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**International
Criminal
Court**

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No. ICC-01/14-01/18

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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

***THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Confidential

**Second Decision on Mr Yekatom's Restrictions on Contacts and
Communications in Detention**

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

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TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 57, 61(11), 64 and 68(1) of the Rome Statute (the 'Statute'), Regulations 96 and 99-101 of the Regulations of the Court (the 'Regulations') and Regulations 167-170, 173-175, 177-180, 182-185 and 187 of the Regulations of the Registry, issues this 'Second Decision on Mr Yekatom's Restrictions on Contacts and Communications in Detention'.

I. Procedural history and submissions

1. Since 19 March 2020, measures have been in place at the Detention Centre in order to protect the health and safety of the detained persons during the ongoing Coronavirus Pandemic (the 'Temporary Measures').¹ These measures were extended until 17 September 2020.²
2. On 17 April 2020, the Chamber issued its first decision on Mr Yekatom's contacts and communications (the 'First Restrictions Decision').³ It decided to, *inter alia*, maintain the restrictions on his contacts and communications during detention (the 'Current Restrictions') and adopt the reporting procedure put in place by Pre-Trial Chamber II (the 'PTC II') with the modification that the Registry was ordered to henceforth submit its report every three months (the 'Reporting Procedure').⁴ The Chamber recalls the procedural history set out therein.⁵ As per the Current Restrictions, Mr Yekatom is, *inter alia*, only

¹ See Registry Update on Detention Centre COVID-19 Measures, 3 July 2020, ICC-01/14-01/18-578-Conf, para. 1 (with confidential Annex I; and confidential *ex parte* Annex II, only available to the Registry, the Ngaïssona Defence and the Yekatom Defence); Registry Second Update on Detention Centre COVID-19 Measures, 23 July 2020, ICC-01/14-01/18-597-Conf, para. 4 (with one confidential annex).

² On 20 August 2020, the Registry informed the Chamber per email that the Temporary Measures have been extended from 17 August 2020 until 17 September 2020 as per Memorandum 2020/PRES/00077-18. The Registry further informed the Chamber that the Memorandum was issued to all detainees and will be put on the case record by way of a transmission filing shortly.

³ Decision on Mr Yekatom's Restrictions on Contacts and Communications in Detention, ICC-01/14-01/18-485-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence, the Prosecution and the Registry, p. 16.

⁴ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, p. 16.

⁵ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, paras 1-10.

permitted to have non-privileged telephone calls with individuals duly verified by the Registry and not permitted to discuss the present case.⁶

3. On 5 May 2020, the Single Judge rejected the request of the Yekatom Defence (the 'Defence') to modify the Current Restrictions to allow Mr Yekatom to make phone calls three days per week,⁷ and ordered the Registry to inform the Chamber about any changes in the Temporary Measures (the 'Decision on the Modification Request').⁸
4. On 15 June 2020, the Office of the Prosecutor (the 'Prosecution') provided its preliminary list of witnesses, indicating, *inter alia*, which witnesses it is already certain it will call to testify (the 'Preliminary Witness List').⁹
5. On 1 July 2020, the Registry informed the Chamber of an incident whereby the person with whom Mr Yekatom was speaking (the 'Interlocutor') recorded a part of their conversation in order to play it for a third party who was not on Mr Yekatom's verified contact list (the 'Third Party' and the 'Incident', respectively).¹⁰ The Chamber directed the Registry to make observations on the Incident in its upcoming report following the Reporting Procedure.¹¹
6. On 17 July 2020, the Registry filed its first report on the implementation of restrictions as ordered in the First Restrictions Decision (the 'First Registry Report').¹² It stated that the Chief Custody Officer (the 'CCO') concluded that

⁶ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, paras 13, 32.

⁷ Yekatom Defence Observations on Twelfth Registry Report on the Implementation of the Restrictions on Contacts by Mr. Alfred Yekatom Ordered by Pre-Trial Chamber II, ICC-01/14-01/18-494-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence, the Prosecution and the Registry (the 'Modification Request'), para. 10.

⁸ Decision on the Yekatom Defence's Request to Modify the Active Monitoring Restriction, ICC-01/14-01/18-507-Conf-Exp, confidential *ex parte*, only available to Yekatom Defence, the Prosecution and the Registry.

⁹ See Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528, ICC-01/14-01/18-553 (the 'Preliminary Witness List Submission') (with confidential Annex A; and confidential *ex parte* Annex B, only available to the Prosecution).

¹⁰ Email from the Registry to the Chamber and the Yekatom Defence, 1 July 2020, at 13:58.

¹¹ Email from the Chamber to the Registry and the Yekatom Defence, 2 July 2020, at 15:39.

¹² First Registry Report on the Implementation of the Restrictions on Contact of Mr Alfred Yekatom Ordered by Chamber Trial V, ICC-01/14-01/18-592-Conf-Exp, confidential *ex parte*, only available to Yekatom Defence and the Registry (with one confidential *ex parte* annex, only available to the Yekatom Defence and the Registry) (confidential redacted version notified the same day, ICC-01/14-01/18-592-Conf-Exp-Red).

by virtue of the Interlocutor recording a message to relay to the Third Party, Mr Yekatom has violated the Current Restrictions.¹³ The Registry added that the substance of the recorded conversation, however, referred to private matters and was therefore, in the Registry's view, not in breach of the Chamber's order.¹⁴ As a result, the CCO removed the Interlocutor from Mr Yekatom's non-privileged contact list.¹⁵

7. On 23 July 2020, the Registry provided its update on the Temporary Measures, detailing the medical advice provided to the Registrar by the Medical Officer and including a risk assessment model for the easing of these measures.¹⁶
8. On the same day, the Prosecution submitted its observations on the First Registry Report, requesting that the Current Restrictions be maintained and the frequency of random active monitoring be increased (the 'Request').¹⁷ The Prosecution reiterates its submissions concerning Mr Yekatom's network of supporters in the Central African Republic (the 'CAR') and the risk to witnesses.¹⁸ Further, the Prosecution requests information concerning the identity of the Third Party involved in the Incident in order to determine whether there are any risks to witness security and integrity of evidence that it intends to rely at trial.¹⁹ Lastly, the Prosecution requests that the Registry review the last period of calls to assess any other security breaches with the Interlocutor or others and provide it with all relevant information.²⁰

¹³ First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 12.

¹⁴ First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 13.

¹⁵ First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 16.

¹⁶ Registry Second Update on Detention Centre COVID-19 Measures, ICC-01/14-01/18-597-Conf (with confidential annex, ICC-01/14-01/18-597-Conf-Anx).

¹⁷ Prosecution's Observations on the "First Registry Report on the Implementation of the Restrictions on Contact of Mr Alfred Yekatom Ordered by Trial Chamber V, (ICC-01/14-01/18-592-Conf-Exp-Red)", ICC-01/14-01/18-599-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence, the Registry and the Prosecution, paras 5-8.

¹⁸ Request, ICC-01/14-01/18-599-Conf-Exp, paras 9-12.

¹⁹ Request, ICC-01/14-01/18-599-Conf-Exp, para. 14.

²⁰ Request, ICC-01/14-01/18-599-Conf-Exp, para. 15.

9. On 28 July 2020, the Defence filed its observations on the First Registry Report (the 'Defence Observations').²¹ The Defence acknowledges that Mr Yekatom breached the Current Restrictions.²² Furthermore, it informs the Chamber that Mr Yekatom apologises for this breach and is willing to take steps in order to avoid further incidents.²³ The Defence asserts however that the Incident 'in no way involved interference with or threats to Prosecution witnesses, nor did [Mr Yekatom] disclose any confidential information',²⁴ and does not object to disclosure of the relevant transcripts to the Prosecution.²⁵ With respect to the Prosecution's suggestion that the Registry review Mr Yekatom's past calls and that active monitoring be intensified, the Defence notes that the 'Registry is free to do so at any time and has not requested any orders from the Trial Chamber to that effect.'²⁶
10. The Defence submits that, 'given that there are no changed circumstances' since the Chamber's last decision on Mr Yekatom's restrictions, it has no further requests for modification of the Current Restrictions at this time.²⁷ It maintains its position that the Current Restrictions together with the Temporary Measures are 'onerous and disproportionate' and 'incompatible with the presumption of innocence', and argues that the appropriate remedy is for 'the Chamber to grant the Yekatom Second Motion for Interim Release'.²⁸

II. Classification

11. The Chamber notes that the respective submissions by the parties are filed as confidential *ex parte*, only available to the Yekatom Defence, the Prosecution and the Registry. The Chamber sees no reason justifying this classification.

²¹ Yekatom Defence Observations on First Registry Report on the Implementation of the Restrictions on Contacts by Mr. Alfred Yekatom ordered by Trial Chamber V, ICC-01/14-01/18-606-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence, the Prosecution and the Registry.

²² Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 7.

²³ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, paras 4-6.

²⁴ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 7.

²⁵ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 8.

²⁶ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 9.

²⁷ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 10.

²⁸ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 11 *referring to* Second Yekatom Defence Motion for Interim Release, 27 July 2020, ICC-01/14-01/18-603-Conf (public redacted version notified the same day).

Furthermore, the Chamber notes that the Yekatom Defence does not object to its submissions being made available to the Ngaïssona Defence.²⁹ The Prosecution does not provide observations but the Chamber recalls that it has requested reclassification of similar submissions as confidential.³⁰ Accordingly, the Chamber considers it appropriate to reclassify the parties' submissions as confidential.

III. Analysis

12. The Chamber recalls the standard and the criteria of assessment set out in its First Restrictions Decision.³¹ Notably, the Chamber recalls that it will regularly review the restrictions in place, where circumstances change.³² The Chamber continues to be guided by its obligation to review the restrictions in place and to 'carefully balance the need for and proportionality of the restrictions against the important right accorded to detained persons to have contact'.³³
13. At the outset, the Chamber recalls the circumstances underlying the First Restrictions Decision and the Decision on the Modification Request. Therein, the Chamber noted that the security situation in the CAR continues to remain fragile and volatile; and given his position as a member of the parliament during his arrest, Mr Yekatom would have the means to continue to exercise influence over the members of the Anti-Balaka in his immediate and extended community.³⁴ The Chamber further considered it relevant that a significant number of Prosecution witnesses reside in the CAR and could fall within Mr Yekatom's sphere of influence, leaving them amenable to risk of interference and/or security, especially those whose identities are known to Mr Yekatom and whose security is at risk.³⁵ The Chamber also took note of the

²⁹ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 12.

³⁰ See Prosecution's Submission in Compliance of the Single Judge's "Order to Review Ex Parte Filings on the Case Records", ICC-01/14-01/18-492, 22 May 2020, ICC-01/14-01/18-529, para. 6.

³¹ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, paras 15-18, 20.

³² First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 18.

³³ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 18, *referring, inter alia, to* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on Mr Bosco Ntaganda's appeal against the decision reviewing restrictions on contacts of 7 September 2016, 8 March 2017, ICC-01/04-02/06-1817-Conf (public redacted version notified the same day), para. 72. *See also* paras 44, 102.

³⁴ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 21.

³⁵ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 21.

breach reported during the reporting period preceding the First Restrictions Decision³⁶ and, having regard to the circumstances of the case, found that there were reasonable grounds to believe that the lifting of the Current Restrictions could prejudice the outcome of the proceedings.³⁷

14. In view of the Chamber, the aforementioned circumstances have not changed.³⁸ In assessing whether or not the Current Restrictions remain warranted, the Chamber will assess any new circumstances since the First Restrictions Decision and the Decision on the Modification Request.
15. First, the Chamber notes that the Prosecution has filed its Preliminary Witness List containing identities of witnesses that the Prosecution is 'already certain it will call to testify'.³⁹ The Chamber considers Mr Yekatom's awareness of this list relevant to its present assessment. Additionally, the Chamber notes that protective measures have not yet been put in place in respect of certain witnesses,⁴⁰ *inter alia* because the Coronavirus Pandemic continues to impact the Prosecution's and the Registry's ability to conduct individual risk assessments and implement necessary protection measures.⁴¹ The Chamber further notes that the Prosecution considers the Preliminary Witness List to be further subject to, *inter alia*, 'witness availability, [and] security', thereby indicating that there are security concerns in respect of certain witnesses that may affect their ability to testify before the Chamber.⁴²
16. Second, the Chamber takes note of the Incident during the last reporting period. The Chamber recalls that Mr Yekatom is only permitted to have non-privileged telephone calls with individuals duly verified in advance by the Registry.⁴³ During the Incident, the Interlocutor, who was on Mr Yekatom's non-privileged telephone contact list, recorded a message intended for the Third Party, who

³⁶ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 22.

³⁷ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 23.

³⁸ See also Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 10.

³⁹ Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 1. See also Annex A to the Preliminary Witness List Submission, ICC-01/14-01/18-553-Conf-AnxA, pp 1-5.

⁴⁰ See Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 4.

⁴¹ Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 13.

⁴² Preliminary Witness List Submission, ICC-01/14-01/18-553, para. 14.

⁴³ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, paras 13, 32.

was not on this list.⁴⁴ The Chamber considers that Mr Yekatom thereby indirectly communicated with the Third Party, who has not been verified in advance by the Registry. Irrespective of the content of the recorded message, Mr Yekatom has breached the Current Restrictions.

17. The Chamber recalls the Defence's acknowledgment of this breach and appreciates Mr Yekatom's apology in this regard. Nonetheless, the Chamber recalls that Mr Yekatom has shown remorse for breaching the Current Restrictions before,⁴⁵ and yet, another incident occurred during the last reporting period, albeit concerning a different restriction. The Chamber is therefore appreciative of the active preventative steps envisaged by the Defence.
18. The Chamber finds that since the First Restrictions Decision and the Decision on the Modification Request, there have been no other changes in circumstances warranting a modification of the Current Restrictions.
19. Having regard to these factors, the Chamber will now review the necessity and proportionality of the Current Restrictions. The Chamber is persuaded that, given the seriousness of the circumstances underlying the First Restrictions Decision and the Decision on the Modification Request, which remain unchanged, there are reasonable grounds to believe that the lifting of the Current Restrictions could prejudice the outcome of the proceedings, namely by negatively impacting on the Prosecution's ongoing investigations and the protection of victims and witnesses in this case. This is especially the case in light of the challenges faced by the Court in complying with its obligation to take appropriate protective measures for victims and witnesses under Article 68(1) of the Statute during the Coronavirus Pandemic.⁴⁶
20. However, the Chamber does not consider that increasing the frequency of active monitoring of Mr Yekatom's non-privileged telephone calls is necessary or proportionate in light of the Incident.⁴⁷ As pointed out by the Registry,⁴⁸ the

⁴⁴ See First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 14.

⁴⁵ Modification Request, ICC-01/14-01/18-494-Conf-Exp, paras 2-3.

⁴⁶ See above paragraph 15.

⁴⁷ Request, ICC-01/14-01/18-599-Conf-Exp, paras 5-8.

transcript of the Incident reflects that Mr Yekatom informed the Interlocutor to remind the Third Party about the restrictions on his non-privileged telephone contact list, in particular that he may only speak with individuals who have been verified in advance by the Registry.⁴⁹ The Chamber considers that the substance of the conversation does not appear to relate to matters that may tend to compromise witness security. The Chamber also recalls that the Interlocutor has since been removed from Mr Yekatom's non-privileged contact list.⁵⁰ Lastly, the Chamber notes that, following the Incident, all detained persons have been reminded by the Registry that 'during non-privileged telephone conversations their interlocutors are not allowed to put their phone on speakerphone' in order to 'prevent non-authorized telephone contacts to listen to telephone conversations'.⁵¹

21. Nonetheless, noting the Prosecution's concurrent obligations pursuant to Article 68 of the Statute and the fact that the Defence does not object,⁵² the Chamber finds it appropriate to provide the transcript of the conversation to the Prosecution, including the identity of the Interlocutor. Accordingly, it directs the Registry to reclassify filing ICC-01/14-01/18-592-Conf-Exp-Anx as confidential *ex parte*, only available to the Yekatom Defence, the Registry and the Prosecution. The Chamber considers that this provides the Prosecution with sufficient information to assess and discharge its obligations and 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.
22. As regards the Prosecution's request to direct the Registry to review Mr Yekatom's non-privileged telephone calls for the last reporting period, the Chamber recalls its order to report on any violations to the Current Restrictions and that Regulation 175(6) of the Regulations of the Registry requires that a copy of the recording of *all* actively monitored phone calls be forwarded to the

⁴⁸ First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 14.

⁴⁹ Annex to the First Registry Report on the Implementation of the Restrictions on Contact of Mr Alfred Yekatom Ordered by Chamber Trial V, ICC-01/14-01/18-592-Conf-Exp-Anx, p. 1 lines 7, 9, 11.

⁵⁰ First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 16.

⁵¹ See First Registry Report, ICC-01/14-01/18-592-Conf-Exp-Red, para. 15.

⁵² Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 8.

Registrar for review.⁵³ The Chamber is confident that the Registry is complying with its obligations and would have reported any breaches, including incidents involving the Interlocutor, if any. Therefore, the Chamber considers that its intervention is not needed.

23. Lastly, the Chamber notes that the Defence has, again, attempted to introduce the impact of the Temporary Measures in the present review of the Current Restrictions as being disproportionate to Mr Yekatom's rights.⁵⁴ The Chamber recalls its earlier determination that Temporary Measures do not feature in the assessment of proportionality of the restrictions.⁵⁵ As the Chamber has held before, these measures have been imposed to protect the health and safety of all detained persons as well as that of the personnel charged with their care and, as such, fall within the purview of the Registrar pursuant to Regulation 103 of the Regulations.⁵⁶ Further, these measures amount to decisions of a medical nature pursuant to Regulation 155(2) of the Regulations of the Registry. The Chamber also recalls that these measures are exceptional and result from an unprecedented situation beyond anyone's immediate control. These measures are not imposed on Mr Yekatom specifically. Complaints against the Temporary Measures must be made in accordance with the complaints procedure on detention matters, as set out in the Regulations of the Registry.
24. In reviewing the necessity and proportionality of the Current Restrictions, the Chamber has assessed Mr Yekatom's rights, in light of the passage of time, against his recent breach, his knowledge about the anticipated witnesses at trial, and the impact of the Coronavirus Pandemic on the implementation of protective measures for victims and witnesses. Having regard to these considerations and the Chamber's obligations under Articles 68(1) and 64(2) of the Statute, the Chamber finds that the Current Restrictions continue to remain

⁵³ (Emphasis added).

⁵⁴ Defence Observations, ICC-01/14-01/18-606-Conf-Exp, para. 11.

⁵⁵ First Restrictions Decision, ICC-01/14-01/18-485-Conf-Exp, para. 26.

⁵⁶ See *further* Decision on the Defence Request for In-Person Visit to Mr Ngaïssona to Prepare for First Status Conference, 29 June 2020, ICC-01/14-01/18-575-Conf, para. 24; Decision on the Defence Request to Grant Privileged Status to Medical Expert and to Allow In-Person Visits, 24 June 2020, ICC-01/14-01/18-567-Conf, paras 13-14.

necessary and proportional to ensure a fair trial and protect the integrity of the proceedings.

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES to maintain the Current Restrictions;

ORDERS the Registry to reclassify filings ICC-01/14-01/18-599-Conf-Exp and ICC-01/14-01/18-606-Conf-Exp as confidential;

ORDERS the Registry to reclassify the filing ICC-01/14-01/18-592-Conf-Exp-Anx, as confidential *ex parte*, only available to the Yekatom Defence, the Registry and the Prosecution; and

REJECTS the remainder of the Request.

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



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 21 August 2020

At The Hague, The Netherlands