the Prosecutor, ICC-01/14-01/18-1604-Conf (public redacted version notified on 18 October 2022, ICC-01/14-01/18-1604-Red), paras 1-2, 50.

² Noting that P-1839 was scheduled to commence her testimony on 21 October 2022, the Single Judge instructed the participants to file responses, if any, by 13 October 2022 (email from the Chamber, 11 October 2022, at 11:23).

³ Email from the Common Legal Representatives of Victims of Other Crimes, 11 October 2022, at 13:08; email from the Ngaïssona Defence, 12 October 2022, at 17:17.

⁴ 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), ICC-01/14-01/18-1609 (the ‘Response’), paras 1, 40.

II. Analysis

4. The Single Judge recalls the applicable law in relation to the Prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules.⁵ In particular, he recalls, as held by the Appeals Chamber, that the assessment of whether an object is material to the preparation of the defence will depend upon the specific circumstances of the case.⁶

A. The Disclosure Request

1. *Habib Beina's Facebook account*

5. The Single Judge notes the Defence's submissions that the contents of Habib Beina's Facebook account may be exculpatory pursuant to Article 67(2) of the Statute and are material to its preparation pursuant to Rule 77 of the Rules. In particular, 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'.⁷ The Defence submits in this regard that the Prosecution's Trial Brief 'partly predicates Mr. Yekatom's criminal responsibility upon his promotion of Habib [Beina] despite his alleged *avowed* intent to commit harm against Muslim civilians'.⁸ For this reason, in the Defence's submission, the importance of the information requested 'lies also in whether or not such "anti-Muslim" messages exist', and if they do not, '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 [Prosecution's] allegations'.⁹

⁵ See, *inter alia*, Decision on the Yekatom Defence Request Concerning Disclosure Violation and Disclosure of Exculpatory Material, 22 July 2020, ICC-01/14-01/18-595, para. 21; Decision on the Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889, 30 May 2022, ICC-01/14-01/18-1438-Conf (public redacted version notified on 30 September 2022, ICC-01/14-01/18-1438-Red) (the '30 May 2022 Decision'), paras 6-9.

⁶ See Appeals Chamber, *The Prosecutor vs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 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", 28 August 2013, ICC-02/05-03/09-501 OA 4, para. 55. See also 30 May 2022 Decision, ICC-01/14-01/18-1438-Red, para. 9 and the references cited therein; Response, ICC-01/14-01/18-1609-Conf, para. 31.

⁷ Request, ICC-01/14-01/18-1604-Red, para. 18.

⁸ Request, ICC-01/14-01/18-1604-Red, para. 19.

⁹ Request, ICC-01/14-01/18-1604-Red, para. 21.

6. In this regard, the Single Judge notes that the Defence submits that, given that Habib Beina was ‘Mr. Yekatom’s second-in-command’, he is of ‘primordial importance in the case’ and the contents of his Facebook account ‘are of a nature to corroborate testimony, assist rebuttal of other witnesses, or uncover admissible evidence’. Also, it argues that the contents of his contemporaneous private communications 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’.¹⁰
7. The Single Judge does not consider that the mere absence of anti-Muslim rhetoric in Habib Beina’s Facebook communications renders these materials disclosable under Article 67(2) of the Statute or Rule 77 of the Rules in this instance.
8. In particular, the Single Judge considers the Defence’s submissions as to the information that might or might not be contained in Habib Beina’s Facebook communications, to be speculative in nature. Taking into account the Prosecution’s assertion that it has duly discharged its disclosure obligations, the Single Judge cannot, without additional facts or information, make a finding that such material would be disclosable. Furthermore, the Single Judge sees no reason why the Prosecution would have to ‘judicially agree’ to the alleged ‘fact’ that no anti-Muslim rhetoric is present in Habib Beina’s Facebook communications.¹¹ In this regard, he notes that the Defence remains free to make its arguments in its closing statements, and that the Chamber will, in any event and to the extent such material should be recognised as submitted, assess the content of any Facebook conversations of Habib Beina, together with the rest of the evidence, as part of its holistic assessment during its judgment deliberation.
9. Moreover, the Single Judge notes that, according to the Prosecution, one of Habib Beina’s Facebook accounts was created on 27 March 2017 ‘and contains no messages’.¹² A second account, created on 31 July 2014, was also reviewed by the Prosecution ‘in light of the Defence’s correspondence and duly assessed that

¹⁰ Request, ICC-01/14-01/18-1604-Red, para. 28.

¹¹ See Request, ICC-01/14-01/18-1604-Red, para. 22.

¹² See Response, ICC-01/14-01/18-1609, paras 6, 21.

it does not contain material information'.¹³ In this regard, the Single Judge trusts that the Prosecution has fully discharged its disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules.

10. Nevertheless, the Single Judge reminds the Prosecution of its obligation to fully discharge its disclosure obligations and, in particular, disclose anything that is material to the preparation of the defence, including any evidence that is significantly helpful to an understanding of important inculpatory or exculpatory evidence.¹⁴
11. In light of the above, the Single Judge does not consider the contents of Habib Beina's Facebook accounts disclosable under Article 67(2) of the Statute or Rule 77 of the Rules and thus rejects the Disclosure Request with regard to the items related to Habib Beina.

2. P-1839's Facebook account

12. The Defence submits that the contents of P-1839's Facebook account are material to its preparation pursuant to Rule 77 of the Rules, particularly given that (i) her role in these proceedings [REDACTED] 'makes her Facebook account of marked relevance', and that (ii) she voluntarily relinquished her credentials and passwords to the Prosecution during her interview, therefore creating a presumption of materiality which the Prosecution 'has so far failed to overturn'.¹⁵
13. The Single Judge notes that the Prosecution 'has specifically assessed the material sought' and that, '[h]aving undertaken such a review, the Prosecution has

¹³ See Response, ICC-01/14-01/18-1609, paras 6, 23.

¹⁴ See 30 May 2022 Decision, ICC-01/14-01/18-1438-Red, para. 8; Decision on the Common Legal Representative of the Former Child Soldiers Request to Maintain Redactions to Identifying and Contact Information of Intermediaries mentioned in Victim Application Forms, 21 September 2022, ICC-01/14-01/18-1578-Conf (public redacted version notified the same day, ICC-01/14-01/18-1578-Red), para. 24; see also Trial Chamber I, *The Prosecutor vs. Thomas Lubanga Dyilo*, Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06-2624, para. 16; Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 12 July 2011, ICC-01/05-01/08-1594-Conf (public redacted version notified on 29 July 2011, ICC-01/05-01/08-1594-Red) (the '*Bemba Decision*'), para. 21.

¹⁵ Request, ICC-01/14-01/18-1604-Conf, paras 29-35.

assessed that the contents of the account [approximately 160 items] have been fully disclosed to the extent they are material and/or otherwise disclosable'.¹⁶

14. The Single Judge is however mindful of the circumstances in which the Prosecution obtained access to P-1839's Facebook account, and that the witness was [REDACTED]. In this particular case, while the entirety of the content of P-1839's Facebook account may not be material to the preparation of the Defence,¹⁷ the Single Judge is of the view that the Prosecution should review it again to ensure that the Defence indeed has been provided with all disclosable material. In addition, the Prosecution should provide the Defence with all documents regarding the former's obtaining and extracting of information and/or material from P-1839's Facebook account.

3. P-0487's Facebook account

15. The Defence submits that the contents of the Facebook account of P-0487 [REDACTED] are potentially exculpatory pursuant to Article 67(2) of the Statute and are material to its preparation pursuant to Rule 77 of the Rules. In particular, it argues that the contents of P-0487's account may affect the credibility of his evidence, including in relation to [REDACTED].¹⁸
16. In addition, the Defence contends that '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 witnesses, 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, contacts and relations of P-0487 are in and of themselves relevant to the preparation of the Defence'.¹⁹

¹⁶ See Response, ICC-01/14-01/18-1609, paras 31-32.

¹⁷ See *Bemba* Decision, ICC-01/05-01/08-1594-Red, para. 23.

¹⁸ Request, ICC-01/14-01/18-1604-Conf, paras 36-37.

¹⁹ Request, ICC-01/14-01/18-1604-Conf, para. 38.

17. The Single Judge notes the Prosecution's submission that P-0487's Facebook account was opened on 28 August 2016, and that 'it contains no signs of activity thereafter'.²⁰ In this regard, the Single Judge fails to see how its contents may be material to the preparation of the defence or fall under Article 67(2) of the Statute.
18. In light of the above, the Single Judge does not consider the contents of P-0487's Facebook account disclosable under Article 67(2) of the Statute or Rule 77 of the Rules and thus rejects the Disclosure Request with regard to the items related to P-0487.

B. The Access Request

19. For the same reasons as above, the Single Judge rejects the Access Request.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request; and

ORDERS the Prosecution 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 P-1839's Facebook account, as indicated in paragraph 14 above, by 24 October 2022.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Single Judge

Dated 20 October 2022

At The Hague, The Netherlands

²⁰ See Response, ICC-01/14-01/18-1609-Conf, para. 36.