



Original: English

**No. ICC-01/14-01/18
Date: 12 March 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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Decision on the Prosecution Requests related to the Yekatom Defence
Notification under Rule 79 of the Rules**

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 64(2), (3)(c) and 67(1) of the Rome Statute (the ‘Statute’) and Rule 79 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Prosecution Requests related to the Yekatom Defence Notification under Rule 79 of the Rules’.

I. Procedural history and submissions

1. On 13 January 2021, the Yekatom Defence (the ‘Defence’) notified the Chamber and the participants of its intent to raise the existence of alibis for (i) the attack at the Boeing Market on 5 December 2013, concerning counts 1 to 3 (the ‘First Alibi’); and (ii) the crimes committed at the Yamwara School Base, concerning counts 11 to 16 (the ‘Second Alibi’ and, collectively, the ‘Alibi Notification’).¹
2. The Defence indicates the locations where Mr Yekatom claims to have been present at the time when the crimes under the concerned counts were committed, together with some of his elements.² It further names five potential witnesses for the First Alibi, and one potential witness for the Second Alibi.³ However, the Defence emphasises that, as a result of not being able to complete its investigations in the field due to the Coronavirus Pandemic, the names of these potential witnesses are of ‘provisional nature’ and could be subject to ‘an amendment in the near future’.⁴
3. On 25 January 2021, the Office of the Prosecutor (the ‘Prosecution’) responded to the Alibi Notification.⁵ First, it argues that it is ‘inexcusably late’, noting that

¹ Defence Notification Pursuant to Rule 79 of the Rules of Procedure and Evidence, ICC-01/14-01/18-818-Conf (public redacted version notified on 5 February 2021, ICC-01/14-01/18-818-Red), paras 1, 7, 10, 14, 16.

² See Alibi Notification, ICC-01/14-01/18-818-Conf, paras 8, 11.

³ Alibi Notification, ICC-01/14-01/18-818-Conf, paras 9, 12.

⁴ Alibi Notification, ICC-01/14-01/18-818-Red, para. 5.

⁵ 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, ICC-01/14-01/18-851-Conf (with one confidential annex) (public redacted version notified on 18 February 2021, ICC-01/14-01/18-851-Red) (the ‘Response’).

despite being aware of the facts and circumstances of the alibis since Mr Yekatom was served with the warrant of arrest in October 2018, the Defence only informed the participants that it anticipated relying on such alibis in April 2020, without providing further details at that stage. The Prosecution further notes that the Defence again failed to provide any details when the Prosecution specifically requested it to provide ‘timely notice and disclosure’ under Rules 79 and 80 of the Rules in June 2020, ultimately filing its Alibi Notification over one year after the issuance of the decision on the confirmation of the charges.⁶ The Prosecution argues that the Defence therefore failed to provide alibi notice ‘prior to the confirmation hearing’, as preferred by Pre-Trial Chamber II in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the ‘PTC II’ and the ‘Ruto and Sang case’, respectively)⁷ and, in any event, ‘as soon as a determination to rely on such grounds has been made’.⁸

4. Second, it submits that the Defence has provided insufficient details of its Alibi Notification, which makes it ‘substantively deficient’.⁹ It further submits that to the extent that the alibi witnesses have been interviewed, their screenings and statements constitute ‘other evidence’ under Rule 79(1) of the Rules to which the Prosecution is entitled.¹⁰
5. Third, the Prosecution submits that such a late and deficient alibi ‘irreparably prejudices [its] ability to organise its evidence and prepare its case for trial’, impacting on the fairness of the proceedings.¹¹
6. Under these circumstances, the Prosecution requests the Chamber to reject the Alibi Notification as without legal effect (the ‘Request’).¹² In addition, in order

⁶ Response, ICC-01/14-01/18-851-Red, paras 3-6.

⁷ Response, ICC-01/14-01/18-851-Red, para. 7 referring to PTC II, *Ruto and Sang* case, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 (the ‘*Ruto and Sang* Confirmation Decision’), para. 108.

⁸ Response, ICC-01/14-01/18-851-Red, para. 8 referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on ‘Prosecution’s request to order the Defence to comply with rule 79’, 7 June 2016, ICC-02/04-01/15-460 (the ‘*Ongwen* Rule 79 Decision’), para. 10.

⁹ Response, ICC-01/14-01/18-851-Red, paras 1, 11-15, where the Prosecution specifically submits that the Alibi Notification provides insufficient details as to how each witness supports the First Alibi, and fails to name or indicate the approximate number of elements who allegedly accompanied Mr Yekatom for the First and Second Alibis.

¹⁰ Response, ICC-01/14-01/18-851-Red, para. 16.

¹¹ Response, ICC-01/14-01/18-851-Red, paras 10, 17-18.

to ‘mitigate the late and deficient Alibi Notification’, the Prosecution requests the Chamber to (i) order the Defence to ‘immediately disclose any and all additional alibi evidence’; (ii) allow the Prosecution to amend its List of Evidence and Final Witness List, ‘as needed’; (iii) draw an adverse inference in respect of the evidence produced in support of the Alibi Notification; and (iv) authorise the Prosecution to present rebuttal evidence, ‘as appropriate’ (collectively, the ‘Additional Requests’).¹³

7. On 5 February 2021, in line with the time limit set by the Single Judge,¹⁴ the Defence requested the Chamber to dismiss the Request and the Additional Requests.¹⁵ According to the Defence, the Alibi Notification was filed in a timely manner and is fully compliant with Rule 79 of the Rules, and the Prosecution’s claims of prejudice are unsubstantiated and otherwise should not be relied upon.¹⁶ It further submits that the relief sought is ‘unjustified and variously premature, disproportionate and contrary to Mr Yekatom’s fair trial rights’.¹⁷

II. Analysis

8. Pursuant to Rule 79(2) of the Rules, ‘notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond’. While the concept of ‘sufficiently in advance’ is not further defined in the Rules or elsewhere in the Court’s legal framework, the Chamber notes that other chambers of this Court have considered that providing notification

¹² Response, ICC-01/14-01/18-851-Red, paras 1, 26.

¹³ Response, ICC-01/14-01/18-851-Red, paras 16, 19-26.

¹⁴ Further to a Defence’s request for guidance in that respect, the Chamber, noting the requests contained in the Response, indicated that the Defence could file a response thereto within the applicable time limits under Regulation 34(b) of the Regulations of the Court (*see* email from the Chamber, 26 January 2021, at 14:06; email from the Yekatom Defence, 26 January 2021, at 12:11).

¹⁵ Yekatom Defence Response to ‘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’, ICC-01/14-01/18-851-Conf, ICC-01/14-01/18-873-Conf (public redacted version notified the same day, ICC-01/14-01/18-873-Red) (the ‘Defence Response’), paras 2, 47.

¹⁶ Defence Response, ICC-01/14-01/18-873-Red, para. 3. *See also* paras 11-29.

¹⁷ Defence Response, ICC-01/14-01/18-873-Red, para. 3. *See also* paras 30-45.

‘sufficiently in advance’ under Rule 79(1) of the Rules implies notification prior to the commencement of trial.¹⁸

9. The Chamber further notes that, in the *Ruto and Sang* case, PTC II found that ‘the words “sufficiently in advance” sugges[t] that the notification [under Rule 79] should preferably take place prior to the commencement of the confirmation hearing in order to ensure that the Prosecutor is in a position to respond to the Defence’.¹⁹ However, in the Chamber’s view, PTC II’s finding was made in the context of the pre-trial proceedings should the defence raise an alibi under Rule 79(1) of the Rules before the confirmation of charges hearing and is thus not instructive for the present stage of the proceedings.²⁰
10. Moreover, certain chambers of this Court have further considered that, in addition to notification under Rule 79(1) of the Rules, the defence generally has ‘a responsibility to notify their intention, if any, to raise a defence to the

¹⁸ See Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Prosecution’s request seeking dismissal of the Defence notice on affirmative defences, 1 September 2020, ICC-01/12-01/18-1027 (the ‘*Al Hassan Decision on Defence Notice*’), para. 7, where Trial Chamber X recalled its view that ‘the notification that is sufficiently in advance to enable the Prosecution to prepare adequately and to respond implies a notification prior to the commencement of trial’ referring to transcript of hearing, 3 June 2020, ICC-01/12-01/18-T-015-CONF-ENG, p. 32, lines 7-10 (the Chamber notes that, while this decision relates to affirmative defences under Articles 31 to 33 of the Statute, Trial Chamber X referred to ‘the procedure provided under Rules 79 and 80 of the Rules’); *Ongwen Rule 79 Decision*, ICC-02/04-01/15-460, para. 8, where the Single Judge of Trial Chamber IX held that notification under Rule 81(1) of the Rules sufficiently in advance ‘implies notification prior to the commencement of trial’ referring to, *inter alia*, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209 (the ‘*Bemba et al. Initial Directions*’), para. 8, where the Single Judge of Trial Chamber VII directed the Defence to provide its notification under Rule 79, if any, ‘prior to the start of trial’ (the Chamber notes that while the *Ongwen Rule 79 Decision* relates to an affirmative defence under Article 31(1) of the Statute, the *Bemba et al. Initial Directions* do not distinguish between alibi and grounds of excluding criminal responsibility and notification shall be given for both ‘prior to the start of trial’). See also Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205 (the ‘*Gbagbo and Blé Goudé Initial Directions*’), para. 13, where Trial Chamber I directed the Defence to provide its notification under Rule 79, if any, ‘prior to the start of trial’; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on disclosure by the defence, 20 March 2008, ICC-01/04-01/06-1235-Corr-Anx1 (corrigendum notified on 11 June 2008) (the ‘*Lubanga Decision on Disclosure*’), para. 41(b), where Trial Chamber I ordered the Defence to provide its notification under Rule 79 ‘three weeks in advance of the trial’.

¹⁹ See *Ruto and Sang Confirmation Decision*, ICC-01/09-01/11-373, para. 108.

²⁰ See, in this regard, *Ruto and Sang Confirmation Decision*, ICC-01/09-01/11-373, para. 107, where PTC II held that, contrary to the Prosecution’s submission that an alibi ‘can only be properly resolved by a full airing of the evidence, which can only be done at trial’, it ‘may equally be raised during the pre-trial stage, and thus rule 79 of the Rules shall equally apply’.

Prosecution and the Chamber as soon as a determination to rely on such grounds has been made'.²¹

11. For the reasons set out below, the Chamber considers that the Defence filed the Alibi Notification in compliance with the requirements under Rules 79(1)(a) and (2) of the Rules.
12. With regard to the timing of the Alibi Notification, the Chamber notes that it was filed on 13 January 2021, *i.e.* 27 days before the scheduled commencement date of the trial.²² It further observes that the Defence informed the Chamber and the participants as early as 8 April 2020 that it 'anticipate[d] relying on an alibi defence for some of the charges'.²³ With regard to the elapsed time between April 2020 and January 2021, the Chamber notes the Defence's submissions that, as a result of several cancellations of a field trip planned in 2020 due to the Coronavirus Pandemic, it was unable to complete its investigations for the preparation of the Alibi Notification.²⁴
13. Second, with regard to the content of the Alibi Notification, the Chamber notes that, for each of the crimes under the concerned counts, the Defence specifies (i) the locations where the accused claims to have been at the time when the crimes were committed, and (ii) the names of the individuals who allegedly accompanied the accused to said locations at the relevant times and on whom the Defence intends to rely to establish the alibis.²⁵ The Chamber further notes the Defence's submission that currently, it is not 'in possession of "any other evidence" on which it intends to rely in relation to the alibis'.²⁶ The Chamber is

²¹ See *Ongwen* Rule 79 Decision, ICC-02/04-01/15-460, para. 10 referring to Trial Chamber II, *The Prosecutor v. Germain Katanga*, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, ICC-01/04-01/07-2388, para. 46.

²² The Chamber notes that the trial was due to commence on 9 February 2021 but that, on 8 February 2021, it was postponed to 16 February 2021 (see Order Rescheduling the Commencement Date of the Trial, 8 February 2021, ICC-01/14-01/18-875, paras 1-3, p. 4).

²³ See Yekatom Defence Submissions for First Status Conference, ICC-01/14-01/18-472 (with one confidential annex), para. 42.

²⁴ Alibi Notification, ICC-01/14-01/18-818-Red, para. 5.

²⁵ Alibi Notification, ICC-01/14-01/18-818-Conf, paras 8-9, 11-12.

²⁶ Defence Response, ICC-01/14-01/18-873-Red, para. 39.

therefore satisfied that the level of detail provided in the Alibi Notification is consistent with the requirements of Rule 79(1)(a) of the Rules.²⁷

14. Accordingly, the Chamber rejects the Request.
15. Similarly, and in light of the fact that there is no need for ‘measures to mitigate the late and deficient Alibi Notification’, the Chamber rejects the Additional Requests.
16. Specifically with regard to the Prosecution’s requests for the Chamber to authorise it to amend its List of Evidence and Final Witness List ‘as needed’, and to present rebuttal evidence ‘as appropriate’,²⁸ the Chamber observes that these requests are unsubstantiated and formulated in the abstract. The Prosecution is therefore directed to file specific and motivated requests should the need arise.²⁹
17. Finally, with regard to the Prosecution’s submission that the Defence should ‘immediately disclose any and all additional alibi evidence’, including ‘summaries of evidence’ and ‘copies of the statements of witnesses the defence intends to call’,³⁰ the Chamber considers such request premature at this stage of the proceedings and notes that the Chamber will set a timeline for the Defence to effect disclosure of the materials it intends to use at trial in due course.³¹

²⁷ See e.g. *Lubanga* Decision on Disclosure, ICC-01/04-01/06-1235-Corr-Anx1, para. 41(b).

²⁸ Response, ICC-01/14-01/18-851-Red, paras 22, 25-26.

²⁹ See e.g. *Al Hassan* Decision on Defence Notice, ICC-01/12-01/18-1027, para. 14.

³⁰ Response, ICC-01/14-01/18-851-Red, paras 20, 26.

³¹ See e.g. *Gbagbo and Blé Goudé* Initial Directions, ICC-02/11-01/15-205, para. 14; *Bemba et al.* Initial Directions, ICC-01/05-01/13-1209, para. 9.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request and the Additional Requests.

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



Judge Bertram Schmitt

Presiding Judge



Judge Péter Kovács



Judge Chang-ho Chung

Dated 12 March 2021

At The Hague, The Netherlands