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Pénale
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**International
Criminal
Court**

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

Date: **17 February 2021**

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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

PUBLIC

**Public Redacted Version of the “Yekatom Defence Observations on Ninth
Registry Report on Contact Restrictions”, 28 October 2019,
ICC-01/14-01/18-389-Conf**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Me Mylène Dimitri

Mr. Thomas Hannis

Counsel for Mr. Ngaïssona

Me Geert-Jan Alexander Knoops

Mr. Richard Omissé-Namkeamaï

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa

Ms. Elisabeth Rabesandratana

Mr. Yaré Fall

Ms. Marie-Edith Douzima-Lawson

Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

Mr. Paddy Craig

**Victims Participation and Reparations
Section**

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully submit their observations on the *Ninth Registry Report on the Implementation of the Restrictions on Contacts by Mr. Alfred Yekatom Ordered by Pre-Trial Chamber II (“Registry Report”)*¹ and the *Prosecution’s Observations Pursuant to the “Decision Pursuant to Regulation 101 of the Regulations of the Court” (ICC-01/14-01/18-176-Conf-Exp) (“Prosecution’s Observations”)*.² The Defence further requests that the Pre-Trial Chamber (“Chamber”) modify the restrictions to eliminate active monitoring at *random* of Mr. Yekatom’s telephone calls and visits.

2. Active monitoring at *random* at the Detention Centre means that a person is *randomly* listening to the detainee’s telephone calls or visits while those calls and visits are occurring. Remote monitoring means that the calls and visits are recorded in their entirety and listened to at a later time.

3. The only advantage to non-privileged visits and telephone conversations actively monitored at *random* is that a call or visit can be terminated immediately if a breach of the rules is detected.

4. The disadvantage of active monitoring at *random* is that it requires [REDACTED]. As a result of resource constraints, this has meant that Mr. Yekatom can make telephone calls only two days per week for 45 minutes each day.

5. As the Prosecution’s own field investigators can verify, telephone services in the Central African Republic are spotty. Networks are frequently down due to power cuts. Persons are likewise unable to charge the batteries on their phones. The result is that it is very difficult to get through to someone in the Central African Republic by phone without making repeated attempts at various times during the day.

¹ [ICC-01/14-01/18-386-Conf-Exp.](#)

² [ICC-01/14-01/18-387-Conf-Exp.](#)

6. The Registry has also recognised those difficulties when explaining that the reason for Mr. Ngaïssona's ability to only call for 30 to 35 minutes was due to "external difficulties with the telephone system, as telephones sometimes do not connect, cut out or just continuing to ring without answer".³

7. Mr. Yekatom's experience at the Detention Centre has been that he frequently cannot reach someone during the 60 minutes period during which he can make 45 minutes of phone calls. He is then unable to try again until three or four days later when he has his next 45-minute window to make calls.⁴

8. This problem can be solved by the removal of the requirement of active monitoring at *random*, which would allow Mr. Yekatom to make calls at various times during the day.

9. The Appeals Chamber has held that contact restrictions are subject to a proportionality analysis, balancing the necessity of the restrictions against the internationally recognised rights to privacy and family life,⁵ and need to be assessed on a case-by-case basis.⁶ While the Chamber upheld the restrictions in the *Ntaganda* case, it had evidence that there had been four occasions in which the detainee's phone calls had been terminated during active monitoring for breach of the rules.⁷

10. In the *Blé Goudé* case, the Prosecution's motion for active monitoring was rejected by former President Fernández de Gurmendi, sitting as a Single Judge in the Pre-Trial Chamber, where there was insufficient evidence of violation of the restrictions by the detainee.⁸

³ [ICC-01/14-01/18-226-Conf-Exp-Red](#), para. 22.

⁴ [ICC-01/14-01/18-226-Conf-Exp-Red](#), para. 16.

⁵ *Prosecutor v. Ntaganda*, [Judgment on Mr. Bosco Ntaganda's Appeal against the Decision Reviewing Restrictions on Contacts of 7 September 2016](#), ICC-01/04-02/06-1817-Red, 8 March 2017, para. 101.

⁶ *Id.*, para. 74.

⁷ *Id.*, para. 73.

⁸ *Prosecutor v. Blé Goudé*, [Decision on Prosecution's Request for Measures under Regulation 101\(2\) of the Regulations of the Court](#), ICC-02/11-02/11-133, 28 August 2014, para. 10.

11. Restrictions, once imposed, must be actively reviewed periodically and must remain proportionate to the legitimate aim pursued. The Appeals Chamber held that the passage of time is a factor that could become more significant as more time elapses.⁹ In the *Ngudjolo* case, the Trial Chamber removed the restrictions after one year where the detainee had ceased the misconduct that led to the restrictions.¹⁰

12. Mr. Yekatom's calls and visits have been subject to active monitoring since he arrived at the Detention Centre almost one year ago. Despite the monitoring of hundreds of his calls, there has not been a single occasion in which the call had to be terminated due to breach of confidentiality. This record of compliance has been documented in the Registry's periodic reports to the Chamber and continued in the latest *Registry Report*.

13. The Chamber has repeatedly said that "the restrictions on contacts and communications under the Court's statutory framework **must be (re-)assessed** in light of concrete, specific and up-to-date information".¹¹ Mr. Yekatom is not seeking reconsideration of the previous imposition of restrictions,¹² but is requesting an up-to-date, mandatory re-assessment of the necessity of the restrictions, as the Chamber has undertaken to do.

14. During the past year, Mr. Yekatom's defence team has scrupulously observed the protective measures in place for Prosecution witnesses, calling to the attention of the Prosecution its own inadvertent disclosures, as well as notifying the Victims and Witnesses Unit of information concerning protected witnesses that came to its

⁹ *Prosecutor v. Ntaganda*, [Judgment on Mr. Bosco Ntaganda's Appeal against the Decision Reviewing Restrictions on Contacts of 7 September 2016](#), ICC 01/04-02/06-1817-Red, 8 March 2017, para. 72.

¹⁰ *Prosecutor v. Katanga & Ngudjolo*, [Decision on the Registrar's report on the monitoring of some of Mathieu Ngudjolo's conversations following the Registrar's decision on monitoring dated 22 January 2010](#), ICC-01/04-01/07-1966-tENG-Red, 16 March 2010.

¹¹ [ICC-01/14-01/18-52-Conf-Exp](#), para. 15; [ICC-01/14-01/18-75-Conf-Exp](#), para. 15; [ICC-01/14-01/18-86-Conf-Exp](#), para. 14; [ICC-01/14-01/18-137-Conf-Exp](#), para. 18; [ICC-01/14-01/18-161-Conf-Exp](#), para. 35; [ICC-01/14-01/18-176-Conf-Red](#), para. 29.

¹² [ICC-01/14-01/18-176-Conf-Red](#). See also [ICC-01/14-01/18-241-Conf-Exp](#), para. 28.

attention. In addition, the Defence has fully complied with the protocols in place by immediately informing the Prosecution of the occurrence of inadvertent contacts.

15. The Chamber also has now had the experience of seeing how Mr. Yekatom conducts his defence through the recently concluded confirmation of charges proceedings. The Chamber will have observed that the Defence was conducted professionally and focused on legal issues that were legitimately subject to challenge. There is no reason to believe, from the way he conducted his defence, that Mr. Yekatom has any interest in obstructing the proceedings by interfering with witnesses.

16. Considering that, unlike in the *Ntaganda* and *Ngudjolo* cases, the restrictions were imposed upon Mr. Yekatom at the outset of his detention, rather than after a violation, Mr. Yekatom's one-year track record of compliance, and the manner in which he conducted his defence, the Chamber should conclude that the advantage of actively monitoring at *random* (the ability to terminate a call that breaches the rules), compared to remote monitoring (in which any breach of the rules can be promptly discovered), is slight.

17. This slight advantage is strongly outweighed by the great disadvantage of actively monitoring at *random* in that it substantially interferes with Mr. Yekatom's ability to communicate with his family and friends by severely restricting the time available for him to place calls to the unreliable Central African Republic telephone network.

18. The claim that the restrictions upon Mr. Yekatom are justified by the restrictions on his co-defendant¹³ should be rejected. When the Prosecution requested to segregate Messrs. Yekatom and Ngaïssona for the same reason, the Chamber rejected this reasoning as "mere speculation".¹⁴ In almost ten months of joint

¹³ [ICC-01/14-01/18-387-Conf-Exp](#), para. 8.

¹⁴ [ICC-01/14-01/18-106-Conf-Exp-Red](#), para. 16.

incarceration, there has been no evidence of any effort by Mr. Yekatom to pass messages to anyone on behalf of his co-defendant. The Chamber's previous finding should equally apply here as the Prosecution failed again to provide direct proof "sufficiently concrete, nor specific to this situation".¹⁵ Thus, the Prosecution's argument that restrictions upon Mr. Yekatom are justified by the restrictions on his co-defendant "renders the test of 'reasonable grounds to believe' in regulation 101(2) of the Regulations meaningless".¹⁶ And if such efforts were made in the future, they would be surely detected by the remote monitoring when the recordings were listened to. It would be unfair to penalise Mr. Yekatom for conduct of others over whom he has no control.

19. As an additional safeguard, the Chamber can, when eliminating active monitoring at *random* for Mr. Yekatom, authorise the Detention Centre's Commanding Officer to immediately re-impose the active monitoring regime in the event of a breach of the rules by Mr. Yekatom. This will avoid any delay in having to consult the Chamber in the event of a breach.

20. The *Registry Report* shows that Mr. Yekatom has never engaged in any conduct that has jeopardised the integrity of the proceedings. For all of the above reasons, when balancing the need for active monitoring at *random* against the burdens it places on Mr. Yekatom's ability to communicate with his family and friends, and considering Mr. Yekatom's rights as a pre-trial detainee benefitting from the presumption of innocence, the Chamber is respectfully requested to modify the restrictions on contact by removing the requirement of active monitoring and *random*.

CONFIDENTIALITY

21. These observations are filed on a confidential *ex parte* basis because that is the designation provided in the *Registry Report* and the *Prosecution's Observations*

¹⁵ *Id.*, para. 16.

¹⁶ *Id.*, para. 16.

although the Defence does not oppose to its reclassification to confidential. The Defence urges the Pre-Trial Chamber to issue its decision publicly, as conditions for detainees are a legitimate subject of public interest and the matters contained in any decision are unlikely to reveal details that would jeopardise security at the Detention Centre or infringe on Mr. Yekatom's privacy.¹⁷

RESPECTFULLY SUBMITTED ON THIS 17TH DAY OF FEBRUARY 2021



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom



Mr. Thomas Hannis
Associate Counsel for Mr. Yekatom

The Hague, the Netherlands

¹⁷ See *Prosecutor v. Blé Goudé*, [Decision on Prosecution's Request for Measures under Regulation 101\(2\) of the Regulations of the Court](#), ICC-02/11-02/11-133, 28 August 2014, para. 13.