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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Public redacted version of “Prosecution’s Response to Yekatom's Notification
Pursuant to Rule 79 of the Rules of Evidence, ICC-01/14-01/18-818-Conf, and
Request for Related Orders”, 25 January 2021,
(ICC-01/14-01/18-851-Conf)**

Source: Office of the Prosecutor

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 YEKATOM’s 13 January 2021 Notification Pursuant to Rule 79¹ (“Alibi Notification”) as without legal effect. The Alibi Notification is a nullity because it is inexcusably late and substantively deficient. Further, it prejudices the ability of the Office of the Prosecutor (“Prosecution”) thoroughly to investigate the claim. The Chamber should thus order the YEKATOM Defence to disclose all required particulars of the alleged alibi immediately, permit the Prosecution to amend its List of Evidence and List of Witnesses as appropriate to address the alleged alibi, draw an adverse inference in respect of such evidence adduced at trial, and authorise the Prosecution to present rebuttal evidence, as appropriate.

II. CONFIDENTIALITY

2. This Response is classified as “Confidential” as it responds to a filing with the same classification. The Prosecution will file a public redacted version of this submission as soon as practicable.

III. SUBMISSIONS

A. YEKATOM’s Alibi Notification is inexcusably late, deficient, and prejudices the Prosecution

a. The Alibi Notification is late

3. YEKATOM’s Alibi Notification is filed over one year after the 11 December 2019 Decision on the Confirmation of Charges in this case.² YEKATOM has known of the facts and circumstances of his claimed alibi since he was served with the Warrant

¹ ICC-01/14-01/18-818-Conf.

² ICC-01/14-01/18-403-Conf-Corr (“Confirmation Decision”).

of Arrest in October 2018³ and further, as set out substantially unchanged in the Prosecution's Document Containing the Charges in August 2019 ("DCC").⁴ Throughout, YEKATOM has been fully aware of the dates, times, and places of the confirmed charges as well as the factual circumstances of his criminal responsibility for counts 1-3 and 11-16 of the Confirmation Decision. Furthermore, YEKATOM has always been aware of his whereabouts at the time of the BOEING Market attack and the Yamwara School incidents in December 2013.

4. Despite this, the YEKATOM Defence informed the parties only on 8 April 2020 "that he *anticipated* relying on an alibi defence for *some charges* and that it would provide the required notice pursuant to Rule 79...."⁵ No further details were provided. Manifestly, this single sentence does not constitute sufficient notice of alibi under rule 79, in whole or part. It does not provide any indication as to which counts or incidents YEKATOM's prospective alibi might apply, nor any information about the substance of the alibi itself, for example, his alleged location, potential witnesses to his whereabouts, or other corroborating evidence.

5. Having received no further information following YEKATOM's 8 April 2020 filing, on 22 June 2020 the Prosecution specifically requested both Defence teams to provide timely notice and disclosure of the required information and evidence concerning any prospective defence under rules 79 and 80.⁶ Citing the ICTY *Tolimir* case,⁷ the Letter read, in part:

"the Defence is presently well-positioned to provide the Prosecution with timely notice describing with sufficient specificity the relevant physical location(s) the Accused claims to have been at the time(s) of the alleged crimes or key events

³ ICC-01/14-01/18-1-Red.

⁴ ICC-01/14-01/18-206-AnxB1.

⁵ ICC-01/14-01/18-472, para. 42; Alibi Notification at para. 2 (emphasis added).

⁶ See 22 June 2020 letter from the Prosecution to the Yekatom and Ngaissona Defences, attached as Annex A ("Letter").

⁷ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence, 1 December 2010, para. 22.

underlying the modes of liability, and further details regarding other anticipated defences under the Rules.”⁸

Significantly, the Letter further specified that:

“in the case of alibi, this further includes the Accused’s precise whereabouts on the relevant dates and times, and contact information for the witnesses establishing the Accused’s location, as well as any supporting documentation.”⁹

6. The Letter also indicated that provision of the requisite notice and supporting evidence by 6 July 2020 was necessary to allow the Parties and Participants to meaningfully participate in the status conference and to prepare adequately for trial.¹⁰ While the NGAISSONA Defence indicated no intention to rely on rule 79 or 80 defences, the YEKATOM Defence’s responsive email of 22 June 2020 provided that it would disclose the ‘required notice and details’ ‘in due course’.¹¹ None was forthcoming for seven months until 13 January 2021, three weeks before opening statements — and notwithstanding that the Chamber announced the date for the commencement of trial on 16 July 2020.¹²

7. Rule 79 is not discretionary. Its plain language indicates the Defence has an obligation to disclose the *factual details* underlying an alleged alibi:

The Defence shall notify the Prosecutor of its intent to raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.¹³

⁸ Letter, p. 2.

⁹ Letter, p. 2.

¹⁰ Letter, p. 2 (citing *Lubanga* ICC-01/04-01/06-1235-Corr-Anx1, para. 29(a); ICC-02/04-01/15-460, para. 8)

¹¹ The respective Defence emails of 22 June 2020 (YEKATOM) and 23 June 2020 (NGAISSONA) are available on the Chamber’s request.

¹² See ICC-01/14-01/18-589, paras. 25-25, p. 10.

¹³ Rule 79(1)(a) (emphasis added).

As held in the *Lubanga* and *Ongwen* cases, and as rule 79(2) expressly indicates, the Defence is required to disclose this information sufficiently in advance of the trial to enable the Prosecution to prepare adequately and to respond.¹⁴ Pre-Trial Chamber II noted in *Ruto and Sang* its preference for alibi evidence to be disclosed *prior to the confirmation hearing*, "... in order to ensure that the Prosecutor is in a position to respond to the Defence and his case is not prejudiced due to raising an alibi at a late stage."¹⁵ At the very latest, the *Ongwen* case indicates this disclosure must be done before the start of trial.¹⁶ Late notification of an alibi, however, may support concerns that it was fabricated.¹⁷

8. The *Ongwen* case further elaborates that "... as a general rule, the Single Judge concurs with Trial Chamber II's conclusion that defence counsels have a 'responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber *as soon as a determination to rely on such grounds has been made*.'"¹⁸ Here, the YEKATOM Defence did not provide alibi notice as soon as its determination to rely on such grounds was made. Notwithstanding its 4 April 2020 filing, YEKATOM failed to provide the required notice at the confirmation hearing, or even during the first status conference before this Chamber. Instead, the Alibi Notification comes two months after the Prosecution's submission of its Trial Brief and 9 November 2020 pre-trial disclosure deadline.

9. Having been on notice of the specifics of the crimes charged in the Confirmation Decision, the DCC, and the Warrant of Arrest, YEKATOM's failure to provide alibi notice for well over a year, if not two, is inexcusable. *First*, there is no credible claim that YEKATOM simply could not remember until now his whereabouts and/or the related facts and circumstances during the 5 December 2013 BOEING

¹⁴ Rule 79(2); *see also* ICC-01/0-401/06-1235-Corr-Anx1, para. 29(a); ICC-02/04-01/15-460, para. 8.

¹⁵ ICC-01/09-01/11-373, para. 108.

¹⁶ ICC-02/04-01/15-460, para. 8; ICC-02/04-01/15-448-Red2, paras. 31-32.

¹⁷ *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Trial Judgement, 19 June 2012, para. 1277.

¹⁸ ICC-02/04-01/15-460, para. 10 (citing ICC-01/04-01/07-2388, para. 46) [emphasis added].

Market attack and the late December 2013 Yamwara School incident. The Defence need not have contacted the alleged alibi witnesses in order to timely provide their names and information, given that YEKATOM's whereabouts at the dates and times specified in the Confirmation Decision, were at all times within his personal knowledge.¹⁹ *Second*, the YEKATOM Defence received and carefully reviewed the DCC in August 2019, was present throughout the September and October 2019 confirmation hearing when specific evidence was outlined against YEKATOM for each of these charges and, having made detailed submissions, did not raise an alibi defence. However, nothing precluded YEKATOM from providing timely alibi notice – even if partial. As noted in the *Ongwen* case, the confirmation proceedings, together with an extensive pre-confirmation brief (in this case, a 250-page DCC) and substantial disclosure, “is sufficient to allow [the Defence] to determine whether it intends to raise the existence of grounds for excluding criminal responsibility.”²⁰

10. The Alibi Notification which is late and deficient (as described below), irreparably prejudices the Prosecution, which carries the burden of proof at trial. The late notice thus fundamentally deprives it of any meaningful way of investigating the legitimacy of YEKATOM's claimed alibi prior to the start of trial, scheduled in just over two weeks on 9 February 2021.

b. The Alibi Notification is substantively deficient

11. As noted, in addition to being late, YEKATOM's Alibi Notification is also substantively deficient. Rule 79 requires that sufficient details be given to allow the Prosecution to organise its evidence and to prepare its case prior to the commencement of the trial on the merits.²¹ Disclosure of *complete* notice of alibi at the

¹⁹ *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecutor's Supplementary Motion to Compel the Accused to Disclose Particulars of his Alibi, 16 April 2010, para. 23.

²⁰ ICC-02/04-01/15-460, para. 15.

²¹ Rule 79(1)(a); *see also* *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on Prosecution Motion for Alibi particulars (TC), 19 October 2009, para. 2 (quoting Rutaganda Judgement (AC), 1 June 2001, para. 111).

earliest stage of the proceedings ensures the fairness of the trial and proper administration of justice.²² As observed in the *Ongwen* case, such notification “allows the Prosecution to adequately *respond to the Defence and prepare its case for trial*.”²³

12. The alibi information provided with respect to Counts 1, 2, and 3 is incomplete. YEKATOM now claims that he:

“...and the elements forming part of his sub-group had already passed the BOEING market from early morning and were moving towards the CATTIN crossroad. Mr. Yekatom was on foot, walking South *en route* to CATTIN crossroad. He remained in the close vicinity of the CATTIN crossroad at the time the Muslim civilians [REDACTED] were allegedly killed. At no time, on 5 December 2013, was Mr. YEKATOM present at the Boeing market when the six Muslim civilians [REDACTED] were allegedly killed.”²⁴

13. Although the Alibi Notification provides the names of five individuals regarding YEKATOM’s contention that he was “on the road to CATTIN” instead of being at the market that day,²⁵ it provides insufficient details as to *how* each witness supports the alleged alibi. There is no indication that these five individuals are coextensive with the “elements forming part of his sub-group” allegedly with YEKATOM that day. If there were others, rule 79 requires that the Defence name them, or if their names are unknown, an approximate number of people with him who support his alibi defence be provided.

14. The alibi information provided with respect to Counts 11 through 16 is incomplete. YEKATOM provided only one name [REDACTED] to corroborate that he was not at the Yamwara School during the detention, torture, and murder of detainees there. Yet YEKATOM claims that he was doing some field reconnaissance “with some

²² *Prosecutor v. Rutaganda*, Case No. ICTR-93-A, Judgement (AC), 12 May 2003, para. 241 [emphasis added].

²³ ICC-02/04-01/15-460, para. 9 (emphasis added).

²⁴ Alibi Notification, para. 8.

²⁵ Alibi Notification, para. 9.

of his elements” at a location about an hour away by foot.²⁶ The Alibi Notification merely indicates this alibi witness “...was among the elements present with Mr. YEKATOM and is a potential Defence witness.”²⁷ This information is *prima facie* insufficient. While it indicates there were other elements present, they are not named, or their approximate number indicated as rule 79 requires.

15. The Alibi Notification also indicates that YEKATOM “did not return to the Yamwara School until late that evening,”²⁸ but there is no indication at what specific time he supposedly returned, and what he allegedly did (or did not do) with respect to the detainees at that point.

16. Furthermore, it is not clear whether any of these alibi witnesses have been interviewed by the Defence. However, to the extent they have been screened or interviewed, their screenings and statements provide a more complete narrative of the alleged alibi as “other evidence” under rule 79(1) to which the Prosecution is entitled. As detailed below, the Prosecution requests the Chamber order the Defence to provide sufficient notice under rule 79 and to disclose all related materials immediately.

c. The Alibi Notification is prejudicial

17. The limited information provided in the Alibi Notification, irreparably prejudices the Prosecution’s ability to organise its evidence and prepare its case for trial. Most immediately, it prevents the Prosecution from effectively preparing its opening statements. More fundamentally, it hampers the Prosecution’s ability to fully investigate the alibi, meet its burden of proof, and undermines its obligations to establish the truth, as well as the Chamber’s function to seek it.

²⁶ Alibi Notification, para. 11.

²⁷ Alibi Notification, para. 12.

²⁸ Alibi Notification, para. 11.

18. Rule 79(2) permits the Chamber to grant the Prosecutor an adjournment to address untimely and inadequately noticed alibi issues raised by the Defence.²⁹ The issue necessarily goes to the *fairness* of the proceedings. However, the Prosecution considers that other mitigating measures may be more appropriate at this stage, as set out below.

B. The Chamber should order measures to mitigate the late and deficient Alibi Notification

19. Given the need for the Prosecution to investigate YEKATOM's alibi and the circumstances described above, the Chamber should order the following measures in mitigation: (1) require the YEKATOM Defence's provision of all required information under rule 79 immediately, and any related disclosure; (2) permit the Prosecution to amend its List of Evidence and List of Witnesses, as necessary to address the alibi and such new information; (3) draw an adverse inference as to the credibility of the alleged alibi; and (4) allow the introduction of rebuttal evidence as may be necessary, depending on the availability of any evidence countering the proffered alibi.

a. Immediate disclosure of additional details of YEKATOM's alibi, and the timely disclosure of any alibi evidence obtained in the future

20. As demonstrated above, the Defence has not met its obligations under rule 79, impeding the Prosecution's ability to meaningfully investigate and the Chamber's ability to ensure the fair and expeditious conduct of proceedings and to determine the truth. The Prosecution considers that the Chamber may mitigate the damage caused here by ordering the disclosure of information related to the asserted alibi. This includes *inter alia* summaries of evidence, copies of the statements of witnesses the defence intends to call, and the number and the identities of those witnesses.³⁰ Thus,

²⁹ Rule 79(2).

³⁰ See, e.g. Regulation 54 of the Regulations of the Court.

the Chamber should order YEKATOM to immediately provide any and all additional details and any other information supporting his whereabouts during the BOEING Market attack on 5 December 2013, charged in counts 1, 2, and 3, and the abuse and torture of detainees at the Yamwara School charged in counts 11 through 16.³¹ It should include:

- i. Details of how each witness will support the Accused's alibi;
- ii. Names and biographical data of any additional persons or elements with YEKATOM during the incidents in question;
- iii. Any and all witness screening and interview notes obtained from these individuals, and a short summary of alibi witnesses' expected testimony;
- iv. Any other evidence on which the YEKATOM intends to rely to establish his alibi;
- v. Witness particulars for each of the five alibi witnesses, including: activities in 2013-2014, parentage, birthplace, and 2013-2014 residence, and current city and country of residence.

21. The Chamber should further order YEKATOM to provide any additional information about this alibi defence on a rolling basis as it is received.

³¹ This information is required by rule 79 and is commonly disclosed in other cases. *See Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Decision on Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi Pursuant to Rule 54 and 67(ii), 7 February 2011, para. 6.

b. Amendment of the Prosecution's List of Evidence and List of Witnesses, as appropriate

22. The Chamber should allow the Prosecution to amend its List of Evidence and List of Witnesses, as appropriate, to address the alleged alibi. Should the Prosecution need to submit additional relevant or probative evidence to respond to the alleged alibi, there is good cause for a variation of time limits under regulation 35 of the RoC, given that the Defence provided its Alibi Notification two months after the Prosecution's pre-trial disclosure deadline and the filing of its Final List of Witnesses. This includes evidence currently in the Prosecution's possession, evidence uncovered in the course of its prospective responsive investigations, and evidence that the Defence may further disclose.

c. Drawing an adverse inference as to the credibility of alleged alibi

23. Although the statutory framework does not envision the total preclusion of evidence of an alibi defence where rule 79 is violated, the Chamber may and should consider the completeness and timing of the asserted alibi when assessing its credibility. For instance, the ICTR Appeals Chamber found one accused:

"did not provide adequate notice of his intent to rely on an alibi defence as prescribed in Rule 67(A)(ii)(a) of the Rules. The Trial Chamber observed that the lack of notice 'may suggest that the Defence has tailored the alibi evidence to fit the Prosecution's case.' It therefore decided to take this into consideration in assessing the alibi, noting that this 'may diminish its probative value as it raises the question of whether the alibi was recently invented to fit the [Prosecution case].'"³²

³² *Kalimanzira v. Prosecutor*, Judgement, ICTR-05-88-A(AC), 20 October 2010, para. 54 (internal citations omitted).

24. That Chamber reiterated that it "has held that the manner in which an alibi is presented may impact its credibility."³³ Late notification of an alibi, for example, may support concerns that it was fabricated.³⁴ The same can be said for the late and deficient Alibi Notification in this case. Accordingly, at the appropriate time, the Chamber should draw an adverse inference in respect of any such evidence produced by YEKATOM. This is especially the case where the Prosecution no longer has sufficient time in advance of trial to investigate the YEKATOM's claims adequately.

d. Rebuttal Evidence

25. Finally, the Chamber should allow the Prosecution an opportunity to present rebuttal evidence on the issue of alibi, should such evidence come to light after the presentation of its case-in-chief. This is necessary to mitigate and address the prejudicial impact of the deficient Alibi Notification, provided by the Defence two months after the Prosecution's pre-trial disclosure deadline, including the filing of its Final List of Witnesses, and seven months after a formal demand for such information.

³³ *Kalimanzira v. Prosecutor*, Judgement, ICTR-05-88-A(AC), 20 October 2010, para. 56 (internal citations omitted).

³⁴ *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Trial Judgement, 19 June 2012, para. 1277.

IV. RELIEF SOUGHT

26. For the above reasons, the Prosecution respectfully requests that the Chamber: (i) reject the late and deficient Alibi Notification as without legal effect; ; (ii) order YEKATOM to immediately disclose any and all additional alibi evidence as described above in paragraphs 20 and 21; (iii) permit the Prosecution to amend its List of Evidence and List of Witnesses, as needed, to address this delayed disclosure; (iv) draw an adverse inference when such evidence is adduced at trial; and (v) authorise the Prosecution to present rebuttal evidence, as appropriate.



James Stewart, Deputy Prosecutor

Dated this 18th day of February 2021
At The Hague, The Netherlands