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

Date: **8 September 2020**

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 Redacted

Public Redacted Version of “Prosecution’s Response to ‘Second Yekatom Defence Motion for Interim Release Request for Interim Release’ (ICC-01/14-01/18-603-Conf)”, 7 August 2020, ICC-01/14-01/18-617-Conf

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the Second Yekatom Defence Motion for Interim Release (“Motion”).¹ The Motion fails because (1) there are no favourable changed circumstances since the Chamber’s 28 April 2020 Decision on Detention; (2) the purported change – namely, the possibility of the Accused’s release in the territory of the Kingdom of Belgium (“Belgium”) is speculative; and (3) even if the Belgian authorities are willing to accept YEKATOM, the alternative conditions otherwise requiring detention under article 58(1) continue to prevail, and there are additional circumstances militating against his interim release.

II. CONFIDENTIALITY

2. This Response is filed as “Confidential” pursuant to regulation 23*bis* (2) of the Regulations of the Court (“RoC”), as it concerns a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. No Changed Circumstances

3. Since the Chamber’s 28 April 2020 rejection of YEKATOM’s initial application for interim release (“28 April Decision”), there have been no changed circumstances within the meaning of article 60(3). As the Chamber then determined, YEKATOM’s continued detention is required under article 58(1)(b). This remains the case, as the factual conclusions in the 28 April Decision do not solely hinge on YEKATOM’s proposed release in Central African Republic (“CAR”).

¹ ICC-01/14-01/18-603-Conf.

i. The facts underlying the 28 April Decision remain unchanged

4. *First*, the Chamber found YEKATOM to be a flight risk and that his detention was necessary to ensure his appearance for trial.² That fact has not changed. The Chamber specifically determined that, given the serious nature of the charges as confirmed and the potential lengthy sentence they each carry if he is convicted, YEKATOM has a compelling incentive to flee.³ The Chamber moreover determined that YEKATOM has the means to abscond at his disposal; in particular, that he has a network of supporters in CAR, and has access to available resources, including financial means.⁴

5. *Second*, the Chamber determined that YEKATOM's detention was necessary to "ensure that he does not obstruct and endanger the investigation or the court proceedings, particularly through interference with victims and witnesses".⁵ This too, has not changed. The Chamber found that YEKATOM may continue to exercise influence over his supporters given his position as a Member of Parliament of CAR when arrested, and that he potentially continues to exercise influence undermining victims' safety. In this respect, the Chamber expressly referenced YEKATOM's [REDACTED] imposed as a condition of his detention.⁶ The Chamber further noted that witnesses whose identities were known to the Accused may render them susceptible to improper interference.⁷

6. *Third*, the Chamber found that the risk of YEKATOM's continuing commission of at least related crimes within the Court's jurisdiction justify his detention.⁸ There, the Chamber noted [REDACTED] that Anti-Balaka groups continue to commit grave

² ICC-01/14-01/18-495-Red3, para. 26.

³ ICC-01/14-01/18-495-Red3, para. 24.

⁴ ICC-01/14-01/18-495-Red3, para. 25; see ICC-01/14-01/18-494-Conf-Exp, para. 7 [REDACTED].

⁵ ICC-01/14-01/18-495-Red3, para. 31.

⁶ ICC-01/14-01/18-495-Conf-Exp, para. 30; see ICC-01/14-01/18-485-Conf-Exp; see also ICC-01/14-01/18-467-Conf-Exp, paras. 25-26.

⁷ ICC-01/14-01/18-495-Conf-Exp-Red, paras. 29, 30.

⁸ ICC-01/14-01/18-495-Red3, para. 35.

violations of human rights and international humanitarian law and particularly, that there was no guarantee that YEKATOM would not commit such crimes given the prevalence of armed groups [REDACTED].⁹ The Chamber further took cognisance [REDACTED].¹⁰

7. The Motion's characterisation of the 28 April Decision as "heavily based on [YEKATOM's] proposed release to the Central African Republic" intends to create the impression of a changed circumstance where there is none. Even if YEKATOM's previous proposed release to CAR may have had a bearing on the facts underlying the Chamber's conclusions, the assessed risks clearly transcend the location of the Accused's proposed release. Thus, YEKATOM's variation of this aspect of his initial application for release gives rise to no appreciable changed circumstances warranting the Chamber's modification of its detention ruling.

ii. The prospect of YEKATOM's release to Belgium is speculative

8. YEKATOM's proposed release in Belgium is entirely speculative. Absent the Belgian authorities' accession to this proposal, the request cannot be realised.¹¹ Contrary to the Motion, YEKATOM's interim release there is not presently an "availab[le]" option.¹² The Motion thus presents no actual 'changed circumstances' within the meaning of article 60(3). Instead, it simply presents a hypothetical scenario, and should be dismissed on this basis alone.

9. Certainly, article 60(3) does not require a Chamber to revisit its prior detention ruling on speculative grounds. Absent the demonstration of actual changed circumstances, doing so would contravene the interests of judicial economy at the

⁹ ICC-01/14-01/18-495-Conf-Red2, para. 34.

¹⁰ ICC-01/14-01/18-495-Conf-Red2, para. 34.

¹¹ The Prosecution takes note of the request of the Belgian authorities for an extension of time to submit observations ICC-01/14-01/18-615-Anx.

¹² ICC-01/14-01/18-603-Red, para. 13 (arguing that "[t]he availability of interim release in Belgium would constitute changed circumstances that require the Trial Chamber to re-examine its decision").

very least — if not Belgium this time, then France the next, then Democratic Republic of the Congo, then Cameroon, etc. By contrast, the 28 April Decision sufficiently addresses circumstances and risks which extend beyond the Accused’s proposed location of release, as elaborated below.

B. The purported changed circumstances are insufficient to warrant interim release

10. Assuming *arguendo* that YEKATOM’s proposed release in Belgium constitutes a cognisable changed circumstance – which it is not – it would not justify modifying the 28 April Decision.

i. The previously determined article 58(1) circumstances continue to prevail

11. The purported changed circumstance that YEKATOM alleges does not significantly bear on the salient article 58(1)(b) conclusions made in the 28 April Decision. Contrary to the Motion, the Chamber’s assessment of the risks implicated by YEKATOM’s prospective interim release are not confined to his presence in CAR.

12. *First*, that YEKATOM is a ‘flight risk’ pursuant to article 58(1)(b)(i) derives from his motive to abscond given the seriousness of the charges against him, for which Pre-Trial Chamber II has found substantial grounds to believe he is responsible¹³, and the potential lengthy sentences that he faces if convicted.

13. The Defence’s argument that “the risk of flight is substantially reduced were Mr. Yekatom to be released to reside in Belgium” is illogical. That risk is not dependent on, or affected by, the proposed location of his potential interim release. Rather, as found by the Chamber, the risk is driven in the first place by YEKATOM’s

¹³ ICC-01/14-01/18-403-Red-Corr.

serious situation before this Court¹⁴ — a fact which the Motion transparently attempts to minimise.¹⁵ In this respect, the Motion’s reference to the *Gbagbo and Blé Goudé* case is inapposite.¹⁶ There, the accused were released following a decision dismissing the case against them at the conclusion of the Prosecution’s case (and pending the Prosecution’s appeal of that decision). This is far from the circumstances presented regarding the 28 April Decision, just as it is now.

14. To the extent the Motion attempts to analogise YEKATOM’s circumstances to Alphonse Higaniro¹⁷, who was tried before Brussels *Cour d’assises/Hof van Assisen*, it falls short. For instance, the Motion does not make clear whether Higaniro had previously violated the conditions and orders of the relevant International Criminal Tribunal for Rwanda Chambers while in detention, [REDACTED]; whether Higaniro had violated United Nations Security Council sanctions while in detention, [REDACTED]¹⁸; whether Higaniro had demonstrated a personal propensity to commit violence [REDACTED]¹⁹; or whether Higaniro had been granted his release in advance of his trial, as opposed to following service of a lengthy prison sentence.²⁰

15. Moreover, YEKATOM’s contentions that “no fact or circumstances [...] would support a conclusion that Mr. Yekatom would have the means and resources to flee from Belgium”²¹ and that he has “has no supporters or influence [there]”²² is unpersuasive, and does not shift the balance of the Chamber’s prior analysis to any extent. This is because the assertions are (a) unsubstantiated and conclusory; and (b) the 28 April Decision turns on the possibility – not the inevitability – of YEKATOM’s

¹⁴ See ICC-02/11-01/11-278, para. 54 (noting that the gravity of the charges and the possibility of a lengthy prison sentence are relevant factors in interim release decisions).

¹⁵ ICC-01/14-01/18-603-Red, para. 17.

¹⁶ ICC-01/14-01/18-603-Red, para. 18.

¹⁷ ICC-01/14-01/18-603-Red, para. 19.

¹⁸ ICC-01/14-01/18-512-Conf-Exp, para. 3; see ICC-01/14-01/18-494-Conf-Exp, para. 7 [REDACTED] Notably, YEKATOM is the subject of sanctions per United Nations Security Council Resolutions 2127 (2013) and 2134 (2014).

¹⁹ ICC-01/14-01/18-478-Conf-AnxII, pp. 7-8, paras. 6, 9.

²⁰ ICC-01/14-01/18-603-Red, para. 19 (noting Higaniro’s sentencing to 20 years in 2001 and release in 2013).

²¹ ICC-01/14-01/18-603-Red, para. 17.

²² ICC-01/14-01/18-603-Red, para. 17.

access to resources on his possible release, whether financial or otherwise, given that the risk of flight was found on the basis of concrete evidence.²³

16. *Second*, the Chamber's finding that YEKATOM might interfere with witnesses pursuant to article 58(1)(b)(ii) is neither dependent on, nor mitigated by, the location of his proposed release. Rather, the finding arises from the same impetus YEKATOM has to circumvent justice by undermining the proceedings against him.

17. Contrary to the Motion, the 28 April Decision does not devolve upon the Chamber's assessment that the risk of interference with witnesses, or the obstruction or endangerment of the investigation is dependent on YEKATOM's physical presence in CAR. To argue that this risk is mitigated in Belgium where the Defence claims YEKATOM "has no supporters, no influence, and no means to interfere with victims or witnesses"²⁴ misses the point. The claim is unsubstantiated, and given that all that is required is a motive to circumvent Court ordered restrictions and the ability to do so, it is also unavailing.

18. Clearly, to interfere with witnesses or acting to endanger the investigation need not involve more than a simple means of communication with supporters or witnesses/victims directly or indirectly, through persons on the ground (e.g., through social media, email, face to face contacts, etc). Although the means and manner by which YEKATOM may accomplish this may be different as between CAR and Belgium, the risk that the objective may be realised on release is essentially the same.

19. Thus, there is no reason for the Chamber to find YEKATOM incapable of reaching and influencing actors on the ground in CAR from Belgium to any lesser

²³ See ICC-01/14-01/18-495-Red3, para. 26, and preceding; see also ICC-02/11-01/11-278, para. 56.

²⁴ ICC-01/14-01/18-603-Red, para. 21.

extent than he could do so from CAR itself. Nor, does the Motion advance any persuasive argument to that effect.

20. The 28 April Decision cites to YEKATOM [REDACTED]²⁵ in determining the risk of his continued assertion of “[REDACTED]”.²⁶ This was not predicated on his prospective release in CAR. Instead, it objectively arose from [REDACTED]. Not only does that risk continue, but it is further confirmed and justified by YEKATOM [REDACTED]²⁷ — [REDACTED]²⁸ [REDACTED].

21. Additionally, it is well known that a substantial CAR diaspora resides in France, obviously within easy reach of the proposed release location. Indeed, the circumstances of the case reflect this. Importantly, this includes *inter alia* supporters of the Anti-Balaka – recalling that Accused NGAÏSSONA (who maintains a home in France) was arrested there.

22. YEKATOM’s contention that in Belgium, his only means “to influence victims and witnesses would be by telephone”²⁹ is unavailing and misapprehends the issue. The use of a telephone does not “mitigate”³⁰ the risk of influence, but rather merely demonstrates a mode of achieving it. YEKATOM’s further argument that in Belgium “he has no supporters, no influence, and *no means to interfere with victims or witnesses*”³¹ is not only unsubstantiated, but internally inconsistent. It is not because YEKATOM could be released in Belgium that he *would* not interfere with witnesses, including through telephone contact with supporters outside the country. Further, YEKATOM’s undertaking to abide by the terms and conditions of his prospective

²⁵ ICC-01/14-01/18-485-Conf-Exp, paras. 22, 28.

²⁶ ICC-01/14-01/18-495-Conf-Exp, para. 30.

²⁷ ICC-01/14-01/18-592-Conf-Exp-Red.

²⁸ ICC-01/14-01/18-606-Conf-Exp, para. 4.

²⁹ ICC-01/14-01/18-603-Red, para. 21.

³⁰ ICC-01/14-01/18-603-Red, para. 21.

³¹ ICC-01/14-01/18-603-Red, para. 21 (emphasis added) (noting that YEKATOM could indeed interfere with victims or witnesses via telephone).

release³² are not only self-serving, but [REDACTED].³³ It goes almost without saying that outside the immediate reach of the Court, where the Chamber's ability to directly monitor and control the conduct of the Accused is diminished, that risk would be even higher.

23. *Third*, as concerns the risk of further or related crimes under article 58(1)(b)(iii), the Motion incorrectly contends that the relevant findings in the 28 April Decision were "entirely dependent upon [YEKATOM's] release to the Central African Republic".³⁴ Although YEKATOM's prospective release to CAR may indeed have had a destabilising effect in the country and otherwise facilitated the realisation of the assessed risks, this does not mean that the Chamber's conclusions are so confined.

24. To the *contrary*, the 28 April Decision was predicated on several factors which remain. For instance, the Chamber noted that [REDACTED].³⁵ Significantly, it is not necessary for YEKATOM to be present in CAR to cause such crimes to be committed, also bearing in mind that one of the modes of liability underlying the confirmed charges is the 'ordering' of his former elements (presumptively among his present supporters and constituents). There is no reason to believe that YEKATOM would be incapable of directing or instructing the commission of such crimes, independently of where he might happen to be released.

25. The Chamber further found that the situation in CAR "remain[s] uncertain and volatile"³⁶; that armed groups control significant territory in CAR; that the implementation of the February 2019 Peace Agreements is problematic; and that, as found by Pre-Trial Chamber II, "YEKATOM's influence over his Anti-Balaka group and the political situation in the CAR, remain substantially unchanged and for this

³² ICC-01/14-01/18-603-Red, para. 18 *citing* ICC-01/14-01/18-438-AnxB.

³³ ICC-01/14-01/18-69-Conf-Exp, para. 11; *see also* ICC-01/14-01/18-465-Conf-Exp, para. 9.

³⁴ ICC-01/14-01/18-603-Red, para. 22.

³⁵ ICC-01/14-01/18-495-Conf-Red2, para. 34.

³⁶ ICC-01/14-01/18-495-Conf-Red2, para. 34.

reason, Mr Yekatom continues to remain likely to commit further violent acts if released”.³⁷

ii. *Additional unfavourable circumstances require detention*

26. In addition to the Prosecution’s submissions on the factual circumstances relative to each criterion of article 58(1)(b) set out in the response to YEKATOM’s initial interim release application³⁸, the prevailing circumstances have become even *less* favourable to YEKATOM since the issuance of the 28 April Decision. As such, the purported changed circumstances do not overcome the established article 58(1)(b) factors.

a. [REDACTED]

27. YEKATOM has [REDACTED].³⁹

b. More precise knowledge of Prosecution witnesses

28. Similarly, on 15 June 2020, YEKATOM was provided with a “preliminary” list of the witnesses the Prosecution intends to call⁴⁰, which more specifically identifies their importance to the pending charges. In short, YEKATOM now knows better who to interfere with in relation to the case against him than before. Permitting his *interim* release in these circumstances would facilitate his ability to circumvent the Chamber’s supervision and to undermine the security of victims and witnesses, as well as imperil the integrity of the proceedings, already at risk.

³⁷ ICC-01/14-01/18-495-Red3, para. 33.

³⁸ ICC-01/14-01/18-452.

³⁹ ICC-01/14-01/18-592-Conf-Exp-Red, paras. 10-16.

⁴⁰ ICC-01/14-01/18-553; *see* ICC-01/14-01/18-528.

c. A firm trial date has been set

29. A definitive trial date was set on 16 July 2020, for 9 February 2021.⁴¹ As YEKATOM's trial on numerous counts of war crimes and crimes against humanity approaches — any one of which may potentially result in a serious sentence — the serious risk that he will act to thwart the proceedings also rises.

30. Corresponding to the trial date, the Prosecution is also set to disclose even more precise information concerning its witnesses in the context of providing the Parties and Participants with 'provisional' and 'final' lists of witnesses in the coming weeks⁴², further augmenting the attendant risks of interference and efforts to otherwise undermine the trial.

31. As the Appeals Chamber has held, "the decision on continued detention or release pursuant to article 60 (2) read with article 58 (1) is not of a discretionary nature. Depending upon whether or not the conditions of article 58 (1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released".⁴³ Here, for all of the reasons set out above, YEKATOM must remain in ICC detention pending trial.

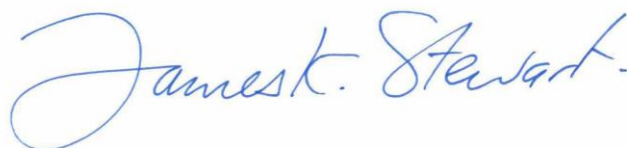
⁴¹ See ICC-01/14-01/18-589.

⁴² See ICC-01/14-01/18-589, p. 10.

⁴³ ICC-01/04-01/06-824 OA7, para. 134.

IV. CONCLUSION

32. For the above reasons, the Chamber should deny the Motion and order YEKATOM's continued detention.

A handwritten signature in blue ink that reads "James K. Stewart". The signature is written in a cursive, flowing style.

James Stewart, Deputy Prosecutor

Dated this 8th day of September 2020
At The Hague, The Netherlands