

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **Choose language**

No.: **ICC-RoR220-06/21**

Date: **31 March 2022**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR V. ALFRED YEKATOM AND PATRICE-EDOUARD NGAÏSSONA**

**Confidential *ex parte*,
available only to the Defence for Mr Yekatom and the Registry**

**Decision on the 'Application for Judicial Review of the Registry Decision issued on 27
September 2021', dated 5 October 2021 (ICC-RoR220-06/21-1)**

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

The Office of the Prosecutor

Counsel for Mr Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Harry Tjonk

**Victims Participation and Reparations
Section**

Other

The Presidency of the International Criminal Court (the 'Court') has before it the application filed by Mr Yekatom on 5 October 2021, seeking judicial review pursuant to regulation 220 of the Regulations of the Registry (the 'Regulations') of a decision of the Registrar issued on 27 September 2021 and requesting the Presidency to order the Registry to support a campaign to raise funds for Mr Yekatom's family to visit him (the 'Application').¹

I. PROCEDURAL HISTORY

1. On 2 July 2021, following a meeting between the Registry and Defence counsel for various detained persons regarding the funding of family visits, the Defence for Mr Yekatom sent an email to the Director of the Registry's Division of Judicial Services providing information about a campaign that it proposed be run in the Central African Republic (the 'CAR') to raise funds for Mr Yekatom's family to visit him.²
2. On 9 July 2021, the Registry sent a memorandum to all Defence teams stating that the Trust Fund for Family Visits (the 'TFFV') had insufficient funds to finance large family visits for all detained persons entitled to benefit from the TFFV in 2021, due to a lack of contributions, and that it was considered necessary to limit the number of beneficiaries of a funded family visit to a maximum of two persons per detained person.³
3. On 31 August 2021, after further correspondence and at the Registry's request,⁴ the Defence for Mr Yekatom provided additional information to the Registry by email about the measures of which it proposed the fundraising campaign would consist and the support it sought from the Registry for those measures.⁵
4. By email dated 6 September 2021, the Registry informed the Defence for Mr Yekatom that the campaign could not be supported by the Registry and that the Registry would

¹ Defence for Mr Alfred Yekatom, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Application for Judicial Review of the Registry Decision issued on the 27 September 2021](#), 5 October 2021, ICC-RoR220-06/21-1.

² Email from the Defence, 2 July 2021, at 18:33, ICC-RoR220-06/21-1-Conf-Anx3, pp 5-6, *annexed to the Application*; [Application](#), ICC-RoR220-06/21-1, paras 4, 6.

³ Memorandum of the Registry, 9 July 2021, ICC-RoR220-06/21-1-Conf-Anx1, *annexed to the Application*, ICC-RoR220-06/21-1.

⁴ Emails between the Registry and the Defence, 5 July to 31 August 2021, ICC-RoR220-06/21-1-Conf-Anx3, pp 2-5 and ICC-RoR220-06/21-1-Conf-Anx2, pp 3-6, *annexed to the Application*, ICC-RoR220-06/21-1.

⁵ Email from the Defence, 31 August 2021, at 17:49, ICC-RoR220-06/21-1-Conf-Anx2, pp 2-3, *annexed to the Application*, ICC-RoR220-06/21-1.

continue its fundraising efforts with States Parties and international organisations (the 'Registry Decision').⁶

5. On 13 September 2021, Mr Yekatom made a complaint to the Registrar pursuant to regulation 218(1) of the Regulations, requesting among other relief that the Registry reconsider the Registry Decision (the 'Complaint').⁷
6. On 27 September 2021, the Registrar issued a decision dismissing the Complaint as inadmissible (the 'Impugned Decision').⁸
7. On 5 October 2021, Mr Yekatom filed the present Application for review of the Impugned Decision by the Presidency.⁹ On 7 October 2021, the Registrar transmitted the Registry Decision, Complaint and Impugned Decision to the Presidency, in accordance with regulation 220(3) of the Regulations.¹⁰ The Registrar did not submit any observations pursuant to regulation 220(4) of the Regulations.

II. IMPUGNED DECISION

8. In the Impugned Decision, the Registrar dismissed the Complaint as inadmissible on the basis that it did not deal with a matter concerning Mr Yekatom's detention, as regulation 217(1) of the Regulations requires.¹¹
9. The Registrar acknowledged that the question of whether or not a detained person is accorded a funded family visit would be a matter concerning that person's detention pursuant to regulation 217(1).¹² However, he held, fundraising for such visits 'is only indirectly related thereto' and 'is too far removed' from Mr Yekatom's detention to qualify as a matter concerning detention.¹³ He stated that the Complaint dealt instead with

⁶ Email from the Registry to the Defence, 6 September 2021, at 10:37, ICC-RoR220-06/21-1-Conf-Anx2, p. 2, *annexed to* the Application, ICC-RoR220-06/21-1 and ICC-RoR220-06/21-2-Conf-Exp-AnxI, p. 2, *annexed to* Registry, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Transmission pursuant to Regulation 220(3) of the Regulations of the Registry, 7 October 2021, ICC-RoR220-06/21-2 (the 'Registry Transmission').

⁷ ICC-RoR220-06/21-2-Conf-Exp-AnxII, *annexed to* the Registry Transmission, ICC-RoR220-06/21-2.

⁸ Registrar, Decision on Mr Alfred Yekatom's Request for Review dated 13 September 2021, 27 September 2021, ICC-RoR220-06/21-2-Conf-Exp-AnxIII, *annexed to* the Registry Transmission, ICC-RoR220-06/21-2.

⁹ [Application](#), ICC-RoR220-06/21-1.

¹⁰ [Registry Transmission](#), ICC-RoR220-06/21-2.

¹¹ Impugned Decision, ICC-RoR220-06/21-2-Conf-Exp-AnxIII, paras 7-9, 11.

¹² Impugned Decision, ICC-RoR220-06/21-2-Conf-Exp-AnxIII, para. 8.

¹³ Impugned Decision, ICC-RoR220-06/21-2-Conf-Exp-AnxIII, para. 8.

the implementation of a policy of the Registry concerning the replenishment of the TFFV and that '[t]he implementation of that policy cannot be challenged through the complaints procedure set out in [Chapter 5,] Section 5' of the Regulations.¹⁴

10. The Registrar also stated in the Impugned Decision, 'please be informed that a fundraising campaign with states and international organisations is actively ongoing'.¹⁵

III. APPLICATION

11. In the Application, Mr Yekatom argues that his request for Registry support for the proposed fundraising campaign 'goes to the heart of [his] detention conditions'.¹⁶ He characterises the subject of his Complaint as the implementation of a fundraising campaign to finance family visits¹⁷ and, more generally, 'issues raised in relation to the funding of family visits'.¹⁸ He submits that both are matters pertaining to detention within the meaning of regulation 217(1).¹⁹ Accordingly, he claims, 'the Registry' failed to act with procedural fairness when refusing to consider this matter through the regulation 218 complaints procedure.²⁰

12. Mr Yekatom further submits that the Registry erred in law by not considering the campaign as an alternative solution to the funds shortage of the TFFV.²¹ Mr Yekatom claims that this infringed upon his fundamental right to family visits for indigent detainees.²²

13. Mr Yekatom additionally submits that 'the Registry' failed to take into consideration relevant circumstances brought to its attention in the Complaint.²³ It is unclear precisely

¹⁴ Impugned Decision, ICC-RoR220-06/21-2-Conf-Exp-AnxIII, para. 9.

¹⁵ Impugned Decision, ICC-RoR220-06/21-2-Conf-Exp-AnxIII, para. 10.

¹⁶ [Application](#), ICC-RoR220-06/21-1, para. 15.

¹⁷ [Application](#), ICC-RoR220-06/21-1, para. 19.

¹⁸ [Application](#), ICC-RoR220-06/21-1, para. 18.

¹⁹ [Application](#), ICC-RoR220-06/21-1, para. 20, p. 11. *See also* para. 18 referring to 'fundraising for family visits'.

²⁰ [Application](#), ICC-RoR220-06/21-1, para. 19.

²¹ [Application](#), ICC-RoR220-06/21-1, para. 27.

²² Mr Yekatom does not state this explicitly in his submissions on this issue (contained in paras 21-28 of the [Application](#), ICC-RoR220-06/21-1), but does so in the heading to those submissions, on p. 5.

²³ [Application](#), ICC-RoR220-06/21-1, p. 7.

to what circumstances this refers. However, the matters he raises in support of this submission include:

- a. the fact that funds in the TFFV have been critically depleted for a number of years;²⁴
 - b. that 'the Registry's communication'²⁵ omits concrete efforts directed toward civil society and individuals, whereas the proposed campaign would target those funding sources;²⁶
 - a. that a recent Trust Fund for Victims Management Brief refers to the Registry having assisted that fund in various ways, for example, coordination with the fund regarding its website and support from Registry Country Offices to outreach activities in situation countries;²⁷ and
 - b. the fact that the Registry provided no reasons for declining to support the campaign.²⁸
14. Mr Yekatom requests the Presidency to order the Registry to support his fundraising project, specifically by publicising the campaign in the CAR, using the Court's logo on the relevant banner, setting up a Central African office telephone number for information on the campaign and setting up a bank account dedicated strictly to fund Mr Yekatom's family visits.
15. He requests in the alternative that the Presidency find that issues raised in relation to the funding of family visits to a detained person are matters pertaining to detention in the meaning of regulation 217(1), and order the Registry to reconsider the request and liaise with his Defence to find appropriate funding solutions to facilitate family visits for him.²⁹

²⁴ [Application](#), ICC-RoR220-06/21-1, para. 29; *see also* para. 35.

²⁵ It is unclear whether 'communication' in this submission is intended to mean a specific communication about the Registry's fundraising efforts, such as those in the Registry Decision and Impugned Decision, or Registry communication generally.

²⁶ [Application](#), ICC-RoR220-06/21-1, paras 30-31, 33, 36-38.

²⁷ [Application](#), ICC-RoR220-06/21-1, para. 32.

²⁸ [Application](#), ICC-RoR220-06/21-1, paras 39-41; *see also* para. 33, asserting that the Registry refused to meaningfully consider the fundraising proposal.

²⁹ [Application](#), ICC-RoR220-06/21-1, p. 11.

IV. DETERMINATION OF THE PRESIDENCY

16. The Presidency recalls that prior to the judicial review of a decision of the Registrar, it must be satisfied that the Application is properly before it.³⁰
17. As a detained person, Mr Yekatom is entitled under regulation 217(1) of the Regulations to 'make a complaint against any matter concerning his [...] detention' at any time. The Presidency's power of judicial review under regulation 220 of the Regulations, on which the Application relies, is limited to decisions of the Registrar on such complaints.
18. The admissibility of the Application thus depends on whether the Registry's declining to provide the requested support to Mr Yekatom's proposed fundraising campaign is a 'matter concerning his [...] detention' under regulation 217(1).
19. The words of regulation 217(1), particularly 'any' and 'concerning', are inherently broad. The textual context to that regulation also supports a broad interpretation. Both the chapter title 'Detention Matters' and the content of the regulations in Chapter 6 of the Regulations of the Court and Chapter 5 of the Regulations of the Registry indicate that, at a minimum, the matters explicitly provided for in those chapters are matters concerning a detained person's detention. Those explicitly regulated matters include a wide range of rights and particular conditions of detention, in section 2 of each Chapter. The right to receive visits is among them.
20. Specifically, regulation 100(1) of the Regulations of the Court provides that '[a] detained person shall be entitled to receive visits'. Regulation 179 of the Regulations of the Registry addresses applications for visits from family, among others. It provides in paragraph (1), in relevant part, '[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links.'
21. While acknowledging that there is no provision specifically addressing funding for family visits,³¹ the Presidency has previously accepted that there is an implied obligation

³⁰ See, e.g., Presidency, [Decision on the admissibility of Aprodec's "Requête en Annulation de la Décision du Refus de Visite opposé par le Greffier le 5 janvier 2010. Et, Contestation du Comportement et l'Aptitude du Greffier à exercer les Fonction prévues à l'Article 43\(1\)."](#), 9 June 2010, ICC-RoR221-01/10-5-Red, para. 17.

³¹ See, e.g., Presidency, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221\(1\) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008"](#), 24 March 2009, ICC-RoR217-02/08-8 (the '2009 Ngudjolo Decision'), para. 37.

of the Court to fund family visits of indigent detained persons and a corollary obligation to seek donations to the TFFV actively.³² Moreover, as Mr Yekatom also notes,³³ the Presidency has previously found that in circumstances where there are no available funds in the TFFV, the Registrar should explore whether there exist temporary feasible means to support family visits of indigent detainees.³⁴ In addition the Presidency has specifically urged the Registrar to redouble efforts to seek donations from civil society and individuals, along with States Parties, other States, non-governmental organisations and other entities.³⁵

22. The Registrar's explanation of his view that the complaint is inadmissible, in the Impugned Decision, refers to no authorities other than regulations 217 and 218 of the Regulations. Having reviewed these and the other provisions of those Regulations and the Regulations of the Court pertaining to detention, the Presidency considers that they leave open the possibility that the subject of the complaint constitutes a matter concerning Mr Yekatom's detention. The Presidency's previous jurisprudence on applications for judicial review of decisions related to funding for family visits also leaves open this possibility.

23. The Presidency therefore finds the Application to be admissible.

24. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.³⁶

³² See, e.g., [2009 Ngudjolo Decision](#), ICC-RoR217-02/08-8, paras 30-42; Presidency, [Public redacted version of "Decision on the 'Application to review the 'Decision on Complaint to the Registrar by \[REDACTED\] concerning Supported Family Visit'" dated \[REDACTED\] 2016"](#), 30 August 2016, ICC-RoR221-02/16-3-Red, para 42, p. 13; Presidency, [Public redacted version of "Decision on Defence 'Request for review of the Registrar's decision of 21 June 2019' dated 5 July 2019 \(ICC-RoR220-01/19-1-Conf-Exp\)"](#), 17 September 2019, ICC-RoR220-01/19-2-Conf-Exp, 10 December 2019, ICC-RoR220-01/19 (the '2019 Ntaganda Decision'), para. 24.

³³ [Application](#), ICC-RoR220-06/21-1, para. 26.

³⁴ [2019 Ntaganda Decision](#), ICC-RoR220-01/19, para. 27, p. 11.

³⁵ [2019 Ntaganda Decision](#), ICC-RoR220-01/19, para. 27.

³⁶ The standard of judicial review was defined by the Presidency in its [Decision on the application to review the Registrar's decision denying the admission of Mr Ernest Midagu Bahati to the list of counsel](#), 29 December 2005, ICC-Pres-RoC72-02-05 (the 'Bahati Decision'), para. 16 and supplemented in its Decision on the application to

25. The Presidency further recalls that it has found, regarding the matters just described, that:

The precise remedy for an error of a nature described in the preceding paragraph lies within the discretion of the Presidency. In general terms, where there has been a failure within the decision-making process, the resulting decision is liable to be quashed and, where appropriate, remitted to the Registrar for further consideration or action in the light of the decision of the Presidency on the application for review.³⁷

26. As earlier stated, Mr Yekatom has raised in his Application: failure to act with procedural fairness, error of law and 'fail[ure] to take into consideration relevant circumstances',³⁸ which the Presidency interprets as referring to failure to take into account relevant factors. The Presidency has found above that this Application is admissible, on the basis that the Complaint was against a matter concerning Mr Yekatom's detention. It follows from this finding that the Presidency considers that the Registrar erred in dismissing the Complaint as inadmissible. This is properly characterised as an error of law, not a failure to act with procedural fairness as Mr Yekatom alleges. The Presidency, acting by majority, Judge Mindua dissenting, finds that, given that this error, the Impugned Decision should be quashed and the matter remitted to the Registrar for consideration on its merits.

27. In light of these findings, the Presidency will not address further Mr Yekatom's submissions regarding the scope of regulation 217(1) or the other grounds of review he has raised, which appear to be principally directed not at the Impugned Decision itself, but rather at the decision-making process that led the Registry to decline to support the fundraising campaign.

V. CLASSIFICATION

28. The Presidency notes that the Application has been filed publicly but that its annexes have been filed confidentially and *ex parte*. The annexes consist of the memorandum from the Registry to all Defence teams referred to in paragraph 2 above and a series of

review the decision of the Registrar denying Mr. Balembo privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. See also Presidency, [Reasons for the 'Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel"'](#), 10 July 2008, ICC-RoC72-01/08-10, para. 20; Presidency, [Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts](#), 6 August 2009, ICC-RoR56-01/09-2, para. 11.

³⁷ [Bahati Decision](#), ICC-Pres-RoC72-02-05, para. 17.

³⁸ [Application](#), ICC-RoR220-06/21-1, p. 7.

emails between Registry officers and members of the Defence for Mr Yekatom, some of which are also referred to above. Mr Yekatom gave no reasons for the confidential *ex parte* classification of these annexes. The Registry has also filed the Complaint, Impugned Decision and emails between Registry officers and members of the Defence for Mr Yekatom³⁹ confidentially and *ex parte*, on the basis that they 'contain [...] information on the internal operations of the Registry'.⁴⁰

29. In the Presidency's view, nothing said in this decision *prima facie* qualifies it as confidential *ex parte*. The Presidency directs Mr Yekatom and the Registry to indicate, by way of submissions filed no later than 14 April 2022, what information in its decision, if any, ought to be redacted to the public. The Presidency will proceed to issue a public version of its decision after receipt of Mr Yekatom's and the Registry's views.

In light of the above, the Presidency hereby:

GRANTS the Application, in part, and, acting by majority, Judge Mindua dissenting, **REVERSES** the Impugned Decision and **REMITTS** the matter to the Registrar for consideration of the Complaint on its merits. The Presidency further **ORDERS** Mr Yekatom and the Registry to file submissions by 1600 on 14 April 2022 on what information, if any, ought to be redacted in the public version of its decision.

³⁹ In addition to annex I to the Registry Transmission, which consists entirely of such emails (ICC-RoR220-06/21-2-Conf-Exp-AnxI), some such emails were also annexed to the Complaint and thus form part of annex II to the Registry Transmission (ICC-RoR220-06/21-2-Conf-Exp-AnxII).

⁴⁰ [Registry Transmission](#), ICC-RoR220-06/21-2, para. 2.

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



Judge Piotr Hofmański
President



Judge Luz del Carmen Ibáñez Carranza
First Vice-President



Judge Antoine Kesia-Mbe Mindua
Second Vice-President

Dated this 31 March 2022

At The Hague, The Netherlands