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PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR V. ALFRED YEKATOM

**Confidential, *ex parte* – only available to Pre-Trial Chamber II, the Prosecution
and the Defence**

**With confidential *ex parte* Annexes A and B available only to Pre-Trial Chamber II
and the Defence.**

**Defence views on the “Prosecutor’s submission regarding the extension of contact
restrictions concerning Alfred YEKATOM’s pre-trial detention”**

Source: Defence Team of Mr Alfred Rombhot Yekatom

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

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Further to the Decision pursuant to Regulation 101 of the Regulations of the Court ("First Decision on Restrictions" and "RoC") and the Confidential Redacted version of the "Prosecution's submission regarding the extension of contact restrictions concerning Alfred YEKATOM's pre-trial detention" ("Prosecution Submission on the Extension of Restrictions") and the Second Decision Pursuant to Regulation 101 of the RoC issued by Pre-Trial Chamber II ("Pre-Trial Chamber") of the International Criminal Court ("Court") on 04 December 2018 ("Second Decision on Restrictions"), Counsel representing Mr. Alfred Rombhot Yekatom ("Mr. Yekatom" or "Defence") hereby submit this:

Defence views on the "Prosecution's submission regarding the extension of contact restrictions concerning Alfred YEKATOM's pre-trial detention"

INTRODUCTION

1. Significantly, the Prosecution Submission on the Extension of Restrictions was filed no less than five days after the deadline set to submit a request to extend the restrictions imposed beyond the two-week period following Mr. Yekatom's arrival at the Detention Centre of the Court ("ICC DC"). It was also filed two days after the expiry of the restrictions imposed on Mr. Yekatom in the First Decision on Restrictions.¹
2. In its late submission, the Prosecution did not request that the restrictions initially imposed on Mr. Yekatom be extended. The Prosecution rather deferred "[...] to the Chamber regarding the determination on the extension of contact restrictions imposed on YEKATOM in respect of his conditions of pre-trial detention".²

¹ First Decision on Restrictions.

² Prosecution Submission on the Extension of Restrictions, para. 12.

3. *First*, the available documentation and information does not give rise to reasonable grounds to believe pursuant to Regulation 101 RoC that contact between Mr. Yekatom and unnamed associates could affect the investigations and the outcome of the proceedings against him ("Reasonable Grounds to Believe Pursuant to Regulation 101 RoC").
4. *Second*, Mr. Yekatom has not been provided with a genuine opportunity to provide his views regarding other information or documentation possibly allowing for a finding of Reasonable Grounds to Believe Pursuant to Regulation 101 RoC. Accordingly any such information cannot be held against Mr. Yekatom at this time to extend the restrictions imposed on him, at this time.
5. *Third*, more importantly, as stated by the Prosecution: "[...] (3) the Registrar's Report on the implementation of the Order; and (4) the Registry's inspection and/or Chamber's review of YEKATOM's actively and passively monitored communications, including the content thereof [...] would particularly inform the Chamber of whether YEKATOM has breached or attempted to breach any salient condition of the Order, which is highly relevant to the Chamber's determination on the propriety of extending its terms and conditions".³ In this regard, the First and Second Registry Reports conclude that "[s]ince his arrival at the DC, no violations of the Decision on Restrictions have occurred".⁴ In fact, not only did Mr. Yekatom fully comply with all applicable conditions set out in the First Decision on Restrictions and the Second Decision on Restrictions (together "First and Second Decisions on Restrictions"); he also

³ Prosecution's submission regarding the extension of contact restrictions concerning Alfred YEKATOM's pre-trial detention, 3 December 2018, ICC-01/14-01/18-24-US-Exp ("Prosecution Submission on the Extension of Restrictions"), para. 10.

⁴ "Registry report on the implementation of the restriction on contact ordered by the single judge" ("First Registry Report") and "Second Registry Report on the Implementation of the Restrictions on Contact Ordered by the Pre-Trial Chamber II" ("Second Registry Report") ("First and Second Registry Reports"), para. 9.

acknowledged and undertook to abide by such conditions⁵ and demonstrated a determination to comply by *inter alia* instructing Counsel to ensure that his visitor understood and would abide with the said terms and conditions.⁶

6. Consequently the Defence prays the Pre-Trial Chamber to immediately end the restrictions on Mr. Yekatom's non-privileged telephone communications and visits.

PROCEDURAL BACKGROUND

7. On 29 October 2018, Mr. Yekatom was arrested in the Central African Republic ("CAR").⁷
8. On 30 October 2018, the Prosecutor filed an application pursuant to Article 58 of the Rome Statute ("Statute") for the issuance of a warrant of arrest against Alfred Rombhot Yekatom,⁸ ("Prosecutor's Article 58 Application").
9. On 11 November 2018, the Pre-Trial Chamber issued a warrant of arrest pursuant to Article 58 against Mr. Yekatom,⁹ who was surrendered to the Court on 17 November 2018 ("Warrant of Arrest").¹⁰
10. On 17 November 2018, the Single Judge, acting on behalf of the Pre-Trial Chamber, restricted Mr. Yekatom's telephone communications and visits for a two-week period¹¹ as requested in the Prosecutor's Article 58 Application.

⁵ Annex A *ex parte*.

⁶ Annex B *ex parte*.

⁷ Rapport du Greffe sur l'Arrestation et la Remise de M. Alfred Yekatom, 22 Novembre 2018, ICC-01/14-01/18-17-US-Exp.

⁸ Prosecution's Application for the Issuance of a Warrant of Arrest for Alfred Yekatom, 30 October 2018, ICC-01/14-01/18-US-Exp.

⁹ ICC-01/14-01/18-1-US-Exp ("Warrant of Arrest"). A public redacted version is also available, *see* ICC-01/14-01/18-1-Red.

¹⁰ Decision pursuant to Regulation 101 of the Regulations of the Court, 17 November 2018, ICC-01/14-01/18-11-Conf-Exp ("First Decision on Restrictions").

¹¹ First Decision on Restrictions.

11. On 18 November 2018, Mr. Yekatom was transferred to the ICC DC. Following his arrival, Mr. Yekatom received a non-redacted version of the Warrant of Arrest.
12. On 19 November 2018, the Registry filed a Notification of Appointment of Mr. Mathias Barthelemy Morouba as Counsel for Mr. Alfred Rombhot Yekatom.¹²
13. On the same day, Mr. Yekatom was formally informed of the terms and conditions regarding his non-privileged communications, including the restrictions imposed on him for a two-week period, which Mr. Yekatom acknowledged and undertook to respect.
14. On 20 November 2018, following an application filed by the Prosecutor, the Single Judge, issued a public "Decision concerning the legal representation of Alfred Yekatom", suspending the appointment of Mr. Mathias Barthelemy Morouba.¹³
15. On 23 November 2018, Mr. Yekatom, made his first appearance before the Pre-Trial Chamber.
16. On 29 November 2018, the Pre-Trial Chamber issued a Decision granting Mr. Morouba's request to withdraw; acknowledged Mr. Yekatom's choice of a new Counsel; and terminated the appointment of the OPCD to represent Mr. Yekatom.¹⁴
17. On 30 November 2018, the Registry submitted First Registry Report.¹⁵

¹² Notification of the Appointment of Mr. Mathias Barthelemy Morouba as Counsel for Mr. Alfred Yekatom, 19 November 2018, ICC-01/14-01/18-13.

¹³ Decision concerning the legal representation of Alfred Yekatom, 20 November 2018, ICC-01/14-01/18-16.

¹⁴ Decision on Withdrawal of Counsel, 29 November 2018, ICC-01/14-01/18-21.

¹⁵ Confidential Redacted version of Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge, 30 November 2018, ICC-01/14-01/18-23-Conf-Exp ("First Registry Report").

18. On 03 December 2018, the Prosecution filed, out of time, Prosecution Submission on the Extension of Restrictions.¹⁶ On 12 December 2018, the Prosecution was ordered to file a confidential redacted version of its Prosecution Submission on the Extension of Restrictions, which was submitted five days later on Monday 17 December 2018.
19. On 04 December 2018, the Pre-Trial Chamber issued its confidential *ex parte*, only available to the Prosecutor and the Defence for Alfred Rombhot Yekatom, Second Decision on Restrictions in which the Pre-Trial Chamber, *inter alia*, ordered the Defence to submit its views on the Prosecution Submission on the Extension of Restrictions to continue the imposition of restrictions on the communication rights of Mr. Yekatom with non-privileged contacts, no later than Thursday, 20 December 2018.¹⁷
20. On 11 December 2018, the Defence submitted a confidential, *ex parte* "Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor's Application for issuance of a warrant of arrest" ("Defence Request").¹⁸
21. On 12 December 2018, Pre-Trial Chamber issued its Order on Reclassification ("Order on Reclassification")¹⁹ in which the Pre-Trial Chamber, *inter alia*, denied on the Defence Request, holding that the classification that the Prosecution Application must be maintained.²⁰

¹⁶ Prosecution's submission regarding the extension of contact restrictions concerning Alfred YEKATOM's pre-trial detention, 03 December 2018, ICC-01/14-01/18-24-US-Exp

¹⁷ Second Decision Pursuant to Regulation 101 of the Regulations of the Court, 04 December 2018, ICC-01/14-01/18-25-Conf-Exp ("Second Decision on Restriction").

¹⁸ Expedited Request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor's application for issuance of a warrant of arrest, 11 December 2018, ICC-01/14-01/18-29-Conf-Exp.

¹⁹ Order on Reclassification, 12 December 2018, ICC-01/14-01/18-31-Conf ("Order on Reclassification").

²⁰ Order on Reclassification, para. 6.

22. On 14 December 2018, the Registry submitted the Second Registry Report.²¹
23. On 17 December 2018, the Prosecutor filed the confidential redacted version of its Prosecution Submission on the Extension of Restrictions²² along with other confidential redacted versions of certain filings.²³

SUBMISSIONS

The available documentation and information does not give rise to reasonable grounds to believe pursuant to Regulation 101 of the RoC

24. Pursuant to Regulation 101 RoC, the imposition of restrictions on the non-privileged contacts of a person detained requires a showing of reasonable grounds to believe that, *inter alia*, such contact could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation.
25. In this case, the available documentation and information does not establish reasonable grounds to believe – in particular, following the implementation of restrictions imposed for an initial period of two weeks following Mr. Yekatom's arrival at the ICC DC - that contact between Mr. Yekatom and any other person could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation.

²¹ Confidential Redacted version of Second Registry Report on the Implementation of the Restrictions on Contact Ordered by the Single Judge, 14 December 2018, ICC-01/14-01/18-32-Conf-Exp ("Second Registry Report").

²² Confidential Redacted version of "Prosecution's submission regarding the extension of contact restrictions concerning Alfred YEKATOM's pre-trial detention", 3 December 2018, ICC-01/14-01/18-24-US-Exp, 17 December 2018, ICC-01/14-01/18-24-Conf-Red.

²³ Confidential Redacted version of "Prosecution's Urgent Request for Redactions to the Warrant of Arrest for Alfred YEKATOM (ICC-01/14-01/18-1-US-Exp)", 13 November 2018, ICC-01/14-01/18-5-US-Exp, 17 December 2018, ICC-01/14-01/18-5-Conf-Red; Confidential Redacted version of "Prosecution's Request for Redactions to the Warrant of Arrest for Alfred YEKATOM (ICC-01/14-01/18-1-US-Exp)", 17 November 2018, ICC-01/14-01/18-7-Conf-Red; Confidential Redacted version of "Provision of Information Concerning Anticipated Witness Protection Considerations", 30 October 2018, ICC-01/14-01/18-8-US-Exp, 17 November 2018, ICC-01/14-01/18-8-Conf-Red; «Rapport du Greffe sur l'Arrestation et la Remise de M. Alfred Yekatom» datée du 22 novembre 2018, ICC-01/14-01/18-17-US-Exp, 17 November 2018, ICC-01/14-01/18-17-Conf-Red.

26. First, in its Prosecution Submission on the Extension of Restrictions, the Prosecution neither advances nor attempts to establish the existence of such reasonable grounds to believe. Quite to the contrary, the Prosecution acknowledges its inability to establish such reasonable grounds to believe in the absence of certain information and defers to the Pre-Trial Chamber's assessment in this regard.
27. The late filing of the Prosecution Submission on the Extension of Restrictions supports this conclusion. Indeed, had the Prosecution been able to establish such Reasonable Grounds to Believe Pursuant to Regulation 101 RoC, the 17 December deadline would not have been missed.
28. Notably, the initial restrictions imposed on Mr. Yekatom for a period of two weeks, were imposed pursuant to Regulation 101(3) RoC – on an urgent basis, in exceptional circumstances - before Mr. Yekatom was even informed of the request, let alone given an opportunity to be heard.
29. The initial restrictions were also implemented before Mr Yekatom was even informed of the terms and conditions applicable to non-privileged communications from the ICC DC and before he undertook to comply with the same, in the knowledge of the consequences if he did not.
30. Now that Mr. Yekatom has been informed of the applicable terms and conditions applicable; acknowledged; and undertaken to comply with the same; and in fact abided with all ICC DC regulations since his arrival; the Defence posits that a showing of Reasonable Grounds to Believe Pursuant to Regulation 101 RoC necessitates more than speculation on the risk that in the absence of restrictions, contact between Mr. Yekatom and any other person could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation.

31. In these circumstances, a showing of reasonable grounds to believe requires concrete information indicating a likelihood that contact between Mr. Yekatom and any other person could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation *despite* his knowledge, undertaking and compliance with the applicable regulations since his arrival at the ICC DC.
32. In this regard, the Defence respectfully submits that the findings relied upon by the Pre-Trial Chamber in Paragraph 5 of the First Decision on Restrictions—referred to in Paragraph 8 of the Second Decision on Restrictions, recalling Paragraph 22 of the Warrant of Arrest – do not reach the required threshold.
33. While pursuant to the Warrant of Arrest, these findings allowed the Chamber to determine²⁴ the necessity to issue a warrant of arrest against Mr. Yekatom on 11 November 2018, they are insufficient to establish the existence of Reasonable Grounds to Believe Pursuant to Regulation 101 RoC, in the present circumstances, at this stage.
34. Based on the available documentation and information, the fact *inter alia* that Mr. Yekatom purportedly “ [...] retains strong influence over his (former and current) Anti-Balaka subordinates, in particular in Lobaye prefecture, which could allow him to reach, intimidate, or harm (potential) witnesses, their families or other individuals cooperating with the Court [...]” does not give rise to Reasonable Grounds to Believe Pursuant to Regulation 101 RoC, in particular at this stage.
35. On this basis, the extension of the restrictions imposed on Mr. Yekatom until 11 January 2019 must be rescinded forthwith.

²⁴ This submission is made without prejudice to Mr. Yekatom.

Mr. Yekatom has not been provided with a genuine opportunity to be heard regarding any other information or documentation

36. In its Order on Reclassification, the Pre-Trial Chamber denied the Expedited request on behalf of Mr. Yekatom seeking immediate disclosure of the Prosecutor's Application for issuance of a warrant of arrest, noting that the "[...] detailed information in the warrant of arrest suffices, at this stage, for Yekatom to be informed within the meaning of article 67(1)(a) of the Statute, to effectively seek provisional release under article 60 of the Statute and, pursuant to article 19 (2) of the Statute, to challenge the admissibility of the case [...]"²⁵
37. The Pre-Trial Chamber did not however make a similar finding regarding the information available to Mr. Yekatom and his right to be heard regarding the extension of the restrictions imposed on him pursuant Regulation 101 RoC.²⁶
38. Pursuant to Regulation 101(3) RoC, the right of the detained person to be informed and to be given the opportunity to be heard or to submit his or her views requires that the detained person be given a genuine opportunity to challenge the information purportedly giving rise to Reasonable Grounds to Believe Pursuant to Regulation 101 RoC.
39. This imperatively requires that the detained person be provided with adequate information to submit an informed view, in the knowledge of the scope of the allegations against him or her, sufficient to understand the evidence submitted to the Chamber.
40. In the present circumstances, the information provided to Mr Yekatom is limited to the findings referred to and recalled by the Pre-Trial Chamber in its

²⁵ Order on Reclassification, 12 December 2018, ICC-01/14-01/18-31-Conf, para. 6 (emphasis added).

²⁶ Order on Reclassification, 12 December 2018, ICC-01/14-01/18-31-Conf, para. 7.

Second Decision on Restrictions.²⁷ Accordingly, the determination on the necessity or not to extend the restrictions imposed on Mr. Yekatom must be based on the information that was provided to Mr. Yekatom and no more.

41. Notably, in its Order on Reclassification, the Pre-Trial Chamber indicated that the discrete request to restrict Yekatom's communications is included in the Prosecutor's Article 58 Application, which cannot be made available to Mr Yekatom at this stage.²⁸
42. Whether or not the Prosecutor's Article 58 Application contains further information and/or allegations possibly giving rise to Reasonable Grounds to Believe Pursuant to Regulation 101 RoC, absent the disclosure of the Prosecutor's Article 58 Application, Mr. Yekatom is not in a position to effectively present informed views and challenge the information and/or allegations found therein. Consequently, in accordance with Regulation 101(3), such allegations and/or information cannot be held against Mr. Yekatom for the purpose of extending the initial restrictions imposed on him for a period of two weeks following his arrival at the ICC DC.
43. In this regard, full weight must be accorded to Mr Yekatom's undertaking to comply and his effective compliance with all applicable ICC DC regulations, which justifies rescinding the extension of the restrictions imposed on him until 11 January 2019 forthwith.

Mr. Yekatom has acknowledged, undertaken to comply and effectively complied with all regulations applicable to non-privileged telephone communications and visits.

44. It is highly significant that from the moment Mr. Yekatom was transferred to the ICC CD, he was informed; he acknowledged; he undertook to comply

²⁷ *Infra* para. 32.

²⁸ Order on Reclassification, para. 7.

with;²⁹ and has indeed complied with all regulations applicable to non-privileged telephone communications and visits at the ICC DC.

45. Indeed, as stated by the Prosecution in the Prosecution Submission on the Extension of Restrictions : “[...] the Registrar’s Report on the implementation of the Order; and the Registry’s inspection and/or Chamber’s review of YEKATOM’s actively and passively monitored communications, including the content thereof [...] would particularly inform the Chamber of whether YEKATOM has breached or attempted to breach any salient condition of the Order, which is highly relevant to the Chamber’s determination on the propriety of extending its terms and conditions”.³⁰
46. Pursuant to the First Decision on Restrictions, the Single Judge ordered the implementation of a certain number of measures including : (i) a limit of 60 minutes per week on Mr. Yekatom’s non-privileged calls along with stringent conditions on the persons he is allowed to call; (ii) a restriction on the languages which Mr. Yekatom can use during his non-privileged communication *i.e.* French and Sango; (iii) a prohibition on discussing any case related matter during his non-privileged telephone communications; (iv) the audio recording and active monitoring of Mr. Yekatom’s non-privileged telephone communications; (v) a restriction on Mr. Yekatom’s non-privileged visits at the ICC DC, subject to a few exceptions;³¹ and (vi) the audio recording and active monitoring of Mr. Yekatom’s non-privileged visits at the ICC DC.

²⁹ Annex A *ex parte*.

³⁰ Prosecution Submission on the Extension of Restrictions, para. 10.

³¹ Decision on Regulation 101, para. 9 (“(i) visits from the persons identified in regulations 97 and 98 of the Regulations of the Court and regulation 174(1) of the Regulations of the Registry; (ii) visits from a limited number of individuals, such as family members, whose identities and contact details will have been duly verified beforehand with the support of the Victims and Witnesses Unit”).

47. Significantly, the First and Second Registry Reports³² conclude that “[s]ince his arrival at the ICC DC, no violation of the Decisions on Restrictions have occurred”.³³
48. What is more, not only did Mr. Yekatom fully comply with all applicable conditions set out in the First Decision on Restrictions, he also demonstrated a determination to comply by *inter alia*: (i) limiting the number of persons he intends to call to a strict minimum, including only immediate family members;³⁴ and (ii) instructing Counsel to ensure that his visitor was briefed before the visit, understood all the applicable conditions and would abide with the same.³⁵
49. The fact that Mr. Yekatom : (i) has fully complied with the conditions set forth in the First Decision on Restrictions; (ii) has demonstrated the will and the determination to abide by all regulations and conditions applicable to his non-privileged telephone communications and visits; and that (iii) the First and Second Registry Reports confirm the absence of any violation since Mr. Yekatom’s arrival at the ICC DC, plainly overcome any available information and/or documentation purportedly giving rise to Reasonable Grounds to Believe Pursuant to Regulation 101 RoC.
50. In these circumstances, the Defence respectfully submits that the restrictions imposed on Mr. Yekatom in the First Decision on Restrictions should be terminated forthwith.

³² “Registry report on the implementation of the restriction on contact ordered by the single judge” (“First Registry Report”) and “Second Registry Report on the Implementation of the Restrictions on Contact Ordered by the Pre-Trial Chamber II” (“Second Registry Report”) (“First and Second Registry Reports”).

³³ First Registry Report, para. 13; Second Registry report, para. 9.

³⁴ First Registry Report, para. 7; Second Registry Report, para. 9.

³⁵ Annex B *ex parte*.

51. In the alternative, should the Pre-Trial Chamber deem necessary to maintain some of the restrictions imposed until 11 January 2019,³⁶ the Defence respectfully requests that, at the minimum: (i) the limit of 60 minutes per week imposed on Mr. Yekatom's non-privileged calls be increased to 120 minutes, distributed over four different days; (ii) the active monitoring of Mr. Yekatom's non-privileged telephone communications be terminated; and (iii) private visits between Mr. Yekatom and his wife, who is expected to visit him shortly, be authorized.

CONCLUSION

52. The absence of Reasonable Grounds to Believe Pursuant to Regulation 101 RoC, the positive attitude and good will displayed by Mr. Yekatom and the fact that Mr. Yekatom will be separated from his many children during the holiday period, justify the termination of all restrictions imposed on him at this time. In the alternative, at a minimum, the restrictions imposed until 11 January 2019 should be modified as set out above.

CONFIDENTIALITY

53. This request is classified as confidential *ex parte* as it refers to the Prosecution Submission on the Extension of Restrictions, which bears the same classification.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Pre-Trial Chamber to:

RESCIND the restrictions imposed on Mr. Yekatom's non-privileged telephone communications and visits forthwith; or

³⁶ Second Decision on Restrictions, para. 8.

IN THE ALTERNATIVE

Between now and 11 January 2019,

EASE AND MODIFY the restrictions imposed on Mr. Yekatom non-privileged telephone communications and visits as set out in paragraph 51 above.

RESPECTFULLY SUBMITTED ON THIS 20TH DAY OF DECEMBER 2018



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The Hague, The Netherlands