

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **16 May 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

Wih Confidential Annexes A and B

Prosecution's request to order the Defence to comply with rule 79

Source: The Office of the Prosecutor

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

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Introduction

1. To give full expression to the requirement “that a trial is fair and expeditious”,¹ to achieve justice for the victims as soon as possible, to save the Court hundreds of hours of court-time and significant expense, this trial should focus only on live issues. The most effective way to do that is for the Chamber to ensure timely Defence compliance with its obligations under rule 79 to notify the Prosecution, before the start of trial, of its intention to raise any ground for excluding criminal responsibility and to provide details of evidence it relies on in support.

2. The Defence has refused to comply with its notification obligations under rule 79 of the Rules of Procedure and Evidence (“Rules”). Its refusal threatens to disrupt the efficient preparation and conduct of the trial and undermine the fairness of proceedings.

3. The Prosecution requests the Trial Chamber to exercise its broad trial management powers under article 64(3)(c) and rule 134(1) and order the Defence to comply with rule 79, sufficiently in advance of the commencement of trial. Specifically, the Prosecution requests that the Defence be ordered to:

- Clarify whether it intends to rely on article 31(1)(a) or any other defence under article 31;
- Provide particulars of the offences in respect of which such defence will be relied upon;
- Provide the Prosecution with the names of witnesses and any other evidence it relies in support of all defences advanced under article 31; and

¹ Article 64(2) of the Statute.

- Provide the Prosecution with any other evidence upon which it intends to rely, including but not limited to any expert reports.

4. The Prosecution further requests that the Trial Chamber inform the Defence of the Chamber's express authority to freely assess the evidence and proceedings, which includes the authority to draw appropriate adverse inferences from a failure to comply in a timely fashion with its obligations under rule 79.

Background

5. During the Confirmation phase of proceedings, the Defence notified the Prosecution of its intent to rely on the defence of duress under article 31(d) of the Rome Statute ("Statute") as a ground for excluding Dominic Ongwen's criminal responsibility.²

6. The Defence also made several comments ostensibly relating to Dominic Ongwen's psychiatric or psychological condition. Some of the comments made were as follows:

- "[O]nce a child is within the armed group, there is a psychological breakdown of the child";³
- Ongwen was part of an organisation that "is disconnected from 'society' and its 'norms'";⁴
- "disassociation is cited to be a factor as a result of severe child traumatising";⁵
- "Dominic, did not have the so-called normal development";⁶

² ICC-02/04-01/15-404, paras 3-4, 8, 22, 38, 50-57, 114, 132, 135; ICC-02/04-01/5-T-22-ENG, pp. 41-42, 52, 56-57 ; ICC-02/04-01/5-T-23-ENG, pp. 1, 3-10.

³ ICC-02/04-01/15-404, para. 42

⁴ ICC-02/04-01/15-404, para. 43

⁵ ICC-02/04-01/15-404, para. 44

- “Dominic Ongwen remained a child up to the time he surrendered”;⁷
- Ongwen was “a child who has been brought in the bushes and has not had the opportunity to relate with common society, common decent society”;⁸ and
- Ongwen “succumbed to the so-called Stockholm syndrome”.⁹

7. These comments, on their face, would appear to indicate Dominic Ongwen’s intent to rely on a defence under article 31(1)(a) of the Statute. However, the Prosecution submits that they fall short of formal notice of such an intention as contemplated in rule 79.

8. On 4 May 2016, the Prosecution wrote to the Defence (Annex A), and requested that the Defence clarify whether the comments it made were meant to convey its intention to rely on a defence of mental disease or defect under article 31(1)(a) of the Statute. The Prosecution also requested that the Defence provide the Prosecution with the “names of witnesses and any other evidence” in support of all defences it intended to rely on. The Prosecution’s request was made pursuant to rule 79 of the Rules.

9. The Defence responded to the Prosecution on 9 May 2016 (Annex B). The Defence disagreed with the Prosecution’s interpretation of rule 79, stating that it would not comment “until the Prosecutor has completed her obligations for disclosure.” Relying on the same argument, the Defence also declined to provide the Prosecution with the “names of witnesses and any other evidence” that it relies on in defences it plans to assert.

⁶ ICC-02/04-01/15-404, para. 45

⁷ ICC-02/04-01/5-T-22-ENG, p. 44

⁸ ICC-02/04-01/5-T-22-ENG, p. 48

⁹ ICC-02/04-01/5-T-22-ENG, p. 57

Submissions

10. The Defence refuses to comply with its disclosure obligations under rule 79 until the Prosecution has completed its disclosure. In so doing, the Defence misunderstands its obligations under rule 79 as being contingent on completion of the Prosecution's disclosure. This interpretation finds no basis in the Statute or the Rules and contradicts the express language of rule 79. It also ignores the fact that the Prosecution's disclosure obligation is a continuing one throughout trial. If the Defence's interpretation of rule 79 is accepted, it would never be obliged to notify the Prosecution of its intent to rely on a ground for excluding criminal responsibility.

11. The Defence's insistence that prior to "full and comprehensive disclosure by the Prosecutor"¹⁰ it is unable to clarify whether it intends to rely on a defence under article 31(1)(a) is also unnecessarily obstructionist. It cannot reasonably be argued by the Defence in this case that after having been provided with: i) a detailed Document Containing the Charges; ii) a detailed Prosecution Pre-Confirmation Brief specifying the details of witnesses and of the evidence relied on; and iii) having had the opportunity to hear first-hand and challenge the evidence of witnesses under article 56 proceedings; it is not in a position to clarify whether and on what basis it intends to claim that Dominic Ongwen was under duress at the time, or suffering from a mental disease or defect that destroyed his capacity to appreciate the unlawfulness or nature of his conduct or the capacity to control his conduct.

Rule 79 requires the accused to notify the Prosecution of its intent to rely on a defence under article 31 as soon as that intent is formed

12. Rule 79 provides:

1. The Defence shall notify the Prosecutor of its intent to:

¹⁰ See Annex B.

(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; or

(b) Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.

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.

3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.

4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.¹¹

13. The express language of rule 79 requires the accused to notify the Prosecution of his intent to raise an alibi or to raise a ground for excluding criminal responsibility under article 31, together with the names of witnesses and other evidence it relies on in support. With respect to defences listed under article 31, notice under rule 79(2) must be provided to the Prosecution “sufficiently in advance to enable the Prosecutor to prepare adequately and to respond.” The obligation to notify the

¹¹ Emphasis added.

Prosecution, albeit related, is distinct from the *right* afforded to an accused to raise a defence.

14. As held in *Lubanga*, an accused's right to a fair trial is not necessarily compromised by the imposition upon him or her of an obligation to reveal in advance and in appropriate circumstances details of defences and evidence to be presented, and the issues that are to arise.¹²

15. The Prosecution submits that the correct interpretation of rule 79 requires an accused to notify the Prosecution of his intent to raise a defence under article 31 *as soon as that intent is formed* and in any event sufficiently prior to the commencement of the trial to permit the Prosecution to react thereto. This interpretation is derived from the object and purpose of the provision, namely: i) to promote the efficient preparation and conduct of the trial; and ii) to ensure fairness in trial proceedings. This interpretation is supported by ICC case law on the issue. In *Katanga*, the Trial Chamber held 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*".¹³

Efficient conduct of trial proceedings

16. The Trial Chamber should ensure that the Defence complies with its obligation so as to promote an expeditious and focused trial which provides justice for the victims as soon as possible.

17. Rule 79(2) is clear in requiring the accused to notify the Prosecution of its intention to rely on a defence under article 31(1) "*sufficiently in advance to enable the*

¹² ICC-01/04-01/06-1235, para. 31.

¹³ ICC-01/04-01/07-2388, para.46

Prosecutor to prepare adequately and to respond." The express language of the provision demonstrates that its object and purpose is to avoid, to the greatest extent possible, surprising the Prosecution with a defence. In so doing, rule 79 is a provision that seeks to minimise trial proceeding being disrupted by, for example, forcing the Prosecution to request an adjournment in order to investigate untimely notification of an accused's defence.

18. With respect to defences under article 31(1)(a) the need for timely and detailed notice is particularly pressing. Experience in national jurisdictions underscores the importance of obtaining expert psychiatric and/or psychological evidence in order to allow a court to properly assess the existence of a mental disease or defect and its effect on an accused's criminal capacity. In this regard, the examination of the accused by one or more medical experts appointed by the Prosecution and/or the Chamber prior to the commencement of the trial will, in the Prosecution's submission, be an absolute necessity for its preparations.¹⁴ Thus, if rule 79 notice is not given promptly, the prospect of a delay in the commencement of the trial looms large.

19. Similarly, the correct application of rule 79 enables the Trial Chamber and the parties to focus on the real issues and evidence in the case. It cannot be right that rule 79 be interpreted, as the Defence would wish, in a way that requires the Court to expend a significant amount of time, energy and resources, only to discover that it need not have done so because of an accused's late notification of its defence.

20. The Prosecution observes that Defences such as duress and mental disease or defect are normally raised in situations where an accused does not dispute the commission of the acts alleged, but disputes guilt on the basis of the absence of

¹⁴ See further para. 24 below.

criminal responsibility. The Prosecution thus submits that disclosure of defences under article 31 requires the Defence to indicate which of the charged acts and conduct it is that the accused concedes would otherwise amount to crimes with which he is charged and to specify, in respect of each of these crimes, the evidence which gives rise to a ground for excluding his criminal responsibility. Rule 79(4) permits the Chamber to order this enabling the parties to focus on the issues which are truly live in the case.

21. Academic commentaries support this view, observing that “[r]ule 79 should instil the Prosecutor with a *fairly sophisticated* understanding of the defence case before the trial commences, which should assist in expediting trials and improving the efficiency of proceedings before the Court.”¹⁵

Fairness of proceedings

22. Fairness of proceeding can only be achieved if rule 79 is interpreted as requiring an accused to notify the Prosecution of his intent to rely on a defence as soon as that intent is formed and prior to the commencement of the trial. A different interpretation would obstruct the Prosecution’s ability to perform its duties under article 54(1)(a) and its ability to prove the guilt of the accused under article 66(2).

23. The Prosecution’s right to a fair trial is guaranteed under article 64(2). This has been confirmed by the Appeals Chamber in *Ngudjolo* which concluded that fairness requires that the Prosecution be able to fully perform its duties in seeking to “establish the truth” under article 54(1)(a). It further held that the Trial Chamber must “actively contribute” to achieve this end.¹⁶

¹⁵ A.Lee., *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc.: New York, 2001), p. 415.

¹⁶ ICC-01/04-02/12-271, para. 256.

24. A crucial element of the Prosecution's right to a fair trial is the right to be afforded sufficient time and a genuine opportunity to investigate, prepare and adequately respond to any defence put forward by an accused. This right includes the right to question witnesses comprehensively and fully explore grounds excluding an accused's criminal responsibility. With respect to a defence under article 31(1)(a), the Prosecution's right to a fair trial also includes the possibility of applying for a psychiatric or psychological examination and report under rule 135. This is necessary, firstly, in order to assess whether a trial is even possible in light of an accused's alleged mental disease or defect and, secondly, to allow the Prosecution to properly prepare and respond to such a defence.

25. The Prosecution's interpretation of rule 79 ensures that it is notified of the accused's intent to rely on a defence under article 31 at the earliest possible opportunity. This is consistent with its duties under article 54 which serve interests other than its own.

Rule 80 shows that the accused's obligation to notify its intent to rely on a ground for excluding criminal responsibility should be done in advance of the trial commencing

26. Rule 80 governs the accused's obligation to notify the Court of its intention to rely on a ground for excluding criminal responsibility other than those expressly enumerated under article 31(1). The express language of the provision mandates that notification "be done sufficiently in *advance of the commencement of the trial* to enable the Prosecutor to prepare adequately for trial".

27. Although rule 80 governs unspecified grounds for excluding criminal responsibility there is no well-founded reason why these grounds should be treated differently to those enumerated under article 31(1). If anything, the purpose of rule 80 is the same: to ensure the efficient preparation and conduct of the trial and

fairness of proceedings. Rule 80 serves to emphasize this purpose, by requiring that notification not just be provided to the Prosecution but also to the Trial Chamber. This is so that the Trial Chamber can actively manage trial proceedings and ensure the court is not used as a forum to litigate invalid grounds for excluding criminal responsibility at the expense of time, energy and resources.

28. The equal treatment of notification obligations under rule 79 and 80 is supported by ICC case law. In *Lubanga*, the Trial Chamber cited to *both* rules 79(2) and 80(1) when concluding that article 31(1) defences must be notified *in advance* of trial.¹⁷

Trial Chamber's authority to order the Defence to comply with rule 79

29. Whilst the Prosecution acknowledges that rule 79 is silent as to the consequence of a party's failure to comply with its obligations under rule 79, it submits that the Trial Chamber has the authority to make the orders requested in this filing. If this was not the case, rule 79 would be rendered meaningless and unenforceable.

30. Article 64 grants the Trial Chamber broad and flexible powers to manage trial proceedings. Jurisprudence of this Court establishes that the formulation of article 64 "makes clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters [...] and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect."¹⁸

31. Rule 134(1) further confirms the Chamber's authority to make a ruling on any issue "concerning the conduct of proceedings" prior to the commencement of trial. This is complemented by Regulation 54 which relates to status conferences before

¹⁷ ICC-01/04-01/06-1235, paras. 29(b) and 41(b).

¹⁸ ICC-01/09-01/11-524, para.27.

the Trial Chamber. Regulation 54 expressly authorises the Chamber to issue any orders in the interests of justice including orders under regulation 54(p) that relate to “defences ... to be advanced by the accused.”

The Trial Chamber’s authority to freely assess the entirety of the evidence and proceedings

32. The Statute and Rules are clear that as part of the fact-finding process, the Trial Chamber has authority to freely assess the entirety of the evidence and criminal proceedings. Article 74(2) provides that the “Trial Chamber’s decision shall be based on its evaluation of the evidence *and the entire proceedings*”. It is further articulated in rule 63(2): a “Chamber shall have authority ... to *assess freely all evidence*”.

33. The Chamber’s authority to freely assess all the evidence as well as proceedings includes the ability to draw inferences including those that may be adverse where appropriate. In relation to rule 79, the failure of an accused to notify the Prosecution of a defence at the appropriate time can serve a basis for drawing an adverse inference about the credibility of a defence that is subsequently relied on. Case law from other international courts supports this proposition.

34. The *Nyiramashuko et al* case at the ICTR is on point. In *Nyiramashuko et al*, prior to the commencement of trial, the Trial Chamber directed one of the accused – Ndayambaje - to “immediately make the necessary disclosures in accordance with Rule 67”.¹⁹ While the precise wording of the operative provision at ICTR (rule 67) differs from that of rule 79 at this Court, the principle enshrined therein is the same, which makes the rulings of the ICTR instructive. Rule 67 of the ICTR Rules provides in the relevant part that:

¹⁹ *Prosecutor v Nyiramashuko et al*, ICTR-98-42-T, Decision on the confidential Prosecutor’s motion to be served with particulars of alibi pursuant to rule 67(A)(ii)(a), 1 March 2005, para. 27.

“(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(ii) The Defence shall notify the Prosecutor of its intent to enter

- (a) The defence of 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 and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
- (b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.”

35. *Ndayambaje* failed to timely comply with his obligation. It was not until less than one month before the commencement of his Defence case (some three years later) that he provided notice to the Prosecution of his intent to rely on the defence of alibi. In its free assessment of the evidence, the Trial Chamber took *Ndayambaje's* failure to timely comply with his obligations under rule 67 into account when weighing the credibility of his defence. It concluded that “the late notice the Defence gave regarding its decision to bring alibi evidence suggests that the alibi may be a fabrication, tailored to suit the Prosecution’s case.”²⁰ The Trial Chamber’s authority to freely assess the evidence and draw adverse inferences with respect to the accused’s failure to comply with his disclosure obligations was upheld on appeal.

²⁰ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Judgement, 24 June 2011, para. 1388.

The Appeals Chamber concluded that “the manner in which an alibi is presented may impact its credibility”.²¹

36. The principle is the same at the ICTY. In *Lukić*, the Trial Chamber held that compliance with the ICTY’s equivalent rule (rule 67) “at a late stage in the proceedings may have the effect of depriving the Prosecution of the opportunity to adduce evidence related to the alibi and the jurisprudence of the Tribunal permits a Chamber to consider any failure to provide the requisite notice in its assessment [of an accused’s defence]”.²²

37. There is no reason why this Court should not endorse the approach taken at the ICTR and ICTY.

Conclusion

38. For the reasons set out above, the Prosecution requests the Trial Chamber to exercise its broad trial management powers and order the Defence to comply with rule 79 by:

- Clarifying whether the Defence intends to rely on article 31(1)(a) or any other defence under article 31;

²¹ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Appeals Judgement, 14 December 2015, para. 2856. See *Prosecutor v. Ndahimana*, ICTR-01-68-A, Appeal Judgement, 16 December 2013, paras 113-114 “The Appeals Chamber recalls that the manner in which an alibi is presented may impact its credibility. It was therefore within the Trial Chamber’s discretion to take into account Ndahimana’s failure to provide the necessary particulars of alibi witnesses on time in assessing the alibi evidence. Contrary to Ndahimana’s suggestion, the Trial Chamber was not required to consider whether the Prosecution suffered prejudice from the belated disclosure. The Appeals Chamber has previously upheld the inference drawn by a trial chamber that failure to raise an alibi in a timely manner suggested fabrication of the alibi in order to respond to the Prosecution case. Ndahimana’s arguments that the late disclosure of the particulars was a result of the ongoing investigations and was not motivated by the desire to obtain a tactical advantage fail to demonstrate that such an inference was unreasonable in the present case”; see also *Prosecutor v. Kanyarukiga*, ICTR-02-78-A, Appeals Judgement, 8 May 2012, paras 97, 101, 102; *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Appeals Judgement, 28 September 2011, para. 18; *Prosecutor v. Nchamihigo*, ICTR-2001-63-A, Appeals Judgement, 1 March 2001, para. 97; *Prosecutor v. Kalimanzira*, ICTR-05-88-A, Appeals Judgement, 20 October 2010, para. 56; *Prosecutor v. Nindabahizi*, ICTR-01-71-A, Appeals Judgement, 16 January 2007, para. 66.

²² *Prosecutor v. Lukić*, IT-98-32/1-T, Judgement, 20 July 2009, para. 25.

- Providing the Prosecution with the names of witnesses and any other evidence it relies in support of defences advanced under article 31;
- Providing the Prosecution with the particulars of the acts and conduct in respect of which defences under article 31 are advanced; **and**
- Provide the Prosecution with any other evidence upon which it intends to rely, including but not limited to any expert reports.

39. The Chamber should further inform the Defence of its authority to draw adverse inferences from a failure to comply with rule 79 in a timely fashion.



Fatou Bensouda,
Prosecutor

Dated this 16th day of May 2016
At The Hague, The Netherlands