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Date: **21 August 2023**

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 Observations on the “Eighth Registry
Report on the Implementation of the Restrictions on Contact for Mr Alfred
Yekatom Ordered by Trial Chamber V” (ICC-01/14-01/18-2027-Conf-Red)”**

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”) provides its observations on the Registry’s 14 August 2023 “Eighth Registry Report on the Implementation of the Restrictions on Contact of Mr Alfred Yekatom Ordered by Trial Chamber V” (“Eighth Report”).¹ For the reasons set out below, Trial Chamber V (“Chamber”) should apply the restrictions on contacts, as set out in its 5 April 2023 Decision.²

2. The Eighth Report once again³ raises serious concerns regarding the Accused’s access to communications [REDACTED] at the ICC Detention Centre.⁴ The Registry’s [REDACTED] to ensure the Accused’s compliance with the conditions of detention is untenable.

3. The Prosecution also requests that [REDACTED]⁵ be made available immediately and in its entirety, and the identity [REDACTED] disclosed. In addition, the identities of the purveyors of [REDACTED], as the Registry may further identify [REDACTED], should be similarly provided. In this way, the Prosecution may fully and independently assess any potential security implications [REDACTED]—whether past or prospective.

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential”, as it refers to filings and decisions of the same classification. A confidential redacted version will be filed contemporaneously.

¹ ICC-01/14-01/18-2027-Conf-Red.

² See ICC-01/14-01/18-1830-Red, para. 13 (*citing*, ICC-01/14-01/18-1590-Conf-Red, para. 9).

³ See ICC-01/14-01/18-2012-Conf-Red and ICC-01/14-01/18-1536-Conf-Red.

⁴ Hereinafter, “ICC DC”.

⁵ ICC-01/14-01/18-2027-Conf-Red, para. 10 [REDACTED].

III. SUBMISSIONS

A. The previous restrictions should be applied

5. Applying the previous restrictions on contacts is necessary to protect witnesses and victims pursuant to regulation 101(2)(c) and (f) of the RoC, and to safeguard the integrity of the proceedings, pursuant to regulation 101(2)(b). The facts presented in the Eighth Report⁶ warrant the Chamber's careful control of the Accused's contacts and, moreover, an effective and consistent mechanism of enforcement.

6. *First*, although the Registry states that it "has no incident to report in relation to Mr Yekatom's written correspondence"⁷ and "non-privileged visits,"⁸ this is essentially meaningless. This is because the Registry's ability to control the Accused's conditions of detention [REDACTED].

7. As the Eighth Report makes clear, the Assistant Chief Custody Officer ("CCO"):

[REDACTED] to ensure compliance with the Chamber's restrictions on contacts, or imported as written correspondence or via the import procedure per the RoR."⁹

8. The above repeats precisely the same issue raised by the Registry in its "Sixth Report"¹⁰ a year ago, and again in its 7 August report regarding NGAISSONA's conditions of detention.¹¹ Circumstances in which the Registry [REDACTED] communicated to the Accused — which it has not determined is appropriately privileged or communicated — cannot be countenanced. This is particularly so in a

⁶ See ICC-01/14-01/18-2027-Conf-Red, paras. 12-13.

⁷ ICC-01/14-01/18-2027-Conf-Red, para. 15.

⁸ ICC-01/14-01/18-2027-Conf-Red, para. 14.

⁹ ICC-01/14-01/18-2027-Conf-Red, para. 13 (emphasis added).

¹⁰ ICC-01/14-01/18-1536-Conf-Red, para. 15.

¹¹ ICC-01/14-01/18-2012-Conf-Red, para. 11 (emphasis added).

case such as this, wherein there have been numerous breaches of the contact restrictions by the Accused,¹² and [REDACTED] reported.

9. *Second*, the Accused does not benefit from a presumption of compliance while in detention. Rather, the Registry is obligated to affirmatively enforce the Chamber's orders and the Regulations of the Registry ("RoR"). Here, the Registry expressly notes that it cannot give any assurance that there has not been a violation of the conditions of detention.

10. Two discrete issues arise in the circumstances, namely whether: (1) [REDACTED] comprises properly 'privileged' material; and (2) the means through which [REDACTED] is provided to the Accused are appropriate. The latter involves not only the mechanism of communication/transmission of [REDACTED]¹³, but the status of the *individual(s)* making use of it. The Registry [REDACTED].

11. As the Chamber's 16 February 2021 Decision on the Ngaïssona Defence Request on the Scope of Privileged Communications makes clear, "legal privilege is only afforded to (i) counsel, including co-counsel, and (ii) assistants to counsel, and not to 'other staff' on a defence team."¹⁴ Regulation 124 of the RoR moreover requires strict compliance:

"...the formal requirements under Regulation 124 of the Regulations of the Registry fulfil an important filtering function. Notably, they ensure that *only individuals with relevant legal background, who are bound by the Code of Conduct and the accountability regimes, are entitled to legally privileged communications* under Rule 73(1) of the Rules."¹⁵

¹² ICC-01/14-01/18-62-Conf-Red, paras. 10-11, ICC-01/14-01/18-467-Conf, paras. 25-26, ICC-01/14-01/18-592-Conf-Red, paras. 10-12, ICC-01/14-01/18-673-Conf-Red, paras. 12-13; ICC-01/14-01/18-1348-Conf-Red, para. 6; Pre-Trial Chamber II and Trial Chamber V decisions ICC-01/14-01/18-75, para. 15; ICC-01/14-01/18-485-Conf, para. 22; ICC-01/14-01/18-627, para. 16; ICC-01/14-01/18-727-Conf, paras. 17-18; ICC-01/14-01/18-1148-Conf, para. 9, ICC-01/14-01/18-1348-Conf, para. 6, ICC-01/14-01/18-1750-Conf-Red, para. 7.

¹³ ICC-01/14-01/18-2027-Conf-Red, para. 12.

¹⁴ ICC-01/14-01/18-712-Red, para. 16.

¹⁵ ICC-01/14-01/18-712-Red, para. 17 (emphasis added).

12. It is evident from the Eighth Report [REDACTED]. Indeed, the circumstances described underscore [REDACTED] implement the Chamber's order, designed to mitigate potential risks to the proceedings.¹⁶ As the Chamber has stressed, "when counsel opt to be assisted by other staff, who are not admitted to the List of Assistants, they must accept the consequence that legal privilege does not apply to these team members."¹⁷ Such staff may not avail themselves of privileged communications with an Accused — *by any means* or mechanism — particularly where it circumvents the otherwise applicable regulatory controls at the ICC DC.

13. Although an Accused "is entitled to 'keep himself [...] regularly informed of the news by way of newspapers, periodicals and other publications, radio and television broadcasts', according to Regulation 99(1)(d)",¹⁸ such privilege does not exclude the Registry's obligation to ensure the proper function of the ICC DC. Thus, while the Registry may not exclude such information from a defendant except as provided under the terms of the Regulations,¹⁹ a defendant has no right to circumvent the Registry's responsibility to inspect any material which originates externally to the ICC DC:

*"Any item received from outside the detention centre, including any item brought by any visitor for a detained person, shall be subject to security controls and shall be transported through the detention centre by staff."*²⁰

14. The extent to which the Accused's conduct apparently frustrates this imperative and undermines the Registry's ability to control the conditions of his detention should not be permitted.

¹⁶ ICC-01/14-01/18-1750-Conf-Red, para. 7.

¹⁷ ICC-01/14-01/18-712-Red, para. 18.

¹⁸ ICC-01/14-01/18-1575-Conf, para. 25.

¹⁹ See e.g., Regulation 167(2)(a) and (b) of the RoR.

²⁰ Regulation 167 of the RoR.

15. Presently, it is unclear whether the Registry has inquired or intends to inquire with the YEKATOM Defence as to the nature of [REDACTED]. Either way, the circumstances are such that the defendant's conduct supplants the Registry's independent and critical responsibility to administer the ICC DC in accordance with its responsibilities. The potentially *unauthorised* transmittal of material to the Accused [REDACTED] poses significant risks, and should be taken very seriously.

16. Until the situation described in the Eighth Report is clarified [REDACTED], the Prosecution considers that the Registry's administration of the terms and conditions of the Accused's detention [REDACTED]. Consequently, the previously imposed contact restrictions — at the very least — should be applied until comprehensive information is obtained.

17. *Third*, as is clear from information at the disposal of the Parties and Participants, YEKATOM retains an active support network in the Central African Republic ("CAR"). As previously substantiated, [REDACTED], providing YEKATOM with the opportunity to reach those within his sphere of influence. Significantly, the fact that the Prosecution case is nearly fully presented is not dispositive of the risk to the integrity of the proceedings which, *inter alia*, may entail the Defence or the Prosecution calling further witnesses at a later stage.

18. *Fourth*, the dire political and security situation in CAR outlined in the Registry's 5 May 2023 report,²¹ creates fertile ground for witness interference. This is due in part to the CAR authorities' reduced ability to protect against potential intimidation and retaliation. As noted, the current situation augments [REDACTED] of other corrupt conduct aimed at perverting the course of justice in this case.²²

19. Given that the proceedings are far from complete, the enforcement of the conditions of the Accused's detention warrants the highest degree of prudence. This

²¹ [REDACTED].

²² [REDACTED].

necessarily entails that the Registry is able to affirm its ability to meaningfully implement the Chamber's order and the Regulations in both spirit and letter, as prescribed. The Chamber cannot otherwise risk attenuating the Court's compelling interests in witness security under article 68, and in assuring the integrity of the proceedings.

B. [REDACTED] should be made available

20. The Prosecution requires access [REDACTED] to assess any potential security implications, and to determine whether any additional measures should be requested.

21. Mindful of article 68(1), the Prosecution requests the Chamber to direct the Registry to make [REDACTED] immediately available, as it has done in the past.²³

22. For the same reasons, the Prosecution requests that [REDACTED] to YEKATOM directly or indirectly, be made available, [REDACTED].

²³ See *e.g.*, ICC-01/14-01/18-1148-Conf, para. 12; see also ICC-01/14-01/18-502, p. 5 (noting that “granting access will allow the Prosecution to assess and fully discharge its obligations to take appropriate measures to protect the safety, as well as the physical and psychological well-being, of witnesses pursuant to Article 68(1) of the Statute”).

IV CONCLUSION

23. For the reasons above, the Chamber should: (i) apply the previously imposed restrictions on YEKATOM's contacts; and (ii) direct the Registry to provide the Prosecution promptly with [REDACTED] the Accused as well as [REDACTED], to the extent identified [REDACTED].



Karim A. A. Khan KC, Prosecutor

Dated this 21st day of August 2023

At The Hague, The Netherlands