

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 7 February 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

CLRV's Response to "Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute"

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 Victims¹ (the “CLR V”) opposes the “Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute” (the “Request”).²

2. The CLR V submits that the Request should be rejected *in limine*. Indeed, the matters addressed in the Request should have been raised by the Defence at the time the latter gave the official notification of its intention to raise defences.

3. In any case, should the Chamber entertain the Request, the CLR V submits that the burden of proof rests on the Defence in these specific proceedings.

II. PROCEDURAL BACKGROUND

4. On 9 August 2016, in accordance with the Single Judge’s Decision,³ the Defence filed its Notifications Pursuant to rules 79(2) and 80(1) of the Rules of Procedure and Evidence (the “Rules”), informing the Chamber, the Prosecution and the Legal Representatives of Victims that it is pursuing two defences under article

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; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute”, with Public Annexes A and B, No. ICC-02/04-01/15-1423, and ICC-02/04-01/15-1423-Anxa and ICC-02/04-01/15-1423-AnxB, 28 January 2019 (the “Request”).

³ See the “Decision on Prosecution’s request to order the Defence to comply with rule 79” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-460, 7 June 2016.

31(1)(a) and (d) of the Rome Statute (the “Statute”).⁴ The Defence also indicated that it contracted experts to examine Mr Ongwen in order to determine if the latter suffered from a mental disease or defect affecting his capacity to appreciate the unlawfulness or nature of his conduct or capacity to control his conduct to conform to the requirements of the law.⁵

5. On 25 August 2016, the Defence filed its “Defence Updates to ICC-02/04-01/15-517 and ICC-02/04-01/15-518”,⁶ providing the names of four potential experts.

6. On 8 December 2016, the Defence disclosed to the Legal Representatives of Victims the final version of its expert report.⁷

7. On 28 January 2019, the Defence filed the Request.⁸

III. SUBMISSIONS

8. Primarily, the CLRV submits that the Request as to the burden of proof applicable to article 31 defences is untimely and should be rejected *in limine*. Indeed, it is the CLRV’s submission that such an issue should have been raised by the Defence at the same time the latter gave official notification of its intention to raise such defences. Not only a very long time has passed but also, and crucially, fundamental procedural steps have been accomplished, among which the closure of the Prosecution presentation of evidence,⁹ and the completion of the presentation of

⁴ See the “Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence”, No. ICC-02/04-01/15-517, 9 August 2016; and the “Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence”, No. ICC-02/04-01/15-518, 9 August 2016.

⁵ *Idem*, No. ICC-02/04-01/15-518, paras. 3 and 4.

⁶ See the “Defence Updates to ICC-02/04-01/15-517 and ICC-02/04-01/15-518”, No. ICC-02/04-01/15-528, 25 August 2016.

⁷ See the email from the Defence sent on 7 December 2016, at 18:00.

⁸ See the Request, *supra* note 2.

⁹ See the “Notice of the Prosecution’s completion of evidence presentation”, No. ICC-02/04-01/15-1225, 13 April 2018.

evidence by the Legal Representatives of Victims.¹⁰ Furthermore, the same day the Prosecution filed its notice of closure of its evidence, the Single Judge issued “Directions on Closing Briefs and Closing Statements”, considering *“this to be an appropriate moment to issue further instructions [...] to provide the parties and participants with the maximum amount of time to organise and plan their workload.”*¹¹

9. The CLRV notes that the legal texts of the Court are silent with regard to specific time-limits applicable to motions aiming at clarifying the procedure to be followed when presenting article 31 defences. However, as already highlighted by this Chamber, *“it falls under its discretion under Article 64(2) of the Statute to determine the timeliness of [...] motions [where there is not timeline in the statutory framework]”*.¹² To this effect, the Chamber recalled the Appeals Chamber Judgment in the *Katanga and Ngudjolo* case¹³ where *“the majority of the judges concluded that a Trial Chamber did not err in dismissing a request to stay the proceedings for being out of time even in the absence of any express time limit”*.¹⁴ The Trial Chamber underlined that faced with similar situations the Defence must file such motion *“at the earliest available opportunity”*.¹⁵ In this case, the Chamber indicated that, where the Defence had many opportunities to file its request, being already aware of most of the facts underlying the latter in light of previous procedural developments initiated by the Defence itself, the *“Chamber will not permit such tactics in the strongest possible terms”*.¹⁶

¹⁰ See the Transcript of the hearing held on 24 May 2018, No. ICC-02/04-01/15-T-178-ENG, page 31, lines 20-21.

¹¹ See the “Directions on Closing Briefs and Closing Statements” (Single Judge, Trial Chamber IX), No. ICC-02/04-01/15-1226, 13 April 2018.

¹² See the oral Decision issued in the course of the hearing held on 6 December 2016, No. ICC-02/04-01/15-T-26-ENG CT WT, from page 4, line 2 to page 6, line 10 (the “Oral Decision”).

¹³ See the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”” (Appeals Chamber), No. ICC-01/04-01/07-2259, 12 July 2010, paras. 32 and 33.

¹⁴ See the Oral Decision, *supra* note 12, p. 4 lines 7-11.

¹⁵ *Idem*, p. 5, lines 8 to 10.

¹⁶ *Ibidem*, from p. 5 line 12 to p. 6, line 9.

10. The CRLV underlines that the Defence did not exert due diligence in raising its Request at the earliest available opportunity considering that more than two years and half have passed since its notification. Indeed, as is self-evident, the Defence knew about its own intention to raise such defences at the time it informed the Chamber, the Prosecution and the Legal Representatives of Victims. Quite surprisingly in such a context is the reasoning proposed by the Defence according to which, now, “[a]n immediate ruling is required in order to safeguard the rights of the Accused [...] [and] is warranted to prevent a violation of Articles 67(1)(b), (e), (g) and (i)”.¹⁷ Such a proposition strikes as rather incongruous, not to say guileful in the current circumstances of the case. On this premise alone, the Request for an immediate ruling confirming the burden of proof must be dismissed *in limine*.¹⁸

11. If the Chamber is minded to address the merits of the Request, the CLRV submits that the Chamber should find that the burden of proof of defences raised pursuant to article 31 of the Statute rests on the Defence.

12. The CLRV observes that the legal texts of the Court do not specify the details of the procedure to be followed when affirmative defences are presented by an accused. However, and in contrast, article 66 of the Statute clearly sets the standard expected at the Court for conviction, which is that the Prosecution ought to prove the guilt of the accused beyond reasonable doubt. Moreover, article 54(1)(a) of the Statute also sets the threshold for the Prosecution in relation to its investigations covering all facts and evidence, both incriminating and exonerating.

¹⁷ See the Request, *supra* note 2, para. 5.

¹⁸ See the “Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision” (Trial Chamber IX), No. ICC-02/04-01/15-1147, 24 January 2018, para. 18: “Prior to trial, when a post-confirmation issue of such significance arises that the moving party considers that failure to resolve it would warrant a stay of proceedings, Rule 134(2) of the Rules requires that this issue be raised no later than the commencement of trial. For the Defence to frame the lack of an Acholi translation as a trial-halting proposition 13 months after its commencement is plainly untimely. Noting that no leave from the Chamber is sought to raise this objection now, the Request is dismissible for its untimeliness alone” [we underline].

13. Consequently, in circumstances where the accused willingly decides to present a defence, raising matters outside of the scope of the Prosecution's case, nowhere in the legal texts of the Court is it written, nor even suggested, that the Prosecution - in addition to the thresholds it ought to meet as described *supra*, shall also disprove any defence or evidence brought forward by the accused.¹⁹ Whether or not the Prosecution opts to question such evidence is part of any criminal trial dynamics, but under no circumstances could it be construed as an inherent obligation to go as far as to *disprove* defences presented in the proceedings,²⁰ and even less to carry the burden of proof for such defences *in lieu* of the Defence.²¹

14. Trial Chamber III recognised that when the Court's legal framework does not expressly provide where the burden of proof lies, "*the compelling logic*" is that should an accused raises arguments to support a claim, "*it falls to him to establish the facts and other relevant matters that are said to support the argument*".²² Said Chamber also recognised the existence of an "*overwhelming preponderance of national and international legal systems*" where "*the burden [of proof] lies upon the defence in criminal proceedings*".²³ The CLRV submits that such an approach is coherent with the well-established principle of "*onus probandi actori incumbit*" or "*he who alleges must prove*": "*it is the duty of the party which asserts certain facts to establish the existence of such facts*".²⁴ In addition, other relevant principles can place the burden on the party with

¹⁹ See the "Decision on the Defence Request for Leave to Appeal the Decision Ordering the Disclosure of Medical Records pertaining to Dominic" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-744, 10 March 2017, para. 8: "*The Defence elected to make Dominic Ongwen's mental health a live issue in this trial – including by relying on the psychiatric report of its own experts in an attempt to obtain, inter alia, a stay of the proceedings*" [We underline].

²⁰ See the Request, *supra* note 2, paras. 2 and 17.

²¹ See RADOSAVLJEVIC D., "Scope and Limits of Psychiatric Evidence in International Criminal Law", *International Criminal Law Review*, Vol. 13, No. 5, 2013, 1017: the burden of proof is effectively reversed because the defendant wishes first, to present a Defence which is not an obligation, and second, wishes to rely on specific mental health elements. Such a burden of proof is not *per se* in breach of the fair trial rights guaranteed by the Rome Statute and by the Human Rights standards and principles of laws (article 6(2) of the ECHR).

²² See the "Decision on the Admissibility and Abuse of Process Challenges" (Trial Chamber III), No. ICC-01/05-01/08-802, 24 June 2010, para. 201.

²³ *Idem*, para. 203.

²⁴ See International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, para. 162.

particular or sole knowledge of the facts. International law, as well as domestic laws, in both civil and common law systems, generally require that the party alleging a claim bears the burden of proof as to the support of that claim.²⁵

15. In the legal framework of the Court, the fundamental principles of law shaping the proceedings are inspired from both common law and civil law procedures. Should the legal texts of the Court be unclear or appear incomplete, article 21 of the Statute foresees that the Court shall notably apply, where appropriate and not inconsistent with the Statute and internationally recognised standards, and in a way consistent with internationally recognized human rights, the established jurisprudence of the international law of armed conflict and general principles of law derived from national laws. The CLRV submits that, in as much as the fundamental principles stating the duties of the Prosecution, the presumption of innocence and the rights of the accused are clear, the specific and unique cases where an accused opts to raise defences - despite the terms of article 67(1)(g) of the Statute, by using the grounds for excluding criminal responsibility mentioned in article 31 of the Statute -, are not covered by any specific provision within the Court's legal texts. The only provision addressing the procedures applicable in such circumstances is rule 80 of the Rules, which is silent as to the burden of proof in particular, as well as to the threshold to be met or the consequences to be attached to such proceedings; and only deals with how ("*[t]he defence shall give notice to both the Trial Chamber and the Prosecutor*") and when ("*sufficiently in advance of the commencement of the trial*") grounds for excluding criminal responsibility can be raised.

16. Addressing first the jurisprudence of the international law of armed conflict, and specifically in that respect the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY"), the CLRV submits that, according

²⁵ See, *inter alia*, KAZAZI Mojtaba, *Burden of Proof and Related Issues: A study on Evidence before International Tribunals*, Kluwer Law International, London, 1995, at 60-61 and 369; LILLICH Richard B., ed., *Fact-Finding Before International Tribunals*, Transnational Publishers, Inc., New York, 1990, at 34; HEYDON CD, *Cases and Materials on Evidence*, 1975, at 14.

to the practice of various Chambers of this Court - including this very Chamber -,²⁶ when faced with their duty to interpret the legal texts of the Court and when the latter appear unclear or incomplete, the Judges can, and in fact, *shall* look at and *apply*²⁷ the precedents existing before, notably, said jurisdiction in order to confirm or infirm their own interpretation of the legal principle at hand. In this regard, the ICTY Appeals Chamber,²⁸ faced with a plea of insanity at the time of the offence and raised by a defendant, ruled that “[...] if the defendant raises the issue of lack of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong. Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal.” Conclusively, the CLRV highlights that the interpretation of the legal texts of the Court according to which the burden of proof of defences rests with the accused choosing to present them is further confirmed by the established jurisprudence of the ICTY Appeals Chamber.

17. The CLRV also notes that the Defence in its Request²⁹ argues that said jurisprudence “as a means of supplementary interpretation is not justified” and “is inapposite” in the present circumstances. However, the Defence fails to cite a precise and clear provision from the legal texts of the Court which would plainly and without any doubt state that when raising a ground for excluding criminal responsibility, the *onus* is on the Prosecution. In fact, as referred to *supra*, the only existing provision addressing these procedures is rule 80 of the Rules which not only does not address the specific issue of the burden of proof, but also could rather be

²⁶ See the “Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen” (Trial Chamber IX), No. ICC-02/04-01/15-637-Red, 16 December 2016, paras. 10 and 13.

²⁷ See Article 21(1)(b) of the Rome Statute.

²⁸ See ICTY, Appeals Chamber, *Prosecutor v. Zejnir Delalic, Zdravko Mucic (aka “Pavo”), Hazim Delic and Esad Landžo (aka “Zenga”) (“Celebici case”)*, Case No. IT-96-21-A, 20 February 2001, para. 582 [we underline].

²⁹ See the Request, *supra* note 2, paras. 15-16.

interpreted as placing the latter on the Defence; indeed said provision only foresees that when raised by the Defence, the Prosecution shall be able to adequately “address” it.³⁰ The CLRV submits that the term “address” can under no circumstances be construed as a synonymous for “disprove”, to the contrary. The CLRV argues that recourse to the jurisprudence of the *ad hoc* tribunal not only is justified and apposite in this case, but also necessary, in order to interpret the incomplete provisions of the legal texts of the Court and enable the Judges to give them an interpretation which will conform with article 32 of the Vienna Convention on the Law of Treaties.³¹

18. Furthermore, while stating that the wording of the provisions of the legal framework of the Court “is imperative and unequivocal”,³² the Defence nonetheless refers to the preparatory works in an attempt to demonstrate the intention of the drafters of the Statute.³³ The CLRV submits that absent clear cases where they offer a reliable evidence of the intention and preferences of the drafters of the legal texts – which otherwise would be unclear, recourse to the preparatory works has a limited value and become “an optional and often unreliable aid” which “offer[s] no assistance”³⁴ and is better avoided. In this regard, the CLRV posits that the fragmentary excerpt cited by the Defence is largely insufficient to draw any forceful conclusion as to what the intentions of the drafters of the Statute and of the Rules were in this very specific case. In fact, a thorough review of the preparatory works rather shows that the specific issue of the burden of proof related to defences was not extensively discussed by the drafters of the Statute.³⁵ As a result, recourse to the Preparatory Works does not appear to offer any useful avenue in order to draw any conclusive

³⁰ See Rule 80(1) and (3) of the Rules of Procedure and Evidence.

³¹ See the Request, *supra* note 2, para. 16.

³² *Idem*, paras. 15-16.

³³ *Ibidem*, para. 11.

³⁴ See the “Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial” (Trial Chamber V(B)), No. ICC-01/09-02/11-830, 18 October 2013, paras. 76 to 87, and in particular para. 80.

³⁵ See ESER A., “Grounds for excluding criminal responsibility”, in TRIFFERER, O. (eds.), *Commentary on the Rome Statute of the International Criminal Court*. Second Edition, München, Beck, 2008, in particular p. 873.

interpretation of the legal provisions governing the proceedings of the Court in this regard.

IV. CONCLUSION

19. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to dismiss *in limine* the Defence Request. In the alternative, if the Chamber is minded to address the merits of the Request, the Chamber should find that the burden of proof of defences raised pursuant to article 31 of the Statute rests on the Defence.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 7th of February 2019

Abidjan (Ivory Coast)