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**International
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TRIAL CHAMBER IX

Before:

**Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan**

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public Document

**Common Legal Representative's response to the "Prosecution's request to order
the Defence to comply with rule 79"**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of 592 victims authorised to participate in the present case (the “Common Legal Representative”)¹ supports the Prosecution’s request to order the Defence to comply with its disclosure obligations under rule 79 of the Rules of Procedure and Evidence (the “Rules”).

2. The Common Legal Representative agrees with the Prosecution that the Defence should be compelled to give notification under rule 79 of the Rules of any alibi or ground to exclude criminal responsibility before the start of the trial in order to ensure a good administration of justice and efficient judicial proceedings.

3. The Defence’s failure to provide timely notice of its intention to raise grounds excluding criminal responsibility impacts on the rights of the participating victims. Indeed, advancing an alibi or a ground for excluding criminal responsibility may result in acquittal, thus affecting the personal interests of the victims and their right to the truth and reparations for the harms they suffered from as a result of the crimes allegedly committed by the Accused.

II. BACKGROUND

4. On 16 May 2016, the Prosecution filed a request to order the Defence to comply with rule 79 (the “Request”).²

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

² See the “Prosecution’s request to order the Defence to comply with rule 79”, with Confidential Annexes A and B, No. ICC-02/04-01/15-435, 16 May 2016 (the “Request”).

5. On 17 May 2016, Trial Chamber IX (the “Chamber”), pursuant to regulation 34 of the Regulations of the Court, shortened the deadline for filing any responses and ordered the participants to file their submissions to the Request by 27 May 2016.³

III. SUBMISSIONS

6. The requirement upon the Defence to disclose its intention to rely on the defence of alibi or any special defence reflects a well-established practice in international criminal law.⁴ Rules of Procedure and Evidence of the international and internationalised tribunals and courts all contain provisions to this effect.⁵

7. The practice of these tribunals and courts indicates that the *rationale* behind this specific procedural step is to “enable the Prosecutor to consolidate evidence of the accused’s criminal responsibility with respect to the crimes charged”⁶ which further “reduces delays, contributes to the fairness of the trial and supports the proper administration of justice”.⁷

³ See email from the Legal Officer of Trial Chamber IX, sent on 17 May 2016 at 10:16.

⁴ See for instance, ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 233.

⁵ See rule 67 of Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), Doc No. IT/32/Rev.50 (adopted on 11 Feb 1994, amended lastly on 28 Feb 2008), rule 67 of Rules of Procedure and Evidence of ICTR (adopted on 29 June 1995; amended lastly on 13 May 2015); rule 72 of Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals, Doc No. MICT/1 (adopted on 8 June 2012); rule 67 of Rules of Procedure and Evidence of the Special Court for Sierra Leone (“SCSL”) (lastly amended on 2 December 2015), and rule 112 of Rules of Procedure and Evidence of the Special Tribunal for Lebanon (“STL”) (adopted on 20 March 2009, amended lastly on 15 March 2016).

⁶ See ICTR, *Prosecutor v. Casimir Bizimungu et al.*, Decision on Jérôme Bicomumpaka’s Notice of Alibi (Trial Chamber II), Case No. ICTR-99-50-T, 7 July 2005, para. 4.

⁷ See SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Decision on The Prosecution Motion that the Second Accused Comply with Rule 67 (Trial Chamber I), Case No. SCSL-04-15-T, 1 May 2007, para. 16; ICTR, *Prosecutor v. Nchamihigo*, Decision on Defence Compliance with Rule 67 of the Rules (Trial Chamber), Case No. ICTR-2001-63-T, 5 April 2007, para. 10. The ICTR held, in particular, that “compliance with this Rule 67(A)(ii) allows the Prosecution to adduce rebuttal evidence during its case thereby reducing the likelihood of its having to lead rebuttal evidence after the close of the defence case. Therefore, compliance with Rule 67 reduces delays, contributes to the fairness of the trial and supports the proper administration of justice.”

8. In accordance with the explicit wording of rule 79 of the Rules, the Defence has to notify its intention to raise a ground for excluding criminal responsibility provided for in article 31(1) of the Rome Statute at this very juncture. In this regard, the Common Legal Representative agrees with the Prosecution⁸ that the comments - made by the Defence during the confirmation hearing and related to Mr Ongwen's psychiatric or psychological condition, - indicate its intention to rely on a defence under article 31(1)(a) of the Rome Statute.

9. The Common Legal Representative is also of the view that the Defence's refusal to comply with its disclosure obligation under rule 79 of the Rules until the Prosecution completes its disclosure⁹ is without legal basis and "*constitutes a breach*"¹⁰ of the provisions. Pursuant to article 64(3)(c) of the Rome Statute, echoed by rule 79(4) of the Rules, the Chamber may provide for disclosure of documents and/or information not previously disclosed. In this regard, Trial Chamber I held, in the *Lubanga* case, that "*under the Rome Statute framework it is envisaged that the accused's right to a fair trial is not necessarily compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise.*"¹¹

10. Moreover, the progress of disclosure and the need to conduct further investigations is not sufficient to exempt the Defence from its duty to provide said notification.¹²

⁸ See the Request, *supra* note 2, paras. 6 - 7.

⁹ *Idem*, par. 10 and Annex A and B.

¹⁰ In this sense, see SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Decision on The Prosecution Motion that the Second Accused Comply with Rule 67 (Trial Chamber I), Case No. SCSL-04-15-T, 1 May 2007, para. 16 and ICTR, *Prosecutor v. Nchamihigo*, Decision on Defence Compliance with Rule 67 (Trial Chamber), Case No. ICTR-2001-63-T, 5 April 2007, para. 9.

¹¹ See the "Decision on disclosure by the defence" (Trial Chamber I), No. ICC-01/04-01/06-1235-Corr-Anx1, 11 June 2008, par. 31.

¹² See ICTR, *Prosecutor v. Grégoire Ndahimana*, Appeals Judgement, Case No. ICTR-01-68-A, 16 December 2013, paras. 112 - 114.

11. Rule 79 of the Rules requires the Defence to notify its intention to rely on a defence under article 31 of the Statute as soon as that intention is formed. Notification of alibi or any other special defence at the earliest stage of the proceedings ensures the fairness of the trial and proper administration of justice.¹³ In the *Katanga and Ngudjolo* case, Trial Chamber II ruled that “*under Rule 79(1) and (2) the defence teams have the 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 ground has been made.*”¹⁴ The jurisprudence of the ICTR also suggests that the Defence’s duty to provide said notification is “*triggered*” as soon as practicable after the accused becomes aware of the nature and cause of the charges against him or her and forms his or her intention to raise alibi or any other special defence.¹⁵ Therefore, the Defence must act immediately¹⁶.

12. Furthermore, the Common Legal Representative is in agreement with the Prosecution that, following the specific goals set out by rule 79 of the Rules, the Defence should give said notification and provide details of evidence it relies on before the start of trial.

13. The text of rule 79 of the Rules states that the notification by the Defence of its intention to raise the existence of an alibi or a ground for excluding criminal responsibility provided for in article 31(1) of the Rome Statute “*shall be given sufficiently in advance*” to enable the Prosecution to prepare adequately and to respond.

¹³ See ICTR, *Prosecutor v. Karemera*, Decision on Prosecutor’s Motion for an Order to File Notice of Alibi (Trial Chamber), Case No. ICTR-98-44-T, 22 March 2007, para. 16.

¹⁴ See the “Decision on the ‘Prosecution’s Application Concerning Disclosure Pursuant to Rules 78 and 79(4) by the Defence’” (Trial Chamber II), No. ICC-01/04-01/07-2388, 14 September 2010, para. 46 (Emphasis added).

¹⁵ See ICTR, *Prosecutor v. Karemera*, Decision on Prosecutor’s Motion for an Order to File Notice of Alibi (Trial Chamber), Case No. ICTR-98-44-T, 22 March 2007, para. 13.

¹⁶ See ICTR, *Prosecutor v. Élie Ndayambaje et al*, Decision on the Confidential Prosecutor’s Motion to be Served with Particulars of Alibi pursuant to Rule 67(A)(ii)(a) (Trial Chamber), Joint Case No. ICTR-98-42-T, 1 March 2005, para. 27.

14. According to the jurisprudence of the Court, the Defence is required to give said notification *prior to the commencement of the confirmation of charges hearings*.¹⁷ In particular, Pre-Trial Chamber II in the then *Ruto, Kosgey and Sang* case held that:

*"[...] the Chamber believes that an alibi may equally be raised during the pre-trial stage, and thus rule 79 of the Rules shall equally apply. [...] The reference to the words "sufficiently in advance" suggests that the notification 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 and his case is not prejudiced due to raising an alibi at a late stage."*¹⁸

15. If the Defence is required to provide said notification even prior to the start of the confirmation of charges hearing, the need to do so before the start of the trial is even more evident in order to ensure fairness and expeditiousness of the proceedings. Indeed, Trial Chambers do require the Defence to formally notify its intention to raise the existence of an alibi or a ground for excluding criminal responsibility *"sufficiently in advance of the trial"*, meaning before the start of the trial.

¹⁷ See the "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties" (Pre-Trial Chamber III), No. ICC-01/05-01/08-55, 31 July 2008, para. 51; the "Decision Setting the Date of the Confirmation Hearing" (Pre-Trial Chamber III) No. ICC-01/05-01/08-199-tENG, 31 October 2008, p. 7; the "Second Decision on issues relating to Disclosure" (Pre-Trial Chamber I), No. ICC-02/05-02/09-35, 15 July 2009, p. 18; the "Decision on issues relating to disclosure" (Pre-Trial Chamber I), No. ICC-01/04-01/10-87, 30 March 2011, p. 19; the "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties" (Pre-Trial Chamber II), No. ICC-01/09-01/11-62, 20 April 2011, para. 22 and order (v); the "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties" (Pre-Trial Chamber II), No. ICC-01/09-02/11-64, 20 April 2011, para. 22 and order (v); the "Decision on the Prosecution's request for the postponement of the confirmation Hearing" (Pre-Trial Chamber I), No. ICC-01/04-01/10-207, 31 May 2011, p. 10; the "Decision establishing a disclosure system and a calendar for disclosure" (Pre-Trial Chamber III), No. ICC-02/11-01/11-30, 24 January 2012, para. 47; the "Decision on the 'Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012'" (Pre-Trial Chamber I), No. ICC-02/11-01/11-152-Red, 12 June 2012, p. 13; the "Decision on the date of the confirmation of charges hearing and proceedings leading thereto" (Pre-Trial Chamber I), No. ICC-02/11-01/11-325, 14 December 2012, p. 15; the "Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties" (Pre-Trial Chamber II), No. ICC-01/04-02/06-73, 17 June 2013, p. 21.

¹⁸ See the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012, para. 107 and 108. (Emphasis added).

In the *Lubanga* case, Trial Chamber I instructed the Defence to lodge the relevant notification under rule 79(1) of the Rules “*sufficiently in advance of the trial to enable the prosecution to prepare adequately*”.¹⁹ In the *Gbagbo and Blé Goudé* case, Trial Chamber I, in issuing the same ruling, specified that the notification is to be provided, if any, “*prior to the start of trial*”.²⁰

16. Therefore, in order to ensure a good administration of justice and efficient judicial proceedings, any notification of alibi or a ground for excluding criminal responsibility should be tendered in a timely manner, before the commencement of the trial.²¹

17. Rule 79(3) of the Rules provides that the opportunity for the Defence to rely on the two defences and to call evidence in support thereof is preserved, notwithstanding the lack of notice. In fact, while failure by the Defence to provide such notice does not limit the right of the Accused to rely on a defence of alibi or grounds excluding criminal responsibility, the Chamber has to ensure that the trial is fair and expeditious for all actors involved, including victims, since providing the notice in question at the earliest stage of the proceedings promotes the fairness of the trial and proper administration of justice.²² In the words used by the judges at the SCSL: “[F]ailure to provide timely disclosure may impair the interests of fair trial proceedings and undermine the prosecution’s ability to prepare its case and investigate the evidence on which the alibi defence rests. Therefore, failure by the defence to observe its obligations under Rule 67(A)(ii) will entitle the Trial Chamber to take such failure into account when weighing the credibility of the defence of alibi”.²³

¹⁹ See the “Decision on disclosure by the defence”, *supra* note 11, para. 29. (Emphasis added.)

²⁰ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 03 September 2015, para. 13. (Emphasis added.)

²¹ See ICTR, *Prosecutor v. Rutaganda*, Trial Judgement, Case No. ICTR-96-3-A, 26 May 2003, para. 243.

²² See ICTR, *Prosecutor v. Rwamakuba*, Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection (Trial Chamber III), Case No. ICTR-98-44C-PT, 14 June 2005, para. 7.

²³ See SCSL, *Prosecutor v. Alex Tamba Brima et al.*, Decision on Prosecution Motion for Relief in Respect of Violations of Rule 67 (Trial Chamber II), Case No. SCSL-04-16-T, 26 July 2006, para. 18.

18. Consequently, the Common Legal Representative submits that the Chamber should inform the Defence of the possible consequences of its failure to comply in a timely manner with rule 79 of the Rules.²⁴

19. The Common Legal Representative finally notes that the Defence's failure to provide timely notice of its intention to raise grounds excluding criminal responsibility impacts upon the rights of the participating victims.

20. While the text of rule 79 of the Rules obliges the Defence to provide the notification to the Prosecution, said notification and related evidence should also be made available to the participating victims. Indeed, advancing an alibi or a ground for excluding criminal responsibility may result in acquittal, thus affecting the personal interests of the victims and their right to the truth and reparations for the harms they suffered from as a result of the crimes allegedly committed by the Accused.

21. In this regard, the Common Legal Representative recalls the relevant practice of the Court according to which: “[a]s regards the Defence ‘Notice of Alibi’, the Single Judge agrees with the OPCV in principle that this type of notification should also be notified to the victims participating in the proceedings [...]”.²⁵ Trial Chamber I also held in the *Lubanga* case that “[i]n essence, to the extent that the interests of a participating victim are affected at a particular stage in the proceedings, he or she should receive information in the

²⁴ In this regard, see also the practice at other international tribunals, for instance, SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Decision on The Prosecution Motion that the Second Accused Comply with Rule 67 (Trial Chamber I), Case No. SCSL-04-15-T, 1 May 2007, para. 13; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 237; ICTR, *Prosecutor v. Grégoire Ndayimana*, Appeals Judgement, Case No. ICTR-01-68-A, 16 December 2013, para. 113; ICTR, *Prosecutor v. Augustin Ndirabatswe*, Appeals Judgement, Case No. MICT-12-29-A, 18 December 2014, para. 195; and ICTY, *Prosecutor v. Zoran Kupreskic et al.*, Decision (Trial Chamber), 11 January 1999, order (v).

²⁵ See the “Decision on OPCV requests in relation to the Defence disclosure and list of Evidence” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-167, 24 September 2014, paras. 4 and 10 (Emphasis added).

same way as the Chamber and the prosecution.”²⁶ In the *Katanga and Ngodjulo* case, Trial Chamber II also held that “[...] the present case involving two accused and a number of victims authorised to participate in the proceedings [...], the disclosure obligations of the Defence shall extend not only to the Prosecution, but also to the co-accused and the Legal Representatives of Victims”.²⁷

IV. CONCLUSIONS

22. For the foregoing reasons, the Common Legal Representative respectfully requests the Trial Chamber:

- To order the Defence to comply with rule 79 of the Rules of Procedure and Evidence; and
- To inform the Defence of the Chamber’s authority to draw adverse inferences for a failure to comply with rule 79 of the Rules.



Paolina Massidda
Principal Counsel

Dated this 27th day of May 2016

At The Hague, The Netherlands

²⁶ See the “Decision on disclosure by the defence”, *supra* note 11, para. 39 and 41 (Emphasis added.)

²⁷ See the “Decision on the ‘Prosecution’s Application Concerning Disclosure Pursuant to Rules 78 and 79(4) by the Defence’” (Trial Chamber II), No. ICC-01/04-01/07-2388, 14 September 2010, para. 41 (Emphasis added).