

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 13 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 the "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"**

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 “CLRv”) opposes the *“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”* (the “Request to Reply”).²

2. The CLRv submits that the issue raised in the Request to Reply in relation to her Response does not constitute a new issue which the Defence could not have reasonably anticipated and thus the Chamber would not be assisted in receiving further submissions on the matter.

II. PROCEDURAL BACKGROUND

3. On 28 January 2019, the Defence filed the “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 “Initial Request”).³

4. On 7 and 8 February 2019, the Prosecution⁴ and the CLRv⁵ filed their respective responses to the Initial Request. On 11 February 2019, the Defence filed the Request to Reply.⁶

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 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”, No. ICC-02/04-01/15-1442, 11 February 2019 (the “Request to Reply”).

³ 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”, No. ICC-02/04-01/15-1423, 28 January 2019 (the “Initial Request”).

III. SUBMISSIONS

5. In accordance with regulation 24(5) of the Regulations of the Court (the “Regulations”), “[p]articipants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”.

6. In its Request to Reply, the Defence argued that “[...] [i]n para. 8 of its response, CLRV asserts that the Defence Request is ‘untimely and should be rejected in limine.’ This is a new issue and not reasonably anticipated because this is not an issue that can be waived. There is a crucial need for a finding on the burden and standard of proof prior to the close of the case. All parties, the victims and the Court need to know the burden and standard of proof. The Defence requests leave to reply on this issue to clarify why timing is not an issue under the circumstances.”⁷

7. The CLRV submits that the issue identified in the Request to Reply does not constitute a new issue which the Defence could not have reasonably anticipated. Firstly, the CLRV stresses that the Defence had itself admitted unequivocally that it decided to file the Initial Request “to supplement oral submissions made during the Defence’s opening statement.”⁸ Said oral submissions did extensively discuss the matter in question at the hearing held on 18 September 2018.⁹ This alone demonstrates that

⁴ See the “Prosecution Response to 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 (ICC-02/04-01/15-1423)’”, No. ICC-02/04-01/15-1439, 07 February 2019.

⁵ See the “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’”, No. ICC-02/04-01/15-1441, 08 February 2019 (the “CLRV Response to the Initial Request”).

⁶ See the Request to Reply, *supra* note 2.

⁷ *Idem*, para. 6.

⁸ *Ibidem*, para. 1.

⁹ See the transcript of the hearing held on 18 September 2018, No. ICC-02/04-01/15-T-179-CONF-ENG ET, p. 51 line 20: “The Prosecution mentioned that we do not have any burden of proof whatsoever, I will stop at that. But then apart from the question of proving the case, for purposes of completeness, we believe that it is our duty and the duty of all participants in this case to bring the complete picture to your Honours so that

the Defence had already an opportunity to raise the matter before the Chamber,¹⁰ or had the knowledge about the urgency of the matter much earlier in the proceedings, or, at least, at the opening of the presentation of its evidence last year.

8. Secondly, the Defence further argued that “[a]n immediate ruling is required in order to safeguard the rights of the Accused. The Accused is entitled to know the standard by which he is to be judged, as it will directly impact upon the nature of the arguments raised and the evidence adduced during the course of the trial.”¹¹ The CLRV submits that the Defence again acknowledged here the fact that the matter of burden of proof has a direct impact on the assessment of evidence already presented by the Prosecution and the Victims during the trial proceedings. Therefore, the CLRV highlighted in her Response that the Initial Request is filed out of time since the Prosecution and the Victims had already completed the presentation of their evidence.¹² As mentioned above in the Initial Request, if the Defence were indeed aware of the fact that said matter will impact the evidence adduced during the course of the trial, then it should have formally raised it earlier, in fact, even before the start of the presentation of the evidence by the Prosecution in January 2017. Thus, the Defence had to be conscious of the need to justify why it decided only now to file the Initial Request, many months after the close of the presentation of the evidence adduced by both the Prosecution and the Victims.

justice can be done to the people of northern Uganda.” (Emphasis added). See also p. 82, line 5 to p. 83, line 20: “The Statute provides no guidance on this issue, and nor do the ad hoc jurisprudence, because the ad hocs are basically not united and not uniform in their holdings. However, based on our research, we would conclude that this issue is unsettled for this Court and the honourable Judges here have the opportunity to set the standard. We believe the standard should be applied for an affirmative defence should be in sync with Articles 66 and 67 and that we should--we should not adopt--or you should not adopt a standard which shifts the onus of the burden from the Prosecution to the Defence or somehow minimises or undercuts the principles of proof beyond a reasonable doubt. [...] So that in terms of summing up our approach, we would suggest a two-step process: The initial evidentiary burden on the Defence to raise an affirmative defence with some evidence, and a shift to the Prosecution to disprove the affirmative defence with proof beyond a reasonable doubt. And we will be submitting later a brief on this issue, but I wanted simply to raise the issue now because it is an important legal issue in terms of our defences.” (Emphasis added).

¹⁰ See the “Decision on three requests for leave to reply” (Trial Chamber V(B)), No. ICC-01/09-02/11-953, 19 September 2014, para. 12.

¹¹ See the Initial Request, *supra* note 3, para. 5.

¹² See the CLRV Response to the Initial Request, *supra* note 5, para. 8.

9. As argued in her Response to the Initial Request, the CLRV maintains her position that the Defence should have raised the issue at the same time it gave the notification of its intention to raise defences pursuant to article 31 of the Rome Statute (the “Statute”) on 9 August 2016. To allege that the Defence came to the realization that it needed to raise this matter only now seems to defy logic. Thus, it was a matter of common sense that the Defence had to justify the reasons for staying silent at least for two years and then now proceeding with its motion.

10. Therefore, since the purported issue identified in the Request to Reply is in no way “new” and could reasonably have been anticipated, the Defence should have comprehensively addressed it in its Initial Request. Additionally, the Chamber would not be assisted in receiving further submissions on the matter since the CLRV submits that the Chamber already has at its disposal all the necessary information to issue a ruling.

11. Moreover, since *“the purpose to grant leave to reply to a participant’s response per regulation 24(5) of the Regulations is not to strengthen the arguments presented in the Defence original submission”*,¹³ the CLRV submits that the Defence failed to meet the criteria established in regulation 24(5) of the Regulations and thus the Request to Reply must be dismissed.

12. The Defence also argued in the alternative that, if the Chamber finds that the issue of the timeliness of the Initial Request is either not new or reasonably anticipated, a reply should be granted in the interests of justice. The CLRV equally opposes this alternative relief since (i) the Defence fails to identify any legal basis in the statutory framework of the Court, or provide any other authority for the Chamber to grant leave to reply on this basis; (ii) *“the interest of justice”* criteria

¹³ See the “Decision on the “Defence Application for 1) Leave to Reply to Legal Representative of Victims filing 652 and Prosecution filing 653-Conf, and 2) Extension of Time to Respond to Observations of *amici* Lawyers for Justice in Libya and Redress Trust (filing 654)”, and other related matters” (Pre-Trial Chamber I), No. ICC-01/11-01/11-659, 24 October 2018, para. 14.

enshrined in regulation 60(1) of the Regulations is applicable exclusively to appeals proceedings; and (iii) in the circumstances of the matter at hand, there is no reason for the Chamber to deviate from the clear wording of regulation 24(5) of the Regulations. Therefore, the Defence's alternative request must also fail.

IV. CONCLUSION

13. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to dismiss the Request for Leave to Reply.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 13th of February 2019

At The Hague, The Netherlands