

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 redacted version of

Third Decision on Mr Yekatom's 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 58(1), 60(3), 61(11), 64(2) and (6)(a), and 68(1) of the Rome Statute (the ‘Statute’) and Rule 118(2) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Third Decision on Mr Yekatom’s Detention’.

I. Procedural history and submissions

1. The Chamber recalls the procedural history set out in its ‘Decision on the Yekatom Defence Application for Interim Release’ (the ‘First Decision’)¹ and its ‘Decision on the Second Yekatom Defence Motion for Interim Release’ (the ‘Second Decision’).²
2. On 14 December 2020, in line with the time limit set by the Single Judge,³ the Yekatom Defence (the ‘Defence’),⁴ the Office of the Prosecutor (the ‘Prosecution’),⁵ and the Common Legal Representative of the Former Child

¹ First Decision, 28 April 2020, ICC-01/14-01/18-495-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence, the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-495-Conf-Red; lesser confidential redacted version and public redacted version notified on 24 July 2020, ICC-01/14-01/18-495-Conf-Red2 and ICC-01/14-01/18-495-Red3, respectively). *See also* Yekatom Defence Application for Interim Release, 3 March 2020, ICC-01/14-01/18-438 (with public Annexes A-C and confidential Annexes D-F). *See further* Prosecution’s Response to Yekatom’s Request for Interim Release, 16 March 2020, ICC-01/14-01/18-452; Common Legal Representatives’ Joint Response to the “Yekatom Defence Application for Interim Release”, 16 March 2020, ICC-01/14-01/18-450; Registry, Transmission of observations from the Kingdom of the Netherlands and the Central African Republic on interim release of Alfred Yekatom, 14 April 2020, ICC-01/14-01/18-478 (with confidential Annexes I-II).

² Second Decision, 7 September 2020, ICC-01/14-01/18-643-Conf (public redacted version notified the same day, ICC-01/14-01/18-643-Red). *See also* Second Yekatom Defence Motion for Interim Release, 27 July 2020, ICC-01/14-01/18-603-Conf (public redacted version notified the same day, ICC-01/14-01/18-603-Red). *See further* 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 (public redacted version notified on 8 September 2020, ICC-01/14-01/18-617-Red); Common Legal Representatives’ Joint Response to the “Second Yekatom Defence Motion for Interim Release”, 7 August 2020, ICC-01/14-01/18-616-Conf (public redacted version notified on 9 September 2020, ICC-01/14-01/18-616-Red); Registry, Transmission of the Responses of Belgium and the Netherlands concerning the Application for Interim Release of Mr Alfred Yekatom, 27 August 2020, ICC-01/14-01/18-633-tENG (with public Annex I and confidential Annex II).

³ *See* email from the Chamber, 7 December 2020, at 12:03.

⁴ Observations de la Défense de M. Yekatom sur l’éventualité d’une libération provisoire, ICC-01/14-01/18-771-Conf-Exp, confidential *ex parte*, only available to the Yekatom Defence and the Registry (with confidential *ex parte* Annex A, only available to the Yekatom Defence and the Registry) (confidential redacted version and public redacted version notified the same day, ICC-01/14-01/18-771-Conf-Red and ICC-01/14-01/18-771-Red2, respectively) (the ‘Defence Observations’).

⁵ Prosecution’s Submissions under Rule 118 (2) of the Rules of Procedure and Evidence, ICC-01/14-01/18-770-Conf (the ‘Prosecution Observations’).

Soldiers and the Common Legal Representatives of Victims of Other Crimes (jointly, the 'CLRV')⁶ filed their observations on Mr Yekatom's detention.

3. The Defence requests the Chamber to: (i) order Mr Yekatom's interim release; (ii) request observations from the relevant authorities of the Kingdom of the Netherlands (hereinafter: 'the Netherlands') with regard to Mr Yekatom's presence on its territory throughout trial; and (iii) determine the necessary conditions for Mr Yekatom's interim release.⁷ Specifically, it submits that Mr Yekatom's release is warranted in light of (i) the 'excessive' duration and conditions of his detention, and (ii) the 'precarious' health situation at the Detention Centre, both of which, it argues, constitute changed circumstances favouring his interim release.⁸
4. More specifically, the Defence first argues that, in the course of his two years of detention, Mr Yekatom has displayed exemplary behaviour and the minor incidents concerning his restrictions on contacts do not indicate an intent to obstruct the investigation or the proceedings.⁹ Further, it submits that the temporary suspension of all visits at the Detention Centre due to the Coronavirus Pandemic and, in particular, the cumulative effect of the repeated extension of this measure since March 2020, has strongly impacted Mr Yekatom's mental well-being and his capacity to effectively prepare his defence.¹⁰ Second, the Defence argues that [REDACTED].¹¹ It submits that the health risks to Mr Yekatom associated with the Coronavirus Pandemic could be mitigated through his interim release.¹²
5. Moreover, the Defence argues that the risks under Article 58(1) of the Statute justifying Mr Yekatom's detention are no longer present, considering that, *inter alia*: (i) there are no objective elements indicating that Mr Yekatom would

⁶ Observations conjointes des Représentants Légaux Communs des Victimes relatives au réexamen de la détention de Monsieur Alfred Yekatom, ICC-01/14-01/18-768-Conf (public redacted version notified the same day, ICC-01/14-01/18-768-Red) (the 'CLRV Observations').

⁷ Defence Observations, ICC-01/14-01/18-771-Red2, p. 13.

⁸ Defence Observations, ICC-01/14-01/18-771-Red2, para. 11.

⁹ Defence Observations, ICC-01/14-01/18-771-Conf-Red, para. 14.

¹⁰ Defence Observations, ICC-01/14-01/18-771-Red2, paras 15-19.

¹¹ Defence Observations, ICC-01/14-01/18-771-Conf-Exp, paras 24-26.

¹² Defence Observations, ICC-01/14-01/18-771-Red2, para. 27.

abscond should he be temporarily released, and this risk could in any case be limited with strict control measures;¹³ (ii) there are no objective elements indicating that Mr Yekatom would obstruct or endanger the proceedings, which is further enhanced by the fact that the Registry did not report any incidents involving the Anti-Balaka in its recent report on the security and political situation in the Central African Republic (the 'CAR' and the 'Registry Security Report', respectively);¹⁴ and (iii) conditional release to the Netherlands would not facilitate the continued commission of the alleged crimes in the CAR.¹⁵ The Defence submits that Mr Yekatom's release to the Netherlands would be subject to any of the conditions set out in Rule 119 of the Rules and further, that it would not interfere with his attendance at court hearings and would ensure continuity in the Defence's preparation.¹⁶

6. The Prosecution requests the Chamber to order Mr Yekatom's continued detention, as there have been no changed circumstances within the meaning of Article 60(3) of the Statute requiring a modification of the conditions of his detention.¹⁷ The Prosecution submits that the facts underlying the First and Second Decisions remain unchanged and each criterion under Article 58(1)(b) of the Statute continues to be satisfied.¹⁸ It further submits that additional circumstances weigh in favour of Mr Yekatom's continued detention, namely: (i) a new breach of his contact restrictions, (ii) more precise knowledge of Prosecution witnesses, and (iii) the approaching commencement of trial, which may result in a lengthy sentence upon conviction, thus raising a 'serious and concrete risk that he will act to thwart the proceedings'.¹⁹
7. The CLRV request the Chamber to order Mr Yekatom's continued detention, submitting that the circumstances underpinning the First and Second Decisions have not changed and the risks under Article 58(1) of the Statute continue to

¹³ Defence Observations, ICC-01/14-01/18-771-Red2, para. 30.

¹⁴ Defence Observations, ICC-01/14-01/18-771-Conf-Red, paras 31-32 *referring to* First Periodic Report of the Registry on the Security and Political Situation in the Central African Republic, 7 December 2020, ICC-01/14-01/18-755-Conf (with one annex, ICC-01/14-01/18-755-Conf-Anx).

¹⁵ Defence Observations, ICC-01/14-01/18-771-Red2, para. 33.

¹⁶ Defence Observations, ICC-01/14-01/18-771-Red2, paras 19, 36.

¹⁷ Prosecution Observations, ICC-01/14-01/18-770-Conf, paras 2, 4, 14.

¹⁸ Prosecution Observations, ICC-01/14-01/18-770-Conf, paras 4-7.

¹⁹ Prosecution Observations, ICC-01/14-01/18-770-Conf, paras 8-12.

exist.²⁰ Further, the CLRV point to (i) the political and security situation in the CAR, including the ongoing violence by armed groups,²¹ (ii) Mr Yekatom's third violation of his contact restrictions,²² and (iii) the filing of the Prosecution's Final Witness List,²³ all of which would indicate that Mr Yekatom's continued detention is necessary for the protection of victims and witnesses.²⁴

8. Replying to the Defence's observations, the CLRV add, *inter alia*, that (i) neither the length and conditions of detention nor the health situation at the Detention Centre constitute changed circumstances justifying the interim release of Mr Yekatom under Article 60(3) of the Statute;²⁵ and (ii) the conditions under Article 58(1)(b) of the Statute remain satisfied.²⁶ In this regard, the CLRV further submit that the absence of documented incidents involving the Anti-Balaka does not negate their existence or diminish the risk of improper influence,²⁷ and that the risk of witness interference is reinforced by the approaching commencement of trial²⁸ and remains possible, even from a distance, in the Netherlands.²⁹

II. Analysis

9. The Chamber recalls its obligation to periodically review its ruling on the accused's release or detention 'at least every 120 days', pursuant to Article 60(3) of the Statute and Rule 118(2) of the Rules, and incorporates by reference the applicable law, as set out in the Second Decision.³⁰

²⁰ CLRV Observations, ICC-01/14-01/18-768-Red, paras 9-14, 20-21.

²¹ CLRV Observations, ICC-01/14-01/18-768-Conf, para. 14.

²² CLRV Observations, ICC-01/14-01/18-768-Conf, paras 16-17.

²³ CLRV Observations, ICC-01/14-01/18-768-Red, para. 18.

²⁴ CLRV Observations, ICC-01/14-01/18-768-Red, para. 19.

²⁵ Réponse des Représentants Légaux Communs des Victimes à « la version confidentielle expurgée des Observations de la Défense de M. Yekatom sur l'éventualité d'une libération provisoire » (ICC-01/14-01/18-771-Conf-Red), 17 December 2020, ICC-01/14-01/18-781-Conf (public redacted version notified the same day, ICC-01/14-01/18-781-Red) (the 'CLRV Reply'), paras 7, 15. See also paras 8-14, 17.

²⁶ CLRV Reply, ICC-01/14-01/18-781-Conf, paras 21-27.

²⁷ CLRV Reply, ICC-01/14-01/18-781-Conf, paras 29-30.

²⁸ CLRV Reply, ICC-01/14-01/18-781-Red, para. 10.

²⁹ CLRV Reply, ICC-01/14-01/18-781-Red, para. 34.

³⁰ Second Decision, ICC-01/14-01/18-643-Red, paras 14-17.

10. The Chamber will assess whether any of the circumstances underpinning its findings in the First and Second Decisions (the 'Initial Circumstances')³¹ have changed or whether any new circumstances have arisen since the Second Decision. In the affirmative, the Chamber will assess whether these changes have a bearing on its previous ruling on Mr Yekatom's detention.
11. In this context, the Chamber notes that the participants allege the following changed and/or new circumstances: (i) the 'excessive' duration and conditions of Mr Yekatom's detention; (ii) the 'precarious' health situation at the Detention Centre due to the Coronavirus Pandemic [REDACTED]; (iii) the absence of reported incidents involving the Anti-Balaka in the Registry Security Report as evidence of Mr Yekatom's inability to influence the proceedings; (iv) the third violation of his contact restrictions; (v) Mr Yekatom's increased knowledge regarding Prosecution witnesses; and (vi) the imminent commencement of trial.
12. The Chamber recalls the Initial Circumstances as set out in its Second Decision.³² In this regard, the Chamber notes the Defence's submission that the Registry Security Report does not mention any incidents in western CAR involving the Anti-Balaka or Mr Yekatom's former associates, which, according to the Defence, evidences Mr Yekatom's inability to influence the proceedings.³³ The Chamber, however, notes that the security situation in the CAR remains fragile and volatile, particularly in light of the presidential elections and rising political tensions.³⁴ Furthermore, as a former member of the CAR parliament, Mr Yekatom retains the means to exercise influence over the Anti-Balaka in his immediate and extended community, where several witnesses reside.³⁵ Therefore, the Chamber is of the view that there remains a risk that, if released, Mr Yekatom would endanger the proceedings by

³¹ For a summary of these circumstances, see Second Decision, ICC-01/14-01/18-643-Conf, para. 19. See also First Decision, ICC-01/14-01/18-495-Conf-Exp, paras 20-34.

³² See Second Decision, ICC-01/14-01/18-643-Conf, para. 19.

³³ Defence Observations, ICC-01/14-01/18-771-Conf-Red, para. 32.

³⁴ See Registry Security Report, ICC-01/14-01/18-755-Conf-Anx, para. 6.

³⁵ See Third Decision on Mr Yekatom's Restrictions on Contacts and Communications in Detention, 11 November 2020, ICC-01/14-01/18-727-Conf (the 'Third Decision on Restrictions'), para. 14; Second Decision, ICC-01/14-01/18-643-Red, para. 26.

interfering with witnesses in this case, and would be able to do so irrespective of his location.³⁶

13. In light of the above, the Chamber is of the view that the Initial Circumstances have not changed since its review of Mr Yekatom's detention in the Second Decision.
14. Nevertheless, the Chamber acknowledges that a number of new circumstances have surfaced since its Second Decision.
15. First, with regard to Mr Yekatom's current detention conditions, the current health situation at the Detention Centre due to the Coronavirus Pandemic [REDACTED], the Chamber does not consider that any of these new circumstances have a bearing on the continued existence of the risks under Article 58(1) of the Statute which, as found in the First and Second Decisions, warrant Mr Yekatom's detention.
16. Second, as regards the third violation of contact restrictions by Mr Yekatom,³⁷ the Chamber, recalling its previous findings in the First and Second Decisions,³⁸ finds that a new breach of restrictions only confirms that the risk under Article 58(1)(b)(ii) of the Statute continues to exist and weighs in favour of maintaining Mr Yekatom's detention.
17. Third, with respect to Mr Yekatom's increased knowledge regarding Prosecution witnesses, the Chamber recalls that since its Second Decision, the accused has been provided with the Prosecution's Final Witness List, which provides details on the 151 witnesses the Prosecution intends to call to testify at trial, and includes brief summaries of their anticipated testimonies.³⁹ Mr Yekatom has therefore acquired substantive and specific knowledge regarding their testimonies and their relevance to the charges against him. The Chamber also notes that the deadline for the disclosure of the Prosecution's evidence,

³⁶ See Second Decision, ICC-01/14-01/18-643-Red, paras 25-26.

³⁷ See Third Decision on Restrictions, ICC-01/14-01/18-727-Conf, para. 18.

³⁸ See Second Decision, ICC-01/14-01/18-643-Conf, para. 30; First Decision, ICC-01/14-01/18-495-Conf-Exp, paras 30-31.

³⁹ See Annex A to the Prosecution's List of Witnesses and Evidence, 9 November 2020, ICC-01/14-01/18-724-Conf-AnxA.

including witness statements, which was set for 9 November 2020, has already passed.⁴⁰

18. The Chamber considers that the Defence's increased knowledge of Prosecution witnesses and the new violation of contact restrictions, at most, confirm the Chamber's initial risk assessment under Article 58(1)(b)(ii) of the Statute, finding that Mr Yekatom's continued detention is necessary to ensure that he does not interfere with victims or witnesses.
19. Similarly, the Chamber considers that the imminent commencement of the trial, which is set to begin on 9 February 2021,⁴¹ only aggravates the risks found under Article 58(1)(b)(i) and (ii) of the Statute. The Chamber recalls that the fact that Mr Yekatom's case is moving forward and that he might face a significant sentence in the event of a conviction, might incentivise the accused to abscond or interfere with victims or witnesses.⁴²
20. Accordingly, the Chamber considers that there are no changed or new circumstances within the meaning of Article 60(3) of the Statute.
21. As regards the Defence's argument that the duration of Mr Yekatom's detention is 'excessive', the Chamber recalls the Appeals Chamber's finding that a chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecution, pursuant to Article 60(3) of the Statute.⁴³ Further, it is recalled that the length of detention cannot be considered on its own to be a changed circumstance within the meaning of Article 60(3) of the Statute. Rather, the length of detention pending trial is a factor that must be considered alongside

⁴⁰ See Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589, p. 10.

⁴¹ See Decision Setting the Commencement Date of the Trial, ICC-01/14-01/18-589, p. 10.

⁴² See Second Decision, ICC-01/14-01/18-643-Red, para. 32.

⁴³ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals against Pre-Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, 29 May 2015, ICC-01/05-01/13-969 (the '*Bemba et al.* Judgment on Interim Release'), para. 43.

the risks being reviewed under Article 60(3) to determine whether continued detention is no longer reasonable.⁴⁴

22. In the present circumstances, the Chamber, having balanced the persisting risks under Article 58(1) of the Statute against the duration of Mr Yekatom's detention, including other factors such as the cumulative impact of the temporary measures in place at the Detention Centre since March 2020, finds that Mr Yekatom has not been held in detention for an unreasonable period of time.
23. In light of the above, the Chamber considers that a modification of its previous ruling on Mr Yekatom's detention is not warranted under Article 60(3) of the Statute, and decides that Mr Yekatom shall remain in detention.
24. With regard to the Defence's request for conditional release, the Chamber recalls that, although conditional release may be ordered even where the conditions of Article 58(1) are satisfied, this remedy is entirely at the Chamber's discretion.⁴⁵ In this instance, and specifically noting that none of the conditions that could be imposed would mitigate the persisting risks, the Chamber considers the exercise of this discretion unwarranted.
25. Lastly, the Chamber notes that it did not consider it necessary to seek observations from the host State under Regulation 51 of the Regulations of the Court, as requested by the Defence.⁴⁶ The Appeals Chamber recently held, by majority, that this provision 'cannot be understood as imposing on the chamber hearing an application for interim release, *in the absence of any prospect for the application to succeed*, a general obligation to seek observations from the host State and/or the State on the territory of which interim release is sought'.⁴⁷ The Chamber considers that no such prospect existed under the present

⁴⁴ *Bemba et al.* Judgment on Interim Release, ICC-01/05-01/13-969, paras 44-45.

⁴⁵ See Second Decision, ICC-01/14-01/18-643-Red, para. 34, n. 68.

⁴⁶ Defence Observations, ICC-01/14-01/18-771-Red2, para. 41, p. 13.

⁴⁷ Appeals Chamber, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on the Defence Request for Interim Release', 8 October 2020, ICC-02/05-01/20-177 (OA2), para. 61 (with a separate concurring opinion, ICC-02/05-01/20-177-Anx) (emphasis added).

circumstances, in light of its findings in the present decision,⁴⁸ and further noting its previous finding that the risks under Article 58(1) of the Statute persist irrespective of the State to which Mr Yekatom wishes to be released and of any potential observations by the concerned State.⁴⁹

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES to maintain Mr Yekatom's detention; and

ORDERS the Prosecution to file a public redacted version of document ICC-01/14-01/18-770-Conf.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 5 January 2021

At The Hague, The Netherlands

⁴⁸ See above paragraphs 20 and 23.

⁴⁹ Second Decision, ICC-01/14-01/18-643-Red, paras 25-26.