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**International  
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Date: 5 February 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 ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public**

**Public redacted version of “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”, 5 February 2021**

**Source:** Defence for Mr. Alfred Rombhot Yekatom

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

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## **INTRODUCTION**

1. Defence Counsel representing Mr. Alfred Rombhot Yekatom ('Defence') hereby file this response<sup>1</sup> to the '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' ('Response').
2. The Response should be dismissed.
3. The Defence's Rule 79 Notification<sup>2</sup> ('Alibi Notice') was filed in a timely manner and fully meets the requirements under that rule, contrary to the Response. The Prosecution's claims of prejudice are unsubstantiated and otherwise should not be relied upon. Lastly, the relief sought by the Prosecution is unjustified and variously premature, disproportionate and contrary to Mr. Yekatom's fair trial rights.

## **PROCEDURAL BACKGROUND**

4. On 8 April 2020, in its submissions for the First Status Conference, the Defence informed the parties that it anticipated relying on an alibi defence for some charges and that it would provide the required notice pursuant to Rule 79 of the Rules of Procedure and Evidence (the 'Rules').<sup>3</sup>
5. On 9 July 2020, the Trial Chamber held the First Status Conference.
6. On 16 July 2020, the Trial Chamber decided that the trial would commence on 9 February 2021.<sup>4</sup>

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<sup>1</sup> This document is filed as a Response pursuant to Regulation 34(b) of the Regulations of the Court, as directed by Trial Chamber V; see, Email from Trial Chamber V of 26 January 2021.

<sup>2</sup> [ICC-01/14-01/18-818-Conf](#).

<sup>3</sup> [ICC-01/14-01/18-472](#), para. 42.

<sup>4</sup> [ICC-01/14-01/18-589](#), paras 24-25.

7. On 13 January 2021, the Trial Chamber decided that the Prosecution's presentation of evidence would commence on 15 March 2021.<sup>5</sup>
8. Also on 13 January 2021, the Defence notified the Trial Chamber, the Prosecutor, and the Legal Representatives for Victims of its intention to raise the existence of alibis for the attack at the Boeing Market on 5 December 2013 and for crimes committed at the Yanwara School base.<sup>6</sup>
9. On 25 January 2021, the Prosecution filed the Response.<sup>7</sup>

### **APPLICABLE LAW**

10. Rule 79 of the Rules ('Disclosure by the defence') provides in relevant part:
  1. The defence shall notify the Prosecution of its intent to:
    - (a) 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;

[...]

  2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.

### **SUBMISSIONS**

#### **I. The Alibi Notice was filed in a timely manner.**

11. The Alibi Notice was filed on 13 January 2021 – that is, 27 days prior to the scheduled Prosecution opening statement, and 61 days prior to the scheduled

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<sup>5</sup> [ICC-01/14-01/18-817](#), para. 3.

<sup>6</sup> [ICC-01/14-01/18-818-Conf.](#)

<sup>7</sup> [ICC-01/14-01/18-851-Conf.](#)

commencement of the Prosecution's presentation of evidence.<sup>8</sup> It was filed sufficiently in advance to enable the Prosecution to adequately prepare and respond, and in any event prior to the commencement of trial, pursuant to 79(2) and in accordance with successive ICC Trial Chambers' interpretations of that rule.<sup>9</sup>

12. For instance, the *Lubanga* Trial Chamber, after having considered the obligation of the Defence to give advance notification pursuant to Rule 79(1)(a), ordered that the Defence provide a document 'setting out in general terms the defences the accused intends to rely on [...] including by way of an alibi [...] under Rule 79', three weeks in advance of the trial.<sup>10</sup>
13. In *Bemba et al.*, Trial Chamber VII held that the Defence were 'to provide [Rule 79] notification, if any, prior to the start of trial' in its Directions on the Conduct of Proceedings, which was issued 27 days before the opening of the trial.<sup>11</sup>
14. Most recently, in *Al Hassan*, Trial Chamber X dismissed a Prosecution request seeking a finding that the Defence's notice of affirmative defences under Articles 31-33 of the Statute, filed one day prior to the Prosecution opening statement and 43 days prior to the commencement of presentation of Prosecution evidence, was 'untimely'.<sup>12</sup>

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<sup>8</sup> Supra, paras 6-7.

<sup>9</sup> See e.g., *Prosecutor v. Lubanga*, [Decision on disclosure by the defence](#), ICC-01/04-01/06-1235-Corr-Anx1, 11 June 2008, para. 29(a); *Prosecutor v. Bemba et al.*, [Directions on the conduct of the proceedings](#), ICC-01/05-01/13-1209, 2 September 2015, para. 8; *Prosecutor v. Ongwen*, [Decision on 'Prosecution's request to order the Defence to comply with rule 79'](#), ICC-02/04-01/15-460, 7 June 2016, para. 8; *Prosecutor v. Al Hassan*, [Decision on the Prosecution's request seeking dismissal of the Defence notice on affirmative defences](#), ICC-01/12-01/18-1027, 17 September 2020, para. 7.

<sup>10</sup> *Prosecutor v. Lubanga*, [Decision on disclosure by the defence](#), ICC-01/04-01/06-1235-Corr-Anx1, 11 June 2008, paras 27-34, 41(b).

<sup>11</sup> *Prosecutor v. Bemba et al.*, [Directions on the conduct of the proceedings](#), ICC-01/05-01/13-1209, 2 September 2015, para. 8.

<sup>12</sup> *Prosecutor v. Al Hassan*, [Decision on the Prosecution's request seeking dismissal of the Defence notice on affirmative defences](#), ICC-01/12-01/18-1027, 17 September 2020, paras 1, 5, 7-9.

15. Further, the Prosecution's reliance in the Response on *Ruto and Sang* is misplaced.<sup>13</sup> Pre-Trial Chamber II's 'preference for alibi evidence to be disclosed prior to the confirmation hearing' is better understood as being limited to circumstances in which a defence intends to raise (or indeed raises, as occurred in that case) an alibi defence at the confirmation hearing, so as to facilitate Prosecution preparation for that hearing.<sup>14</sup> The Prosecution suggestion that the Defence was obliged to provide Rule 79 notice before or during the Confirmation of Charges hearing is also contrary to the permissive (as opposed to mandatory) nature of an accused's participation in such hearings, pursuant to Article 61(6).<sup>15</sup> Moreover, this suggestion implies that the Defence was obliged to file the Alibi Notice roughly eleven months before the disclosure of the final Prosecution Witness and Evidence Lists and the Prosecution Trial Brief,<sup>16</sup> and thirteen months and fifteen months prior to the opening statements and the commencement of the Prosecution presentation of evidence, respectively.
16. Likewise, the *Ongwen* Decision, in which Trial Chamber IX ordered that the Defence provide Rule 79 notification four months prior to the opening statements,<sup>17</sup> is distinguishable in two relevant respects.<sup>18</sup>
17. First, in that case, the Rule 79 notification requirement was triggered by the Defence's intent to raise defences under Article 31 as opposed to a

<sup>13</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 7, citing *Prosecutor v. Ruto & Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-01/11-373, 23 January 2012.

<sup>14</sup> *Prosecutor v. Ruto & Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-01/11-373, paras 105-108 (see especially, at para. 108: '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').

<sup>15</sup> *Prosecutor v. Lubanga*, [Decision on disclosure by the defence](#), ICC-01/04-01/06-1235-Corr-Anx1, 11 June 2008, , para. 27; the Confirmation of Charges hearing commenced on 18 September 2019; see, [ICC-01/14-01/18-851-Conf](#), para. 9.

<sup>16</sup> [ICC-01/14-01/18-589](#), Disposition.

<sup>17</sup> *Prosecutor v. Ongwen*, [Decision Setting the Commencement Date of the Trial](#), ICC-02/04-01/15-449, 30 May 2016, para. 12.

<sup>18</sup> [ICC-01/14-01/18-851-Conf](#), paras 7-9, citing *Prosecutor v. Ongwen*, [Decision on 'Prosecution's request to order the Defence to comply with rule 79'](#), ICC-02/04-01/15-460, 7 June 2016..

comparatively straightforward alibi defence.<sup>19</sup> As the Prosecution argued, the need for timely notice was ‘particularly pressing’ with respect to Article 31(1)(a) ‘mental disease and defect’ defences in light of the consequent need for the Prosecution to obtain expert psychiatric evidence, request expert examination of the accused, and commission expert reports.<sup>20</sup> Further, Trial Chamber IX expressly noted that a defence under Article 31(1)(a) ‘could generally be advanced on the basis of information solely within the Defence’s control’.<sup>21</sup>

18. Second, in *Ongwen*, within one week of exchanging Rule 79-related *inter partes* communication with the Defence, which the Prosecution ultimately considered non-compliant with that rule, the Prosecution seized Trial Chamber IX, seeking orders for compliance.<sup>22</sup> On the contrary, in the instant case, no such effort was made by the Prosecution.<sup>23</sup>
19. Lastly, the Prosecution’s submission that the Defence did not file the Alibi Notice as soon as a determination to rely on it was made is speculative.<sup>24</sup> This determination could only be finalised once the Defence had the opportunity to thoroughly analyse the Prosecution Trial Brief and the final Prosecution Lists of Witnesses and Evidence; and once the final Prosecution disclosure deadline had passed, which approach led to the disclosure of more than 59.000 pages and dozen hours of audio/video material since early October..<sup>25</sup> Following this disclosure, the final Prosecution List of Witnesses was reviewed for any

<sup>19</sup> *Prosecutor v. Ongwen*, [Prosecution’s request to order the Defence to comply with rule 79](#), ICC-02/04-01/15-435, 16 May 2016, paras 6-7.

<sup>20</sup> *Ibid*, paras 18, 24; see also, where Trial Chamber IX ordered the disclosure of material ‘including but not limited to any expert reports’ insofar as they related to grounds under Article 31, ICC-02/04-01/15-460, para. 20.

<sup>21</sup> *Prosecutor v. Ongwen*, [Decision on ‘Prosecution’s request to order the Defence to comply with rule 79’](#), ICC-02/04-01/15-460, 7 June 2016, para. 15; cf. [ICC-01/14-01/18-851-Conf](#), para. 9 (‘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”).

<sup>22</sup> *Prosecutor v. Ongwen*, [Prosecution’s request to order the Defence to comply with rule 79](#), ICC-02/04-01/15-435, 16 May 2016, paras 8-9.

<sup>23</sup> See *infra*, paras 27-29.

<sup>24</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 8.

<sup>25</sup> [ICC-01/14-01/18-589](#), Disposition.

additions or removals of witnesses in relation to the relevant events. For instance, the Defence notes that [REDACTED], who was relied upon for his allegation that ‘he saw Yekatom at the Boeing Market around 11:00 hours on 5 December 2013 together with more than 30 armed Anti-Balaka elements’, was not included in the final Prosecution List of Witnesses.<sup>26</sup> Further, the new disclosures were reviewed for evidence relating to the events to which the alibi itself might relate. Upon completion of these reviews, investigations were planned and conducted for the purposes of finalising the Defence’s determination regarding reliance on the alibi witnesses between these deadlines and its eventual filing (some of which were cancelled due to circumstances out of the Defence’s control).<sup>27</sup>

20. The Alibi Notice was thus filed at a time which duly took into account and sufficiently balanced the competing considerations of Prosecution trial preparations and disclosure obligations, Defence investigations, the requirements of Rule 79, and the start date of the trial.<sup>28</sup>

## **II. The Alibi Notice is fully compliant with Rule 79(1)(a).**

21. The Prosecution submission that the Alibi Notice is ‘substantively deficient’ is without merit.<sup>29</sup>
22. While the Prosecution’s claims in this regard are addressed in detail below,<sup>30</sup> the Defence here broadly notes that the alleged ‘deficiencies’ in the Alibi Notice comprise categories of information not required under Rule 79(1)(a). Indeed, the Prosecution claim that the Alibi Notice is deficient on account of

<sup>26</sup> See, [ICC-01/14-01/18-403-Conf-Corr](#), para. 89; and [ICC-01/14-01/18-724-Conf-AnxA](#); while [REDACTED] had not been included in the provisional Prosecution List of Witnesses, the Defence was obliged to await final confirmation in this regard.

<sup>27</sup> See, [ICC-01/14-01/18-818-Conf](#), paras 5-6.

<sup>28</sup> See also, *Prosecutor v. Lubanga*, [Decision on disclosure by the defence](#), ICC-01/04-01/06-1235-Corr-Anx1, 11 June 2008, para. 34, where Trial Chamber I noted the ‘link between the disclosure obligations to be imposed on the defence, on the one hand, and the proximity of the start date of the trial and the extent to which the prosecution has fulfilled its own disclosure obligations, on the other’.

<sup>29</sup> See, [ICC-01/14-01/18-851-Conf](#), paras 11-16.

<sup>30</sup> *Infra*, paras 33-39.

the Defence not having provided information as to Mr. Yekatom's movements or actions outside the alibi period is illustrative of the Prosecution's overreach in this regard.<sup>31</sup>

23. Contrary to the Response, the requirements of Rule 79(1)(a) are satisfied when the Defence has notified the Prosecution of the 'required particulars' of the alibi.<sup>32</sup> This is consistent with a plain language reading of that rule, which specifically states that notification must specify the relevant location(s) of an accused and the 'names of witnesses [...] upon which the accused intends to rely'.

### III. The Prosecution's claims of prejudice are unsubstantiated and otherwise should not be relied upon.

24. The Response can be dismissed on the basis of the Prosecution's failure to substantiate its claims of 'irreparable prejudice'.<sup>33</sup> In *Ruto and Sang*, Pre-Trial Chamber II noted the Defence's failure to provide prior Rule 79 notification regarding its intention to lead alibi evidence, raised for the first time during the confirmation hearing, and nonetheless decided to address (and rely on) it, on the basis that the Prosecution had not suffered any prejudice.<sup>34</sup>
25. The Prosecution does not explain how it has been rendered unable to 'organise its evidence' as a result of the Alibi Notice.<sup>35</sup> Nor is it clear from the Response how the Alibi Notice prevents effective preparation of its opening statements; especially so, given the Prosecution's recent submissions on the scope and purpose of opening statements, in which it was emphasised that they should be limited to a summarisation or commentary on a party's own

<sup>31</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 15.

<sup>32</sup> See, *Rutaganda v. Prosecutor*, [Judgement](#), ICTR-96-3-A , 26 May 2003 ('Rutaganda Appeal Judgment'), para. 242.

<sup>33</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 17.

<sup>34</sup> *Prosecutor v. Ruto & Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), ICC-01/09-01/11-373, paras 105-110; see also, paras 119, 125, 132, etc.

<sup>35</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 17.

evidence.<sup>36</sup> Likewise, the Prosecution fails to explain in what way the Alibi Notice undermines the Prosecution's obligation to establish the truth, much less how it undermines 'the Chamber's function to seek it'.<sup>37</sup>

26. Furthermore, the Prosecution's claim that the Alibi Notice 'hampers the Prosecution's ability to fully investigate the alibi' should be assessed in light of the fact that its own witnesses have previously stated that Mr Yekatom was not present during the events to which the Alibi Notice pertains.<sup>38</sup> Specifically, Prosecution investigators were informed in April 2018 that Mr Yekatom was not present during the 5 December 2013 attack at the Boeing Market.<sup>39</sup> Likewise, Witness [REDACTED] and murder at the Yanwara School base.<sup>40</sup> It is the Defence's expectation that the Prosecution duly pursued these leads in accordance with its fundamental duty to investigate incriminating and exonerating circumstances equally, pursuant to Article 54(1)(a) of the Statute. In any event, the Prosecution raises no impediment to investigation into the individuals named in the Alibi Notice.
27. Lastly, the Trial Chamber should assess the Prosecution's claim of 'irreparable prejudice' in light of the Prosecution's failure to take meaningful action to mitigate any prejudice that might arise from the filing of the Alibi Notice on 13-January 2021.
28. The Prosecution has been on notice of the fact that the Defence anticipated raising an alibi defence, and specifically, of the Defence's intention to 'provide the required notice pursuant to Rule 79 at a time fixed by the Chamber', since

<sup>36</sup> [ICC-01/14-01/18-852-Conf](#), para. 7, fn. 4.

<sup>37</sup> [ICC-01/14-01/18-851-Conf](#), para. 17.

<sup>38</sup> *Ibid.*, paras 17, 20.

<sup>39</sup> CAR-OTP-2104-0718-R01, 0753, line 1159 to 1175 ; 0755, line 1236 to 0756, line 1260 ; see, [ICC-01/14-01/18-818-Conf](#), paras 8-9.

<sup>40</sup> CAR-OTP-2122-6900-R01, 6910 , line 346, to 6912, line 392 ; see, [ICC-01/14-01/18-818-Conf](#), paras 11-14.

8 April 2020.<sup>41</sup> The Prosecution did not address the Defence's position in this regard, despite expressly responding to the Defence's 8 April 2020 filing in which that position was set forth.<sup>42</sup> Nor was the Defence's position – as reiterated in *inter partes* correspondence of 22 June 2020<sup>43</sup> – addressed by the Prosecution during the Status Conference of 9 July 2020.

29. To be clear, the Defence is not suggesting that Rule 79 necessarily obliges action on the part of the Prosecution. However, if particular circumstances required the Prosecution to seek an expedited timeline for Rule 79 notification, the Prosecution was free to seize the Chamber at any time during the nine months since it was notified of the Defence's intention to raise an alibi defence. Indeed, the Prosecution's inaction in this regard is notably at odds with the conduct of the Office of the Prosecutor in recent and ongoing proceedings.<sup>44</sup>

#### IV. The relief sought by the Prosecution is unjustified.

30. As outlined above, the Alibi Notice is neither untimely nor deficient, nor has the Prosecution substantiated its claims of undue prejudice arising from it. Not only is the Prosecution's sought relief therefore entirely unjustified in the circumstances, it is ill-founded in the Rules, Statute, and case-law.

##### A. Disclosure orders

31. The sought disclosure orders comprise an impermissible attempt to convert what is at core a simple notification regime into an extensive pre-trial defence disclosure regime. In this respect, the Prosecution position is contradicted in the very case law cited in the Response: in *Rutaganda*, the ICTR Appeals

<sup>41</sup> [ICC-01/14-01/18-472](#), para. 42; it is not the Defence's position that Defence submissions comprise notice for the purpose of Rule 79 ; see also, [ICC-01/14-01/18-851-Conf-Anx](#), p. 1, wherein Prosecution Counsel 'notes the Yekatom Defence's stated intention to rely on an alibi defence'.

<sup>42</sup> [ICC-01/14-01/18-486](#).

<sup>43</sup> Email from Defence to Prosecution, 22 June 2020. available upon request.

<sup>44</sup> See, *Prosecutor v. Ongwen*, [Prosecution's request to order the Defence to comply with rule 79](#), ICC-02/04-01/15-435, 16 May 2016; *Prosecutor v. Al Hassan*, [Decision on the Prosecution's request seeking dismissal of the Defence notice on affirmative defences](#), ICC-01/12-01/18-1027, 17 September 2020, paras 2-4.

Chamber held that 'Rule 67(A)(ii) [i.e. the ICTR's Rule 79 counterpart] does not require the Defence to produce the probative evidence to be used to establish the accused's whereabouts at the time of the commission of the offence'.<sup>45</sup>

32. The sought disclosure orders would prejudice Mr. Yekatom's right against self-incrimination and his right to be presumed innocent, and further would amount to an impermissible reversal of the Prosecution's burden of proof.<sup>46</sup>
33. Further, while the Defence reiterates that the Prosecution's claims of prejudice remain unsubstantiated, if any prejudice were to arise from the Alibi Notice, the Prosecution's first port of call should be relief in the form of an adjournment, as envisaged in Rule 79(2). Indeed, the Prosecution's failure to motivate its claim that *inter alia* disclosure orders are 'more appropriate at this stage' than an adjournment is telling.<sup>47</sup> In the absence of any such justification, the sought disclosure orders can only be understood as an opportunistic attempt to outsource its investigative duties.
34. Further, the disclosure orders sought by the Prosecution far exceed the requirements of Rule 79(1)(a).
35. First, Rule 79(1)(a) is both specific and limited as to what it requires in relation to witnesses: i.e. their names. The Prosecution request for disclosure of a wide range of witness particulars is therefore properly seen as an unjustified broadening of the ambit of this rule, contrary to the intention of the drafters.<sup>48</sup>

In this respect, the Defence also notes that Rule 79(1)(a) differs from its *ad hoc*

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<sup>45</sup> Rutaganda Appeal Judgment, para. 242; cited at [ICC-01/14-01/18-851-Conf](#), para. 11, fn. 22.

<sup>46</sup> Articles 66(1)-(2), 67(1)(i), and 67(1)(g); see, where Trial Chamber II stated that 'the starting point for consideration of defence disclosure is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence', *Prosecutor v. Katanga*, [Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79\(4\)"](#), ICC-01/04-01/07-2388, 14 September 2010, para. 37 (citing *inter alia* [ICC-01/04-01/06-1235-Corr-Anx1](#), para. 27).

<sup>47</sup> [ICC-01/14-01/18-851-Conf](#), para. 24.

<sup>48</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 20(v).

Tribunal counterparts in that the latter expressly require that alibi witnesses' 'names and addresses' be provided; it appears therefore that the drafters of the ICC Rules intended that the alibi defence notification requirements be reduced in comparison, if anything.<sup>49</sup>

36. Second, Rule 79(1)(a) is similarly specific in that it only requires names of 'witnesses [...] upon [whom] the accused intends to rely to establish the alibi'. The purpose of an Alibi Notice is therefore to notify the Prosecution of those witnesses intended to be relied upon. It therefore cannot ground the Prosecution request for disclosure of names and biographical data of 'any additional persons or elements with [Mr Yekatom] during the incidents in question'.<sup>50</sup> For the same reason, the Prosecution submission that the Alibi Notice is deficient because it does not name every individual who might be in a position to confirm the alibi – regardless of whether the Defence intends to call them to testify – or the 'approximate number' of such individuals, is without merit.<sup>51</sup>
37. Third, and similar to the above, the Prosecution's request for disclosure of 'details of how each witness will support' the alibi, 'witness screening and interview notes', and summaries of alibi witnesses' expected testimony, is ill-founded as it far exceeds the boundaries of what is required under Rule 79(1)(a) in relation to witnesses.<sup>52</sup> Moreover, the compound effect of disclosure of this information would amount to impermissibly requiring the Defence to fully articulate its alibi defence before the Prosecution has completed – or in the present circumstances, commenced – its case.<sup>53</sup>

<sup>49</sup> See, ICTR Rules of Procedure and Evidence, Rule 67(A)(ii)(a); ICTY Rules of Procedure and Evidence, Rule 67(B)(i)(a).

<sup>50</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 20(ii).

<sup>51</sup> *Ibid.*, paras 13-14.

<sup>52</sup> See, [ICC-01/14-01/18-851-Conf](#), paras 20(i), (iii).

<sup>53</sup> See also, where Trial Chamber IX rejected a Prosecution request seeking 'particulars of the acts and conduct in respect of which the Ongwen Defence intended to advance defences under Article 31, on the basis that the request 'tended towards' requiring the Defence to fully articulate its case before completion of the Prosecution

38. Nor can Rule 79(4) ground the sought disclosure orders, as that rule does not give rise to an obligation to provide an outline of a defence, or to disclose information regarding the identification of Defence witnesses, or their statements or summaries thereof.<sup>54</sup> Moreover, as Trial Chamber II held in relation to *inter alia* Rule 79(4) and Regulation 54<sup>55</sup> of the Regulations of the Court, ‘the Chamber has a “duty to ensure that any discretionary order it makes regarding defence disclosure does not derogate from the accused’s right to a fair and impartial hearing in which his rights are fully safeguarded’.<sup>56</sup>
39. Lastly, the Defence is not currently in possession of ‘any other evidence’ on which it intends to rely in relation to the alibis.<sup>57</sup> As stated in the Alibi Notice, the Defence is currently investigating as to whether call data records support the alibis.<sup>58</sup> In the event, the Defence undertakes to notify the Trial Chamber and Parties expeditiously of which CDR it intends to rely upon, if any. However given that the Prosecution is already in possession of the call data records in question, any prejudice to Prosecution preparations will be negligible.

*B. Amendment of Prosecution Lists of Witnesses and Evidence*

40. The Prosecution request for leave to amend its List of Witnesses and List of Evidence is premature. Its cited ‘need to submit additional or relevant evidence’ is entirely hypothetical at this stage.<sup>59</sup>

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case, *Prosecutor v. Ongwen*, [Decision on ‘Prosecution’s request to order the Defence to comply with rule 79’](#), ICC-02/04-01/15-460, 7 June 2016, para. 19.

<sup>54</sup> *Prosecutor v. Katanga*, [Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79\(4\)"](#), ICC-01/04-01/07-2388, 14 September 2010,, para. 55.

<sup>55</sup> *Contra* [ICC-01/14-01/18-851-Conf](#), para. 20 and fn. 30.

<sup>56</sup> *Prosecutor v. Katanga*, [Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79\(4\)"](#), ICC-01/04-01/07-2388, 14 September 2010,, para. 40, notably, Trial Chamber II issued similar orders pursuant to Regulation 54 for defence disclosure to be effected after completion of the Prosecution case; see, paras 56-62 and Disposition.

<sup>57</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 20(iv).

<sup>58</sup> See, [ICC-01/14-01/18-818-Conf](#), para. 13.

<sup>59</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 22.

41. If such a need should arise, the Prosecution is free to seize the Chamber in accordance with established procedures.<sup>60</sup>

*C. Adverse inference as to credibility*

42. The Prosecution request that the Chamber should draw an adverse inference in respect of Defence alibi evidence should be rejected.<sup>61</sup> The Prosecution submission that the timing of the Alibi Notice suggests that it was fabricated is wholly without substance or merit and should be dismissed as such.<sup>62</sup>
43. Again, the case law relied on by the Prosecution is distinguishable in relevant respects, and cannot ground the relief sought. In *Kalimanzira*, the defence did not in fact file a statutory alibi notification ‘before or during the trial’ and instead substantively raised its alibi defence during the testimony of its last three (defence) witnesses.<sup>63</sup> In *Nizeyimana*, the Trial Chamber found that the defence alibi notification – filed on the day before commencement of trial – was compliant with the defence’s notice obligations; indeed, in that case it was an evolution in the alibi notice and a related increase in the number of alibi witnesses during the course of the Prosecution case that the Trial Chamber considered was a relevant factor in its assessment of the credibility of the alibi evidence.<sup>64</sup>

<sup>60</sup> In *Ongwen*, following the filing of a defence Rule 79 notification, the Prosecutor filed a request *inter alia* seeking amendments of its Lists of Witnesses and Evidence for the purposes of adding three expert witnesses and three expert reports and specific associated items; Trial Chamber IX granted the request in relevant part; see, *Prosecutor v. Ongwen*, [Decision on Prosecution Requests Related to Mental Health Expert Evidence](#), ICC-02/04-01/15-1073, 16 November 2017; see also, *Prosecutor v. Al Hassan*, [Decision on the Prosecution’s request seeking dismissal of the Defence notice on affirmative defences](#), ICC-01/12-01/18-1027, 17 September 2020, para. 14.

<sup>61</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 24.

<sup>62</sup> *Ibid.*

<sup>63</sup> See, *Kalimanzira v. Prosecutor*, [Judgement](#), ICTR-05-88-A, 20 October 2010, paras 54, 57; see also *Prosecutor v. Kalimanzira*, [Judgement](#), ICTR-05-88-T, 22 June 2009, paras 112-113.

<sup>64</sup> *Prosecutor v. Nizeyimana*, [Judgement and Sentence](#), ICTR-2000-55C-T, 19 June 2012, paras 1276-1278; note that in any event the Trial Chamber proceeded to thoroughly assess the credibility of the alibi evidence ‘in isolation’; see paras 1279-1371.

*D. Rebuttal evidence*

44. It is premature of the Prosecution to seek leave to present rebuttal evidence before Defence alibi evidence has been heard.<sup>65</sup> Nor has Prosecution demonstrated that it would be unable to address the alibis during its main case.
45. In any event, should the Prosecution need to present rebuttal evidence, it is free to seize the Trial Chamber with a motivated request, in accordance with the test as adopted by successive ICC Trial Chambers.<sup>66</sup>

**CONFIDENTIALITY**

46. This response is filed on a confidential basis, corresponding to the classification of the Alibi Notice. A public redacted version will be filed forthwith.

**RELIEF SOUGHT**

47. For the above reasons, the Defence respectfully requests that Trial Chamber V:  
  
**DISMISS** the Response.

**RESPECTFULLY SUBMITTED ON THIS 5<sup>TH</sup> DAY OF FEBRUARY 2021**



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<sup>65</sup> See, [ICC-01/14-01/18-851-Conf](#), para. 25.

<sup>66</sup> *Prosecutor v. Bemba*, [Decision on "Prosecution's application to submit additional evidence"](#), ICC-01/05-01/08-3029, 2 April 2014, paras 24-25 and fn. 49 and references cited therein; see also, [ICC-01/14-01/18-631](#), para. 16.