

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No. ICC-01/14-01/18

Date: 29 May 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

**Decision on the Yekatom Defence Request for Leave to Appeal the 15 April 2019
Decision Pursuant to Regulation 101**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for Alfred Yekatom

Stéphane Bourgon
Mylène Dimitri

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops

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 of the International Criminal Court issues this Decision on the ‘Demande de la Défense de M. Yekatom aux fins d’obtenir l’autorisation d’interjeter appel de la «Decision Pursuant to Regulation 101 of the Regulations of the Court» rendue le 15 avril 2019’ (the ‘Request’).¹

I. PROCEDURAL HISTORY

1. On 30 October 2018, the Prosecutor submitted under seal, *ex parte*, an application for the issuance of warrants of arrest for Patrice-Edouard Ngaïssona and Alfred Yekatom,² and further requesting, *inter alia*, that their contacts be restricted upon arrival at the ICC Detention Centre.³
2. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’.⁴
3. On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic.⁵ On the same day, the Single Judge, acting on behalf of the Chamber,⁶ 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.⁷
4. Between 4 December 2018 and 15 February 2019, upon request by the Prosecutor,⁸ the Chamber issued four decisions pursuant to regulation 101 of the Regulations of the Court (the ‘Regulations’),⁹ extending the contact restrictions for Yekatom.

¹ ICC-01/14-01/18-182-Conf. This document was originally filed as confidential *ex parte* to the Prosecutor and the Defence, and was subsequently reclassified as confidential.

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

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

⁴ 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.

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

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

⁷ ICC-01/14-01/18-11-Conf-Exp.

⁸ 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.

⁹ 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

5. On 20 February 2019, the Chamber issued the 'Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters' thereby joining the cases against Yekatom and Ngaïssona.¹⁰

6. On 1 March 2019, the Chamber issued the 'Decision Pursuant to Regulation 101 of the Regulations of the Court' thereby, *inter alia*, provisionally extending, until 15 April 2019, the restrictive measures concerning Yekatom's contacts.¹¹

7. On 15 April 2019, the Chamber issued its 'Decision Pursuant to Regulation 101 of the Regulations of the Court', ordering, *inter alia*, the extension of the restrictive measures concerning Yekatom's communications and contacts for the remainder of the pre-trial proceedings (the 'Decision').¹²

8. On 23 April 2019, the Yekatom Defence submitted the Request.¹³

II. APPLICABLE LAW

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

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

- i. the decision must involve an issue that would significantly affect both the 'fair' and 'expeditious' conduct of the proceedings; or the outcome of the trial; and
- ii. in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

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.

¹⁰ ICC-01/14-01/18-87.

¹¹ ICC-01/14-01/18-137-Conf-Exp.

¹² ICC-01/14-01/18-176-Conf-Exp. A confidential redacted version is also available, see ICC-01/14-01/18-176-Conf-Red.

¹³ ICC-01/14-01/18-182-Conf.

11. The above requirements are cumulative in nature, and therefore, each criterion must be met in order for leave to appeal to be granted.¹⁴

12. The Chamber recalls, in particular, that 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 disagreement or conflicting opinion’.¹⁵ ‘[T]he “issue” identified by the appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or an abstract legal question’.¹⁶

III. SUBMISSIONS

13. The Yekatom Defence seeks leave to appeal on the following four proposed issues (cumulatively, the ‘Four Issues’):

- (i) Whether the Decision violates regulation 101(2) of the Regulations as it does not establish the existence of reasonable grounds to believe (the ‘First Issue’);
- (ii) Whether the Decision violates regulation 101(3) of the Regulations in that it is based on redacted findings that are not available to the Defence. The Defence submits that it did not have a real opportunity to submit its observations in relation to the Chamber’s finding, based on the fact that a portion of the reasoning was redacted vis-à-vis the Defence (the ‘Second Issue’);
- (iii) Whether the Decision violates the rule of proportionality by failing to take into consideration whether there is an inclination or possibility that Yekatom would contact his so-called associates, given that Yekatom has undertaken to

¹⁴ See, for example, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on “Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’”, 24 July 2015, ICC-01/05-01/08-3273, para. 8.

¹⁵ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

¹⁶ Pre-Trial Chamber I, *The 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; see also Pre-Trial Chamber II, *The 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, para. 10.

respect, and has continued to respect, the restrictive measures in place (the 'Third Issue'); and

- (iv) The Decision violates regulation 101(2) and (3) of the Regulations as it reverses the burden of proof set by these provisions. The Defence refers specifically to paragraph 32 of the Decision which states that '[t]o extend the current regime on contacts [...] and to maintain it for the remainder of the pre-trial proceedings' and 'to reassess the current regime concerning the restrictions on Yekatom's and Ngaissona's contacts if necessary' (the 'Fourth Issue').

14. The Yekatom Defence further advances, in essence, that considering the number of filings that have been submitted in relation to the contact restrictions, the Four Issues affect the expeditiousness of proceedings; that the continuation of restrictive measures when there have been no incidents casts a shadow on the proceedings and has undermined Yekatom's confidence in the administration of justice; and that the procedure surrounding the imposition of contact restrictions has allowed the Prosecutor to make negative allegations against Yekatom without the Defence having access to the content of the allegations, something that is likely to continue if the Four Issues are not immediately resolved.

15. In the view of the Defence, the Four Issues undermine the fairness of the proceedings, and a ruling from the Appeals Chamber would resolve this matter of frequent litigation that has the potential to derail the proceedings.

IV. ANALYSIS

16. The Chamber finds that in relation to the First Issue, the Yekatom Defence merely disagrees with the Chamber's decision to extend contact restrictions for Yekatom, and has overlooked the analysis of the Chamber and the various factors considered in determining that there are reasonable grounds to believe that contact between Yekatom, Ngaissona, and their associates could affect the investigation and the outcome of the proceedings. The Chamber refers to its findings in the Decision on this point.¹⁷

¹⁷ ICC-01/14-01/18-176-Conf-Red, para. 31.

17. 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) are met.

18. Turning to the Second Issue, the Chamber notes that the Yekatom Defence has access to the redacted version of the 'Prosecution's Observations Pursuant to the "Decision Pursuant to Regulation 101 of the Regulations of the Court" (ICC-01/14-01/18-137-Conf-Exp)' (the 'Prosecutor's Observations'),¹⁸ and as such, was informed of the Prosecutor's Observations within the meaning of regulation 101(3). Contrary to its claims, the Yekatom Defence had the opportunity to submit its views, which were fully considered by the Chamber in the Decision.

19. Furthermore, the Yekatom Defence has not demonstrated how leave to appeal the Second Issue would affect the fair or expeditious conduct of proceedings or the outcome of the trial, seeing as the Yekatom Defence has access to the Prosecutor's Observations and the Decision, and had the opportunity to present its views and have them considered in full.

20. In regard to the Third Issue, the Chamber finds that it constitutes a mere disagreement with the manner in which the Chamber has appraised the various factors and interests at stake. The Chamber recalls that it specifically took into consideration Yekatom's commitment to comply with the regulations in force when it found that 'no incidents have occurred in relation to Yekatom's contacts and communications either during the time that all his communications were actively monitored or during the time that his communications were actively monitored at random'.¹⁹ This led the Chamber to reject the Prosecutor's request to order the resumption of active monitoring of all of Yekatom's communications. The Chamber decided nonetheless to maintain the regime of active monitoring at random in light of other relevant factors, which the Chamber has outlined in its Decision and will not repeat here.²⁰ As previously clarified by the Chamber,²¹ regulation 101 of the Regulations requires a balancing of the different interests at stake, and in addition to considering Yekatom's

¹⁸ ICC-01/14-01/18-170-Conf-Red.

¹⁹ ICC-01/14-01/18-176-Conf-Red, para. 30.

²⁰ ICC-01/14-01/18-176-Conf-Red, para. 31.

²¹ Decision on the Defence Requests for Leave to Appeal the 1 March 2019 Decision Pursuant to Regulation 101, 29 March 2019, ICC-01/14-01/18-161-Conf-Exp, para. 32.

behaviour, the Chamber is duty bound to consider *all* other relevant factors. In an attempt to re-litigate the issue, the Yekatom Defence is merely repeating arguments which were already properly considered by the Chamber.²²

21. Turning to the Fourth Issue, the Chamber considers that this reflects a misunderstanding on the part of the Yekatom Defence. The Decision does not result in a reversal of the standard set out in regulation 101(2) and (3), as alleged. It was for the Prosecutor to make a request relating to contact restrictions in accordance with the applicable provisions, and the Chamber has extended the restrictions based on a careful review of the submissions of the parties and the Registry reports.

22. Finally, the Chamber notes that the Yekatom Defence cannot use the prospect of submitting future filings on the same issue as an argument regarding the expeditiousness of the proceedings.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request.

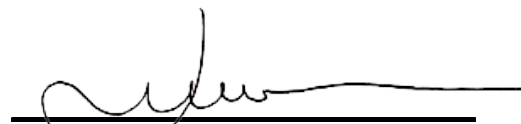
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Wednesday, 29 May 2019

At The Hague, The Netherlands

²² Decision on the Defence Requests for Leave to Appeal the 1 March 2019 Decision Pursuant to Regulation 101, 29 March 2019, ICC-01/14-01/18-161-Conf-Exp, para. 32.