

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



**Original: English**

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

**Date: 25 March 2019**

**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 AND  
PATRICE-EDOUARD NGAÏSSONA***

**Confidential *ex parte*, only available to the Prosecutor  
and the Defence for Yekatom**

Decision on the Request of the Yekatom Defence for Leave to Appeal the “Fifth  
Decision Pursuant to Regulation 101 of the Regulations of the Court”

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

**The Office of the Prosecutor**  
Fatou Bensouda, Prosecutor  
James Stewart, Deputy Prosecutor

**Counsel for Alfred Yekatom**  
Stéphane Bourgon  
Mylène Dimitri

**Counsel for Patrice-Edouard Ngaïssona**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel  
for the Defence**

**States Representatives**

*Amicus Curiae*

---

## **REGISTRY**

---

**Registrar**  
Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**  
Nigel Verrill

**Detention Section**  
Paddy Craig

**Victims Participation  
and Reparations Section**

**Other**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court” or “ICC”) issues this decision on the Defence request for leave to appeal the “Fifth Decision Pursuant to Regulation 101 of the Regulations of the Court”.

## **I. PROCEDURAL HISTORY**

1. On 30 October 2018, the Prosecutor submitted under seal, *ex parte*, an application for the issuance of a warrant of arrest for Alfred Yekatom (“Yekatom”)<sup>1</sup> requesting, *inter alia*, that his contacts be restricted upon arrival at the ICC Detention Centre.<sup>2</sup> The Prosecutor submitted that there were reasonable grounds to believe that contact between Yekatom and his associates would prejudice the outcome of the investigation within the meaning of regulation 101(2)(b) of the Regulations of the Court (the “Regulations”).<sup>3</sup>

2. On 11 November 2018, the Chamber issued a warrant of arrest for Yekatom.<sup>4</sup>

3. On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic.<sup>5</sup> On the same day, the Single Judge, acting on behalf of the Chamber,<sup>6</sup> issued the “Decision pursuant to Regulation 101 of the Regulations of the Court” restricting Yekatom’s communications upon his arrival at the ICC Detention Centre for a period of two weeks.<sup>7</sup>

4. On 18 November 2018, Yekatom arrived at the ICC Detention Centre.<sup>8</sup>

5. Between 4 December 2018 and 15 February 2019, following requests by the Prosecutor,<sup>9</sup> the Chamber issued four decisions pursuant to regulation 101 of the Regulations, including the “Fifth Decision Pursuant to Regulation 101 of the

---

<sup>1</sup> ICC-01/14-01/18-2-US-Exp, together with 11 under seal, *ex parte* annexes.

<sup>2</sup> ICC-01/14-01/18-2-US-Exp, para. 357.

<sup>3</sup> ICC-01/14-01/18-2-US-Exp, para. 357.

<sup>4</sup> ICC-01/14-01/18-1-US-Exp. A public redacted version of the warrant of arrest is also available, *see* ICC-01/14-01/18-1-Red.

<sup>5</sup> ICC-01/14-01/18-17-US-Exp, paras 19-24.

<sup>6</sup> Pre-Trial Chamber II, Decision designating a Single Judge, 9 November 2018, ICC-01/14-01/18-10.

<sup>7</sup> ICC-01/14-01/18-11-Conf-Exp.

<sup>8</sup> ICC-01/14-01/18-17-US-Exp, para. 25.

<sup>9</sup> ICC-01/14-01/18-24-Conf-Red; ICC-01/14-01/18-44-Conf-Exp; ICC-01/14-01/18-69-Conf-Exp; ICC-01/14-01/18-83-Conf.

Regulations of the Court”,<sup>10</sup> extending the restrictions on Yekatom’s contacts until 1 March 2019, with one modification: on 10 January 2019, Yekatom was granted the right to have private family visits.<sup>11</sup>

6. On 11 December 2018, the Defence for Yekatom (the “Defence”) submitted a request seeking immediate disclosure of the Prosecutor’s application for issuance of a warrant of arrest (the “Request for Disclosure”).<sup>12</sup>

7. On 12 December 2018, the Chamber issued the “Order on Reclassification”, in which it rejected the Request for Disclosure, finding that the information in the warrant of arrest for Yekatom was sufficient for Yekatom to be informed within the meaning of article 67(1)(a) of the Rome Statute (the “Statute”).<sup>13</sup>

8. On 23 January 2019, upon Patrice-Edouard Ngaïssona’s (“Ngaïssona”) arrival at the ICC Detention Centre, the Single Judge, acting on behalf of the Chamber<sup>14</sup> prohibited, *inter alia*, any exchange or contact between Yekatom and Ngaïssona.<sup>15</sup>

9. On 29 January 2019, the Chamber rescinded the separation of Ngaïssona and Yekatom in the ICC Detention Centre.<sup>16</sup>

10. On 20 February 2019, the Chamber decided to join the cases against Yekatom and Ngaïssona.<sup>17</sup>

---

<sup>10</sup> Second Decision Pursuant to Regulation 101 of the Regulations of the Court, 4 December 2018, ICC-01/14-01/18-25-Conf-Exp; Third Decision Pursuant to Regulation 101 of the Regulations of the Court, 10 January 2019, ICC-01/14-01/18-52-Conf-Exp; Fourth Decision Pursuant to Regulation 101 of the Regulations of the Court, 1 February 2019, ICC-01/14-01/18-75-Conf-Exp; Fifth Decision Pursuant to Regulation 101 of the Regulations of the Court, 15 February 2019, ICC-01/14-01/18-86-Conf-Exp.

<sup>11</sup> Third Decision Pursuant to Regulation 101 of the Regulations of the Court, ICC-01/14-01/18-52-Conf-Exp.

<sup>12</sup> ICC-01/14-01/18-29-Conf-Exp.

<sup>13</sup> ICC-01/14-01/18-31-Conf, para. 6.

<sup>14</sup> Decision designating a Single Judge, 6 December 2018, ICC-01/14-01/18-90.

<sup>15</sup> Decision pursuant to Regulation 101 of the Regulations of the Court, ICC-01/14-01/18-98-Conf-Exp, para. 6.

<sup>16</sup> Second Decision pursuant to Regulation 101 of the Regulations of the Court, ICC-01/14-01/18-73-Conf-Exp. A confidential *ex parte*, redacted version is also available; see ICC-01/14-01/18-73-Conf-Exp-Red.

<sup>17</sup> Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters, ICC-01/14-01/18-87.

11. On 22 February 2019, the Defence submitted a request for leave to appeal the “Fifth Decision Pursuant to Regulation 101 of the Regulations of the Court” (the “Request” and the “Decision”, respectively).<sup>18</sup>

12. On 27 February 2019, the Prosecutor filed her response to the Request, submitting that the Request should be rejected (the “Response”).<sup>19</sup>

13. On 1 March 2019, the Chamber issued its “Decision Pursuant to Regulation 101 of the Regulations of the Court”, modifying the terms of the restrictive measures and ordering, *inter alia*, that Yekatom’s non-privileged telephone conversations and visits, with the exception of private family visits, are to be subject to random active monitoring.<sup>20</sup>

## II. APPLICABLE LAW

14. The Chamber recalls article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations.

15. The Chamber, mindful of the exceptional nature of the remedy of an interlocutory appeal, notes that, for such leave to be granted, the following requirements must be met:

(a) the decision must involve an issue that would significantly affect (i) both the “fair” and expeditious” conduct of the proceedings; or the outcome of the trial; and

(b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.<sup>21</sup>

According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is

---

<sup>18</sup> ICC-01/14-01/18-123-Conf-Exp and Fifth Decision Pursuant to Regulation 101 of the Regulations of the Court, 15 February 2019, ICC-01/14-01/18-86-Conf-Exp, respectively.

<sup>19</sup> ICC-01/14-01/18-129-Conf-Exp.

<sup>20</sup> ICC-01/14-01/18-137-Conf-Exp.

<sup>21</sup> Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, (“Appeals Judgment”), 13 July 2006, ICC-01/04-168.

disagreement or conflicting opinion.<sup>22</sup> The “issue” identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question.<sup>23</sup>

### III. ANALYSIS

16. The Defence has identified three issues for which it seeks leave to appeal.

17. With regard to the first issue presented, the Defence alleges that the Chamber extended the contact restrictions for Yekatom on the basis of the Prosecutor’s application for a warrant of arrest, and as such, the Decision was based on information unavailable to the Defence (the “First Issue”). The Defence submits that it was unable to provide informed observations as a result, thus interfering with its right to be heard prior to the imposition of restrictive measures, pursuant to Regulation 101(3).<sup>24</sup> In her Response, the Prosecutor states that the Defence has selectively quoted the Prosecutor’s prior arguments to suggest that the Prosecutor, and thereby, the Chamber, relied on arguments contained in an *ex parte* filing.<sup>25</sup>

18. As to the First Issue, the Chamber finds that the Defence has mischaracterised the Decision by omitting reference to the full range of factors considered by the Chamber, and alleging that the Decision was based on the Prosecutor’s application for a warrant of arrest. It is evident from the express reasoning of the Chamber that various sources of information were considered, all of which are sufficiently available to the Defence.<sup>26</sup> In this regard, the Chamber notes in particular that the Defence has access to the unredacted warrant of arrest for Yekatom, which contains the findings made at the time of the issuance of the warrant of arrest.<sup>27</sup>

---

<sup>22</sup> Appeals Judgment, ICC-01/04-168, para. 9.

<sup>23</sup> See, for example, Pre-Trial Chamber I, *Prosecutor v Laurent Gbagbo*, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, ICC-02/11-01/11-464, para. 8; Pre-Trial Chamber II, *Prosecutor v Bosco Ntaganda*, Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014”, 4 July 2014, ICC-01/04-02/06-322.

<sup>24</sup> ICC-01/14-01/18-123-Conf-Exp, paras 3, 13 to 18, 28 to 31, and 34 to 35.

<sup>25</sup> ICC-01/14-01/18-129-Conf-Exp, para. 1.

<sup>26</sup> ICC-01/14-01/18-86-Conf-Exp, para. 14.

<sup>27</sup> ICC-01/14-01/18-1-Conf-Exp.

19. Furthermore, with regard to the Defence arguments in relation to the Prosecutor's application for a warrant of arrest, the Chamber recalls that the issue of disclosure of this filing and Yekatom's right to be informed has been considered in full and ruled upon.<sup>28</sup>

20. Having found that the First Issue does not constitute an appealable issue, it is unnecessary for the Chamber to consider whether the remaining criteria under article 82(1)(d) of the Statute are met. Accordingly, the Chamber rejects leave to appeal this issue.

21. The second issue proposed by the Defence is that the Chamber extended the contact restrictions on Yekatom in order to avoid a conflict with the contact restrictions imposed on a co-detainee, and in doing so, violated regulation 101(2) of the Regulations (the "Second Issue").<sup>29</sup> The Defence asserts that it is essential that this issue is addressed to determine the legality of the restrictions maintained for Yekatom.<sup>30</sup> In her Response, the Prosecutor argues that the Defence has ignored the Chamber's analysis regarding the way in which contact between Yekatom and his associates could affect the investigation and the outcome of the proceedings against Ngaïssona, given the overlap in their cases. Further, the Prosecutor asserts that such reasoning falls within the plain terms of regulation 101(2)(b).<sup>31</sup>

22. The Chamber finds that the Second Issue would not significantly affect the fair and expeditious conduct of the proceedings. Contrary to the Defence's assertion, regulation 101(2) expressly provides that the Chamber may prohibit, regulate, or set conditions for the contact between a detained person and any other person where there are reasonable grounds to believe that such contact could prejudice or otherwise affect the outcome of the proceedings against a detained person or any other investigation. It is thus clearly within the purview of the Chamber to consider whether altering the existing restrictions in place for Yekatom could impact upon other investigations or proceedings.

---

<sup>28</sup> Order on Reclassification, 1 February 2019, ICC-01/14-01/18-31-Conf, para. 6.

<sup>29</sup> ICC-01/14-01/18-123-Conf-Exp, paras 4, 20 to 22, 32 to 33, and 36 to 37.

<sup>30</sup> ICC-01/14-01/18-123-Conf-Exp, para. 20.

<sup>31</sup> ICC-01/14-01/18-129-Conf-Exp, para. 1.

23. Furthermore, the Defence has overlooked the analysis in the Decision concerning the way in which contact between Yekatom and his associates could affect the investigation and the outcome of the proceedings against Ngaïssona, given the overlap in their cases.<sup>32</sup> Accordingly, the Chamber rejects leave to appeal this issue.

24. The third issue proposed by the Defence is that the Chamber refused to lessen the restrictions against Yekatom on the basis that to do so would result in too onerous a burden on the Detention Centre, and that this violates regulation 101(2) of the Regulations (the "Third Issue").<sup>33</sup> The Defence argues that there is no provision in regulation 101 of the Regulations that allows for restrictions on contact to be based upon the workload of the Detention Centre.<sup>34</sup>

25. In her Response, the Prosecutor argues that the Defence has misunderstood the Chamber's analysis, stating that the Chamber did not solely focus on the potential burden on the Detention Centre, but evaluated the restrictions in place and how a burden on the Detention Centre could interfere with the active monitoring regime, and thus the protection of witnesses and victims.<sup>35</sup>

26. At the outset, the Chamber notes that it is the responsibility of the Chamber to consider the practicalities involved in the implementation of any instructions provided to the Detention Centre. As such, it was appropriate for the Chamber to take into account in the Decision any potential burden that variations in the active monitoring scheme may place upon the Detention Centre, in particular, considering that the active monitoring regime is required in order to protect witnesses and victims.

27. That said, in relation to the Third Issue, the Defence has misunderstood the Decision by erroneously asserting that it was based upon the capacity of the Detention Centre. As clearly set out in the Decision, the Chamber considered that Yekatom is able to receive family visits, and has unrestricted contact with Defence counsel.<sup>36</sup> On this basis, the Chamber determined that Yekatom was able to remain informed of the

---

<sup>32</sup> ICC-01/14-01/18-86-Conf-Exp, para. 14.

<sup>33</sup> ICC-01/14-01/18-123-Conf-Exp, para 5. The Chamber notes while in paragraph 5 the Defence refers to Regulation 102 (2) of the Regulations, this appears to be an error. The Chamber considers that the Defence intended to refer to Regulation 101, as it does later in the filing at paragraphs 26 and 27.

<sup>34</sup> ICC-01/14-01/18-123-Conf-Exp, paras 26 and 27.

<sup>35</sup> ICC-01/14-01/18-129-Conf-Exp, para.. 1.

<sup>36</sup> ICC-01/14-01/18-86-Conf-Exp, para. 17.



well-being of those close to him, and provisionally extended the communication and contact restrictions.<sup>37</sup> As such, the Chamber finds that the Third Issue does not constitute an appealable issue and accordingly, the Chamber rejects leave to appeal this issue.

28. Noting that the First Issue and the Third Issue do not constitute appealable issues, and that the Second Issue would not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary for the Chamber to consider whether the remaining criteria under article 82(1)(d) of the Statute have been met.

**FOR THESE REASONS, THE CHAMBER HEREBY**

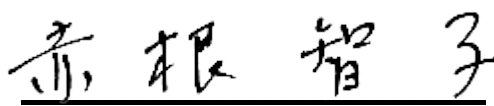
**REJECTS** the Request for leave to appeal

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

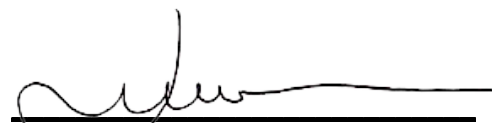
---

**Judge Antoine Kesia-Mbe Mindua**  
**Presiding Judge**

---

**Judge Tomoko Akane**

---

**Judge Rosario Salvatore Aitala**

Dated this Monday, 25 March 2019

At The Hague, The Netherlands

---

<sup>37</sup> ICC-01/14-01/18-86-Conf-Exp.