

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15

Date: 5 April 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

**Decision on 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**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 31(1)(a) and (d), 66, and 67(1)(i) of the Rome Statute ('Statute') and Rule 79 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on 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'.

I. Procedural history and submissions

1. On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen (the 'Confirmation Decision').¹ This Chamber was constituted just over a month later.²
2. In the course of the preparation of the trial, the Single Judge set a deadline of 9 August 2016 for filing notifications of Article 31 grounds for excluding criminal responsibility as well as providing the names of witnesses and any other evidence upon which the Defence intended to rely in order to establish such grounds.³
3. On 9 August 2016, the Defence notified the Chamber of its intention to raise the existence of possible Article 31(1)(a) and (d) grounds.⁴ On 25 August 2016, the Defence provided the names of four potential experts it intended to bring with respect to the Article 31 grounds.⁵
4. On 6 December 2016, the trial commenced.⁶ The following month, the Office of the Prosecutor (the 'Prosecution') called its first witness.⁷ On 13 April 2018, the

¹ Decision on the Confirmation of Charges against Dominic Ongwen, ICC-02/04-01/15-422-Red (with two annexes; confidential version notified same day).

² Decision constituting Trial Chambers VIII and IX and referring to them the cases of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* and *The Prosecutor v. Dominic Ongwen*, 2 May 2016, ICC-02/04-01/15-430.

³ Decision on 'Prosecution's Request to Order the Defence to Comply with Rule 79', 7 June 2016, ICC-02/04-01/15-460, p. 11.

⁴ Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, ICC-02/04-01/15-517 (with confidential annex A; a public redacted version of the annex was filed the same day); Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518.

⁵ Defence Updates to ICC-02/04-01/15-517 and ICC-02/04-01/15-518, ICC-02/04-01/15-528 (with confidential annex A).

⁶ Transcript of hearing, 6 December 2016, ICC-02/04-01/15-T-26-ENG ('Trial Commencement').

⁷ Transcript of hearing, 16 January 2017, ICC-02/04-01/15-T-28-ENG.

Prosecution completed its presentation of evidence,⁸ and on 24 May 2018, the Legal Representatives of the Victims completed the presentation of their evidence.⁹

5. On 18 September 2018, the Defence gave its opening statement during which it raised the issue of the burden and standard of proof for affirmative defences and indicated that it would provide a brief on this matter at a later date.¹⁰ The Defence called its first witness two weeks later¹¹ and has been conducting the presentation of its evidence ever since.
6. On 28 January 2019, the Defence filed a request for ‘an immediate ruling confirming that the [beyond reasonable doubt standard] applies in these proceedings and that the Prosecution bears the burden of proof to disprove each element of the defences raised under Articles 31(1)(a) and (d) of the Statute beyond a reasonable doubt’ (the ‘Request’).¹² The Defence submits that it is only under an evidential obligation to raise the relevant defences,¹³ arguing that the Statute is controlling,¹⁴ and to impose a burden of proving the relevant defences on it would violate Articles 66 and 67(1)(i) of the Statute.¹⁵ It further argues that the drafting history of the Statute included a proposal to place the onus of proof on the accused with respect to defences, but this proposal was ultimately excluded.¹⁶ In light of the Court’s statutory framework, the Defence submits that the jurisprudence of the *ad hoc* tribunals is inapposite in relation to the applicable burden and standard of proof for defences under Article 31(1) of the Statute.¹⁷
7. On 7 February 2019, the Prosecution responded to the Request (the ‘Prosecution Response’).¹⁸ It submits that the Chamber alone has the obligation to determine the applicability of Articles 31(1)(a) and (d) of the Statute, and while the parties may assist

⁸ Notice of the Prosecution’s Completion of Evidence Presentation, ICC-02/04-01/15-1225.

⁹ Transcript of hearing, ICC-02/04-01/15-T-178-ENG, p. 31, lines 20-21.

¹⁰ Transcript of hearing, 18 September 2018, ICC-02/04-01/15-T-179-Red-ENG, p. 82 line 5 to p. 83 line 20.

¹¹ Transcript of hearing, 1 October 2018, ICC-02/04-01/15-T-180-Red-ENG.

¹² 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, ICC-02/04-01/15-1423, with public annexes A and B, paras 2-3, 7, 17.

¹³ Request, ICC-02/04-01/15-1423, para. 2.

¹⁴ Request, ICC-02/04-01/15-1423, paras 12-13.

¹⁵ Request, ICC-02/04-01/15-1423, paras 2, 8-9, 13-16.

¹⁶ Request, ICC-02/04-01/15-1423, paras 10-11.

¹⁷ Request, ICC-02/04-01/15-1423, para. 15.

¹⁸ Prosecution 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 (ICC-02/04-01/15-1423), ICC-02/04-01/15-1439.

the Chamber in this determination, neither party is required to prove or disprove any raised ground for excluding criminal liability.¹⁹ The Prosecution asserts that ‘the Defence is wrong to suggest that article 66 requires the Prosecution to affirmatively disprove beyond reasonable doubt all elements of any article 31 ground asserted by the Defence’.²⁰ The Prosecution argues that the mere assertion of a ground under Article 31(1)(a) or (d) cannot be a basis for the applicability of these provisions,²¹ and that the Defence’s approach is not conducive to the fair and efficient administration of justice.²² Finally, the Prosecution submits that its proposed approach is more defence-friendly than the practice of the ICTY or the approach taken by this Court in the context of an accused’s fitness to stand trial or mitigating circumstances at sentencing.²³

8. On 7 February 2019, the Common Legal Representative for Victims (the ‘CLR V’) argues that the Chamber should dismiss the Request *in limine* (the ‘CLR V Response’).²⁴ The CLR V submits that the Defence should have raised the issue of burdens and standard of proof with respect to Article 31 defences at the same time it notified the Chamber of its intention to raise such defences.²⁵ It argues that, while the legal texts of the Court are silent with regard to specific time-limits applicable to the procedures to be followed when presenting Article 31 defences, it falls under the discretion of the Chamber, pursuant to Article 64(2) of the Statute, to determine the relevant time-lines.²⁶ The CLR V argues that ‘the Defence did not exert due diligence in raising its Request at the earliest available opportunity considering that more than two years and [a] half have passed since its notification’ that it will raise grounds under Article 31 of the Statute.²⁷ Alternatively, the CLR V submits that, if the Chamber is minded to address the merits of the Request, it should find that the party alleging a claim bears the burden of proof as to the support of that claim.²⁸

¹⁹ Prosecution Response, ICC-02/04-01/15-1439, para. 2, 3, 4, 5-6, 23.

²⁰ Prosecution Response, ICC-02/04-01/15-1439, para. 7.

²¹ Prosecution Response, ICC-02/04-01/15-1439, paras 9-11.

²² Prosecution Response, ICC-02/04-01/15-1439, paras 14-17.

²³ Prosecution Response, ICC-02/04-01/15-1439, paras 19-21.

²⁴ CLR V’s Response to “Defence Request for the Chamber to Issue and Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute”, ICC-02/04-01/15-1441 (notified 8 February 2019), para. 19.

²⁵ CLR V Response, ICC-02/04-01/15-1441, para. 8.

²⁶ CLR V Response, ICC-02/04-01/15-1441, para. 9.

²⁷ CLR V Response, ICC-02/04-01/15-1441, para. 10.

²⁸ CLR V Response, ICC-02/04-01/15-1441, paras 11-18, 19.

9. On 26 February 2019, the Defence replied to the Prosecution Response and CLRV Response (the ‘Defence Reply’).²⁹ The Defence submits that Prosecution’s assertion that the only issue under Article 31 of Statute is its applicability and not one of burden of proof is misguided.³⁰ It argues that, while other courts may accept a burden of proof on the Defence for insanity, Article 67(1)(i) of the Statute is explicit in disallowing a reverse burden of proof on the Defence.³¹ The Defence asserts that Articles 31(1)(a) and (d) of the Statute relate directly to the guilt or innocence of the accused and therefore fall within the ambit of Articles 66 and 67 of the Statute.³² As regards the Prosecution’s references to the burden of proof for mitigating circumstances or fitness to stand trial, the Defence argues that such issues do not relate to the guilt or innocence of the accused and are therefore inapposite to the question at hand.³³ It argues there is no specific time-limit in the Court’s legal texts with regard to Article 31 defences and in any event the Request is timely as it has been raised before the close of evidence.³⁴ The Defence submits that it is in the interests of a fair and expeditious trial for the Chamber rule on the burden and standard of proof applicable to Articles 31(1)(a) and (d) of the Statute.³⁵

II. Analysis

10. As concerns the timeliness of the Request, the Chamber notes that the legal texts of the Court are silent as to the specific time-limits with respect to the procedures to be followed when presenting grounds for excluding criminal responsibility under Article 31 of the Statute. Rule 79(1)(b) of the Rules only dictates that notice of an intent to raise Article 31(1) grounds for excluding criminal responsibility and the names of

²⁹ Defence Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Article 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1466 (with public annexes A, B, and C). The Defence sought leave to reply on 11 February 2019. Defence Request for Leave to Reply to Prosecution and CLRV Responses on Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1442. The CLRV responded that the request to reply should not be granted. CLRV’s Response to “Defence Request for Leave to Reply to Prosecution and CLRV Responses on Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, 13 February 2019, ICC-02/04-01/15-1447. The Chamber granted the Defence’s request to Reply on 19 February 2019. Decision on Defence Request for Leave to Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1455.

³⁰ Defence Reply, ICC-02/04-01/15-1466, paras 2-5.

³¹ Defence Reply, ICC-02/04-01/15-1466, paras 6, 8, 9.

³² Defence Reply, ICC-02/04-01/15-1466, paras 7-8.

³³ Defence Reply, ICC-02/04-01/15-1466, paras 10-14.

³⁴ Defence Reply, ICC-02/04-01/15-1466, paras 15-16.

³⁵ Defence Reply, ICC-02/04-01/15-1466, paras 16-18.

witnesses and any other supporting evidence ‘shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and respond’.

11. The Defence fulfilled its notification obligations by the Chamber mandated deadline of 9 August 2016.³⁶ With respect to the issue of the burden and standard of proof applicable to Articles 31(1)(a) and (d) of the Statute, the Defence first mentioned that it might raise issues in this regard in its opening statement to the Chamber on 18 September 2018.³⁷ However, the Chamber considers that the Defence should have raised the Request at the same time it provided its notification. While a question on the interpretation of the law is not, strictly speaking, part of the ‘notification’ prescribed in Rule 79(1)(b) of the Rules, the Chamber is of the view that the matter is intrinsically connected to the issue of providing notification and cannot be viewed separately.
12. This being said, the Chamber is mindful of Rule 79(3) of the Rules which provides that ‘failure of the defence to provide notice under this rule shall not limit its right to raise matters with in sub-rule 1 and to present evidence’. Since the Chamber considers that the Request is linked to the notification of Rule 79(1)(b) of the Rules, Rule 79(3) must apply in an equal manner. Accordingly, it will not reject the matter *in limine* for reasons of untimeliness.
13. In respect of the merits of the request, the Chamber notes that Article 66 of the Statute provides that, *inter alia*, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt, and the onus is on the Prosecution to prove the guilt of the accused. The Appeals Chamber has established that this standard of proof entails that ‘the elements of the crime and the mode of liability alleged against the accused, as well as the facts which are “indispensable for entering a conviction” must be established beyond reasonable doubt’ by the Prosecution.³⁸

³⁶ Decision on ‘Prosecution’s Request to Order the Defence to Comply with Rule 79’, 7 June 2016, ICC-02/04-01/15-460, p. 11; Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence, ICC-02/04-01/15-517 (with confidential annex A; a public redacted version of the annex was filed the same day); Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence, ICC-02/04-01/15-518.

³⁷ Transcript of hearing, ICC-02/04-01/15-T-179-Red-ENG, p. 82 line 5 to p. 83 line 20.

³⁸ Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor’s Appeal Against the Decision of Trial Chamber II Entitled “Judgment Pursuant to Article 74 of the Statute”, 27 February 2015, ICC-01/04-02/12-271, para. 25.

14. The Chamber is also mindful of the protection provided for in Article 67(1)(i) of the Statute. The contours of this provision have not been fully fleshed out by this Court in the context of Article 31 of the Statute. However, the Chamber underscores that an accused must never be required to affirmatively disprove the elements of a charged crime or a mode of liability, as it is the Prosecution's burden to establish the guilt of the accused pursuant to Article 66 of the Statute.
15. As concerns the presentation of the evidence, the Defence itself has maintained that it is under an evidential obligation to raise the grounds for excluding criminal responsibility under Articles 31(a) and (d) of the Statute.³⁹ The Defence has had and will continue to have every opportunity to present evidence on all the elements of the relevant Article 31 grounds. The Chamber encourages the Defence to put forward all the evidence it has in support of the grounds for excluding criminal responsibility it has raised. It notes that the Defence is already presenting such evidence and trusts that it will continue to do so throughout the presentation of its case.
16. Apart from that, the Chamber has previously stated that its interpretations of the applicable law will be set out in its judgment.⁴⁰ Accordingly, it does not consider that further explanations are warranted at this point in the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PROVIDES the explanation contained in paragraphs 13-16 above; and

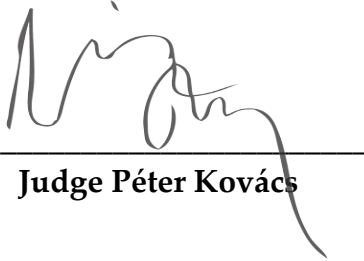
DISMISSES the remainder of the Request.

³⁹ See Request, ICC-02/04-01/15-1423, para. 2; *see also* Defence Reply, ICC-02/04-01/15-1446, para. 4.

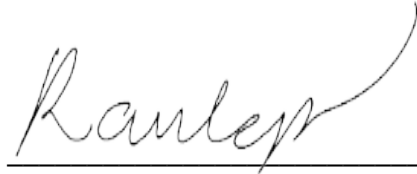
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 5 April 2019
At The Hague, The Netherlands