

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/14-01/18**

Date: **22 August 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 *PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public

Public redacted version of “Prosecution’s Response to Defence Request for an order concerning the cooperation of the Government of Ireland (ICC-01/14-01/18-1492-Conf-Red)”, ICC-01/14-01/18-1538-Conf, 5 August 2022

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Yekatom Defence’s Request for an order concerning the cooperation of the Government of Ireland (“Request”) regarding the provision of non-public [REDACTED] records.¹

2. Although the Request is substantially redacted, two fatal deficiencies are apparent: *First*, the Request relies on speculation concerning the materiality of the contents of the records sought. Thus, its necessity is not made out. *Second*, the Request does not identify any legally cognisable exception to the privacy interests of the prospectively affected parties. It is therefore impracticable under Part 9 of the Statute.

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” as it refers to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Request is Speculative

4. The Request is speculative. Although several passages are redacted, the Request relies to a large extent on unsubstantiated *assumptions* about what the [REDACTED] records sought may reveal. The Request advances purely self-serving conjecture as to what their contents could be and its potential relevance to the proceedings.

¹ ICC-01/14-01/18-1492-Conf-Red (“Request”).

5. A Chamber may seek the cooperation of a member state pursuant to Part 9 as may be necessary to assist a defendant in the preparation of their defence,² and in the collection of evidence that may be material to the determination of issues to be adjudicated.³ However, while the statutory authorisation for a Chamber's action in this respect is predicated on the *potential* materiality of the evidence or information to the proceedings, its very existence and nature cannot be based on mere speculation. Rather, a clear and reasoned basis (circumstantial or direct) substantiating the belief that (a) the evidence sought exists and (b), would contain material information, is minimally necessary.⁴ This is subsumed in the requirement that this Chamber has previously recognised, namely that the Defence must substantiate "what kinds of information [it] seeks and why the persons concerned may have this information", or "why [it] believes [the material sought] might reveal relevant information."⁵ The Request fails in this regard.

6. The Defence's arguments are conclusory. The Request asserts that the "Defence believes that the sought [REDACTED] material *will* contain information corroborating the Defence's position."⁶ However, the factual underpinning for the belief that the requested [REDACTED] records *actually* contain such information is obscure. Similarly, the contention that "Defence investigations have demonstrated that these individuals have been [REDACTED], including critical biographical information, about themselves"⁷ does not speak to the existence of material information in the records that are actually being sought. Although this might be demonstrated by alleging for instance that, [REDACTED] are required to provide *truthful* biographical information, the Request appears to be silent. Conversely, if the supposed "critical" biographical information sought is in fact consistent with the witness's prior

² See article 57(3)(b).

³ See rule 116(1) of the Rules of Procedure and Evidence ("Rules").

⁴ See ICC-01/04-01/07-444, p. 8, fn. 17 (interdicting so-called 'fishing expeditions').

⁵ ICC-02/04-01/15-1254, para. 9.

⁶ Request, para. 26.

⁷ Request, para. 26.

representations or statements – then it would certainly not be material, or otherwise necessary.

7. Nor, is the Request saved by unsubstantiated and conclusory assertions, such as:

“the information accessed to date simply represents the tip of the iceberg, and that the Sought Material will contain further highly relevant information that will directly and materially impact the credibility of these witnesses.”⁸

Noting that the Request has been heavily redacted, there is similarly no substantiation of the claim that contacts involving the relevant individuals (to the extent that they exist – which is itself unclear) “will contain further highly relevant information” or “will directly” bear on the credibility of witnesses, as advanced.

8. As elaborated below, without more, these unsubstantiated claims would be insufficient to overcome the privacy interests of the affected persons in any event, rendering any potential judicial cooperation effort infeasible.

B. The cooperation requested is impracticable on the grounds alleged

9. As is clear, the Request seeks the Chamber’s intervention to obtain:

“private conversations between [REDACTED] associated to a witness, and all [REDACTED] associated to another witness, regardless as to whether the link between [REDACTED] are publicly apparent.”⁹

10. However, the Request fails to establish sufficient grounds to overcome the clearest impediment to the cooperation sought, namely the right to privacy under Irish law. Although the Defence acknowledge the issue, characterising it as a “presumption of privacy,”¹⁰ the Request presents no cognisable exception to its application.

⁸ Request, para. 33 (emphasis added).

⁹ Request, para. 48 (emphasis added).

¹⁰ Request, para. 63.

11. The Defence’s attempt to analogise its Request to the Prosecution’s engagement of the Irish authorities in its Requests for Assistance (“RFA”) to obtain [REDACTED] records, is misguided. Neither the circumstances nor the underlying grounds are alike. Moreover, the distinction has nothing to do with the equality of arms,¹¹ but instead the substantiated legal basis for the Prosecution’s RFAs.

12. In seeking to minimise this distinction, the Defence unpersuasively argues that [REDACTED] material:

“was obtained by the Prosecution on the extremely broad basis that [REDACTED] in question were affiliated to the Anti-Balaka; that the Anti-Balaka was a criminal organization, and that these individuals would have communicated [REDACTED] on the common purpose of the Anti-Balaka.”¹²

In fact, the Prosecution’s allegations are specific and substantiated by *evidence*. As such, they demonstrated reasonable grounds to obtain further evidence of the commission of a crime.¹³ Moreover, the allegations were independently assessed and determined in accordance with Irish law¹⁴ by the relevant domestic authorities.

13. The Request does not compare in any way in terms of sufficiency. It provides no grounds demonstrating any specific exception to the right to privacy as might apply under Irish law.¹⁵ Thus, nothing in the Request establishes that, even if the Chamber were to seek the cooperation as sought, the rendition of such assistance would not be prohibited by Irish law.¹⁶

¹¹ Request, paras. 61, 62.

¹² Request, para. 63.

¹³ *See e.g.*, Irish Criminal Justice Act 2006 (amended in 2009) section 70 *et seq.*, available at <https://www.irishstatutebook.ie/eli/2006/act/26/enacted/en/print#sec70> [Last accessed on 05/08/2022].

¹⁴ *See e.g.*, Irish Communications (Retention of Data) Act 2011, sections 1 and 6(1), available at <https://www.irishstatutebook.ie/eli/2011/act/3/enacted/en/html> [Last accessed on 05/08/2022].

¹⁵ Notice is taken of the Request, para. 56, fn. 65. However, the Prosecution notes the applicability of article 69(8) as per ICC-01/05-01/13-2275-Red, paras. 290-298.

¹⁶ *See e.g.* article 93(1)(l) and (3).

14. Although article 93(1) (particularly subsection (l)) is broad in terms of the type of assistance that may be requested of a State, article 93(3) makes clear that it cannot be made to provide assistance that is “prohibited ... on the basis of an existing fundamental legal principle of general application.”¹⁷ This would certainly encompass material and information covered by the right of privacy under Irish law, absent a recognised exception.

15. As the Chamber has previously observed, article 57(3)(b) authorises the Chamber to seek cooperation:

“where it is satisfied that (i) this *would* ‘facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence.”¹⁸

16. Insofar as the Defence seeks *private* data and information protected by Irish privacy laws regarding a number of individuals, it is not at all clear that the Chamber’s intervention could (much less, would) facilitate the collection of such material.

17. In short, it is not for the Chamber to search for specific grounds to overcome a clear legal impediment to the collection of the material sought, but for the Request to properly identify it. The Defence’s assertions that such private material might (or might not, for that matter) bear on the credibility of witnesses fails to establish a sufficient basis to believe that the cooperation sought through the Chamber on the grounds identified is at all feasible. Moreover, the Request’s general reference to Article 8 of the European Convention on Human Rights¹⁹ does not, in the present circumstances, identify any specific exception to the scope of the protection of privacy rights under Irish law.

¹⁷ See article 93(3) (noting that “[i]f after consultations the matter cannot be resolved, the Court *shall modify the request as necessary*”) (emphasis added).

¹⁸ ICC-01/14-01/18-1159-Red, para. 5; *see also* ICC-01/14-01/18-658, para. 7.

¹⁹ See Request, para. 56.

IV. CONCLUSION

18. For the foregoing reasons, the Prosecution requests that the Chamber reject the Request in its entirety.

A handwritten signature in black ink, consisting of a stylized initial 'K' followed by a long horizontal line that ends in a small dot.

Karim A. A. Khan QC, Prosecutor

Dated this 22nd day of August 2022
At The Hague, The Netherlands