

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **23 July 2020**

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

**Prosecution's Request for Leave to Respond to the "Request for Leave to File
Amicus Curiae Submission on Behalf of the Electronic Privacy Information Center
(EPIC), ICC-01/14-01/18-591"**

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. The Office of the Prosecutor (“Prosecution”) firstly seeks leave to respond to the Request for leave to submit observations filed by the group *Electronic Privacy Information Center (EPIC)* on 17 July 2020 (“Request”)¹ regarding YEKATOM’s Motion to Exclude Call Location Evidence (“Motion”).² If such leave is granted, the Prosecution will file a response opposing the Request.

2. The Prosecution secondly requests that the substantive observations impermissibly contained within the Request be dismissed *in limine*.³

II. PROCEDURAL HISTORY

3. On 29 June 2020, YEKATOM filed a Motion to exclude call location evidence under article 69(7) of the Rome Statute (“Statute”) on the basis that, obtaining it from the authorities of the Central African Republic (“CAR”) without prior judicial approval violated international human rights, and that its admission into evidence would seriously damage the integrity of the proceedings.⁴

4. On 10 July 2020, the Prosecution responded, arguing *inter alia* that YEKATOM failed to meet his burden to demonstrate that the cumulative conditions of article 69(7) of the Statute have been satisfied (“Response”).⁵

5. On 17 July 2020, EPIC submitted its Request,⁶ arguing that there is an “emerging” international trend in recognising the right to privacy in phone

¹ ICC-01/14-01/18-591 (“Request”).

² ICC-01/14-01/18-574 (“Motion”).

³ Namely, paras. 2 and 4-11 of the Request.

⁴ Motion, para. 43.

⁵ ICC-01/14-01/18-584 (“Response”).

⁶ ICC-01/14-01/18-591.

metadata, including cell-site location information (“CSLI”) and that, as such, historical CSLI is also protected.⁷

III. SUBMISSIONS

A. Leave to submit response to Request

6. The Appeals Chamber has stated that “... under the express wording of rule 103(1) of the Rules, the Prosecutor is not entitled to respond to an application under rule 103(1),” and that such responses may not be filed without leave.⁸ Unless the Trial Chamber is minded to reject the Request, the Prosecution hereby requests leave to respond to it. If the Prosecution is granted leave to respond to the Request, it will address whether the intervention of the *amicus curiae* would be helpful and relevant.

7. The Request has no genuine *amicus curiae* function as it does not assist with the resolution of any issue before the Chamber, rather, it repeats citations to case law already briefed by the parties. If leave is granted, the Prosecution would file a concise response containing its reasons for opposing the Request.

Dismissal of substantive observations contained in the Request

8. The Appeals Chamber has stated that “... the submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so.”⁹ While premature submissions have nevertheless been accepted by Trial Chamber V(A) in the *Prosecutor v. Ruto & Sang* case “on an exceptional basis”,¹⁰ the Appeals Chamber has disregarded such submissions in *Bemba*¹¹ and *Lubanga*¹².

⁷ Request, paras. 5-11.

⁸ ICC-01/09-01/11-1972, para. 4; ICC-02/05-01/09-51, para. 8. *See also* ICC-01/05-01/08-602, para. 7; ICC-02/11-01/12-25, para. 11.

⁹ ICC-01/05-01/08-602, para. 9. *See also* ICC-01/09-01/11-1313, para. 35.

¹⁰ ICC-01/09-01/11-1313, para. 35.

¹¹ ICC-01/05-01/08-602, para. 9.

9. The Request in the present case contains substantive observations from paragraphs 2, and 4 to 11. The Prosecution challenges such observations and further submits that there is no exceptional basis upon which to accept these observations and supporting articles. The Prosecution requests that they be dismissed *in limine*.

10. If the Request was to be granted, and the substantive observations exceptionally accepted, the Prosecution intends to respond to the observations as it is entitled to do under rule 103(2) of the Rules of Procedure and Evidence.

IV. CONCLUSION

11. For the above reasons, the Prosecution requests the Chamber grant: i) leave to respond to the Request; and ii) dismissal *in limine* of paragraphs 2, and 4 to 11 of the Request.



Fatou Bensouda, Prosecutor

Dated this 23rd day of July 2020
At The Hague, The Netherlands

¹² ICC-01/04-01/06-3044, para. 9.