

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **2 April 2024**

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 Response to the 'Fourth Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)' (ICC-01/14-01/18-2267-Conf)",
ICC-01/14-01/18-2280-Conf , 21 December 2023**

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. The Office of the Prosecutor (“Prosecution”) opposes the Yekatom Defence’s ‘Fourth Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)’.¹ Trial Chamber V (“Chamber”) should reject the Request. To the extent that D29-P-5016’s statement relates to, *inter alia*, the whereabouts of the Accused and his Anti-Balaka group during the relevant period, it transgresses the requirements of Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”). Apart from this, as set out below, the witness’s proposed testimony presents evidence of an alibi defence, subject to rule 79(1)(a).

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. The Proposed Testimony Impermissibly goes to Proof of Acts and Conduct

3. Contrary to the Request,² D29-P-5016’s proposed testimony goes to proof of the acts and conduct of the Accused. The Request notes in particular that “the Anti-Balaka group of Mr. Yekatom was in [REDACTED] and would move in different localities to ensure[sic] safety.”³ In conjunction with this, the witness claims that when the Muslim population departed [REDACTED], “[l]es Anti-Balaka n’étaient pas encore à

¹ ICC-01/14-01/18-2267-Conf (“Request”).

² ICC-01/14-01/18-2267-Conf, paras. 4, 12.

³ ICC-01/14-01/18-2267-Conf, para. 22; *see also* CAR-D29-0009-0579-R01, para. 24.

[REDACTED] à ce moment-là, ils sont arrivés longtemps après.”⁴ Indeed, he asserts that “Il n’y avait pas de groupe Anti-Balaka à [REDACTED].”⁵

4. D29-P-5016’s proposed testimony is intended to address the evidence of YEKATOM’s Group’s and YEKATOM’s (as an *integral part of that Group*) forcible transfer and/or displacement of the Muslim civilian population along the PK9 – MBAIKI Axis, during their descent toward MBAIKI in January 2014. More specifically, the proposed testimony is directed toward countering the evidence of P-1839 among others,⁶ establishing YEKATOM’s and his Group’s presence in [REDACTED] in or around mid-January 2014.

5. Notably, the Decision on the Confirmation of Charges describes YEKATOM’s Group’s “advance through and takeover of villages along the PK9-Mbaïki Axis (including Sekia, Ndangala, Bimon, Kapou, Bossongo, Pissa, Mbaïki)”⁷ as a part of YEKATOM’s culpable conduct in determining his criminal responsibility regarding crimes charged under articles 7 and 8. As such, and in the context of YEKATOM’s leadership of his Group during their campaign of attacks against Muslim civilians along a specific axis and within a specific period, D29-P-5016’s proposed testimony goes directly to proof of YEKATOM’s personal actions “described in the confirmed charges *or* which are otherwise relied upon by the Prosecution to establish [YEKATOM’s] criminal responsibility for the crimes charged.”⁸ Moreover, it cannot be reasonably argued that D29-P-5016’s proposed testimony in this regard constitutes a mere “peripheral reference to the Accused.”⁹ Rather, it is the very point of the proposed testimony.

⁴ CAR-D29-0009-0579-R01, para. 20 (emphasis added).

⁵ CAR-D29-0009-0579-R01, para. 24.

⁶ See (P-1962) CAR-OTP-2068-0037, paras. 35,106; (P-1666) ICC-01/14-01/18-403-T-231-Conf-Eng, pp. 1-2 and CAR-OTP-2059-0361, paras. 29-32; see CAR-OTP-2014-0729, at 0740; See also ICC-01/14-01/18-403-Corr-Red, fns. 303-304 (citations omitted).

⁷ ICC-01/14-01/18-403-Corr-Red, pp. 104-105.

⁸ ICC-01/14-01/18-1833-Corr-Red, para. 28 (emphasis added).

⁹ ICC-01/14-01/18-1833-Corr-Red, para. 29.

B. The Proposed Testimony Improperly Presents Alibi Evidence

6. As noted above, the presence or absence of YEKATOM's Group at a specific location along the PK9-MBAIKI Axis during which the charged crimes are alleged to have occurred, directly implicates an alibi defence for which prior notice is required under rule 79(1)(a).

7. In the course of the alleged campaign of forcible transfer and displacement along the PK9 – MBAIKI Axis, YEKATOM's Anti-Balaka Group *includes* YEKATOM himself, as an integral part thereof. The Document Containing the Charges and the Decision on the Confirmation of Charges is clear, in that YEKATOM is alleged to have been among his Group during the course of their commission of the charged crimes along the PK9 – MBAIKI Axis, wherein [REDACTED] lies. Thus, D29-P-5016's assertion that "there was no Anti-Balaka group in [REDACTED]" invokes an alibi defence with respect to YEKATOM, whether directly or indirectly.

8. However, the subject matter of D29-P-5016's proposed testimony – namely, YEKATOM's presence at [REDACTED] along the PK9 – MBAIKI Axis in January 2014 was not indicated in YEKATOM's previous alibi notice.¹⁰ Moreover, that notice was withdrawn on 18 September 2023.¹¹

9. The formal submission of the proposed testimony in these circumstances would not only be inconsistent with rule 68(2)(b) – as an alibi defence will almost always involve the acts and conduct of an accused – as it does here, but it would also circumvent the express requirements of rule 79(1)(a) and (2) to provide sufficient advance notice.

¹⁰ See ICC-01/14-01/18-818-Conf; ICC-01/14-01/18-851-Red; and ICC-01/14-01/18-911-Red.

¹¹ See Email from the Yekatom Defence to the Prosecution, dated 18 September 2023, at 15:15 (available on request).

10. As such, contrary to the Request,¹² the formal submission of the D29-P-5016's proposed testimony would prejudice the Chamber's article 64(2) duty to ensure that the trial is fair.¹³

IV. CONCLUSION

11. For the foregoing reasons, the Prosecution requests that the Chamber reject the Request in all respects.

A handwritten signature in black ink, appearing to read 'K.A.K.', is centered on the page. The signature is written in a cursive style with a horizontal line underneath it.

Karim A. A. Khan KC, Prosecutor

Dated this 2nd day of April 2024
At The Hague, The Netherlands

¹² ICC-01/14-01/18-2267-Conf, para. 28.

¹³ ICC-01/04-02/12-271-AnxA, paras. 6, 11. (Dis. Op. Judges Trendafilova and Tarfuser) (noting a Trial Chamber's "duty to ensure a fair trial *vis-à-vis* both parties" and "obligation ... to safeguard the rights of the accused and *equally* the procedural rights of the Prosecutor, acting in public interest) (emphasis supplied).