

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **12 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

Defence Request for Leave to Appeal

‘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’ (ICC-02/04-01/15-1494)

Source: Defence for Dominic Ongwen

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

Fatou Bensouda, Prosecutor
 James Stewart, Deputy Prosecutor
 Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
 Chief Charles Achaleke Taku
 Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
 Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
 Jane Adong

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda
 Caroline Walter
 Orchlon Narantsetseg
States' Representatives

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

Xavier-Jean Keita

Amicus Curiae**REGISTRY****Registrar**

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations
Section****Other**

I. SUBMISSIONS

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal Trial Chamber IX's ('Trial Chamber') 5 April 2019 "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".¹ The appellate issue is: *whether the Trial Chamber's failure to issue a decision as to the burden and standard of proof applicable to Articles 31(1)(a) and (d) violates Mr Ongwen's right to a fair trial.*
2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²
3. The Trial Chamber's failure to issue a decision on the merits is harmful and prejudicial to the Mr Ongwen's right to present a defence, because the Defence does not know, as it presents its evidence, what legal standard will be applied to its defences under Article 31 of the Statute.

A. The Issue constitutes an appealable issue pursuant to Article 82(1)(d)

4. The Defence requested "that the Chamber issue an immediate ruling confirming that the [beyond a 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) beyond a reasonable doubt."³
5. The Trial Chamber decided that it would not issue said immediate ruling and instead it provided an "explanation".⁴
6. The Trial Chamber first considered, procedurally, that it could and would take decision on the merits. The Trial Chamber reasoned that Rule 79(1)(b) of the RPE "only dictates" that notice of Article 31 grounds be given.⁵ It found that the Defence fulfilled this obligation,⁶ but that the Defence should have raised its request at the time of notification⁷ because the request was

¹ ICC-02/04-01/15-1494 ('Decision').

² ICC-02/04-01/15-1334-Red, paras 4 to 10.

³ ICC-02/04-01/15-1423, para. 17.

⁴ Decision, p. 8.

⁵ *Ibid.*, para. 10.

⁶ *Ibid.*, para. 11.

⁷ *Ibid.*, para. 11.

“intrinsically connected”⁸ to the issue of notification. Notwithstanding that finding, the Trial Chamber did not reject the request *in limine* because of the link between the request and Rule 79(1)(b). Because of this, Rule 79(3) – which states that failure to provide notice under Rule 79(1) does not limit the Defence right to raise defences absent a notice – was applicable and therefore the Defence was not limited in its right to raise such matters.⁹ Having found that the Defence was not barred from making the request, the Trial Chamber turned to the merits.

7. In respect to the merits, the Trial Chamber did not give an immediate ruling as requested by the Defence¹⁰ but rather provided an “explanation”.¹¹ This explanation contains a rehearsal of Appeals Chamber jurisprudence on the standard of proof.¹² In particular the 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.¹³ It also contains a confirmation that the “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”.¹⁴
8. Such an explanation simply further raises the question as to whether, having fulfilled the evidential obligation to raise the defence, and particularly after the Trial Chamber has noted that the Defence has already presented some evidence related to the same,¹⁵ whether the obligation is now on the Prosecution to “disprove beyond a reasonable doubt the elements of the mental condition or the duress defence”.¹⁶
9. Whether or not the Defence should have raised the matter earlier is irrelevant because the Trial Chamber will have to decide the issues raised in the request in order to render a judgment. The argument that the Defence should have sought clarification at the time of filing its notices also places an obligation upon the Defence which is not present in the Statute, rules, or regulations.

⁸ Decision, para. 11.

⁹ *Ibid.*, para. 12.

¹⁰ ICC-02/04-01-15/1423, para. 17.

¹¹ Decision, p. 8 *citing* paras 13-16.

¹² *Ibid.*, para. 13.

¹³ *Ibid.*, para. 13.

¹⁴ *Ibid.*, para. 14.

¹⁵ *Ibid.*, para. 15 (“It notes that the Defence is already presenting such evidence”).

¹⁶ ICC-02/04-01/15-1423, para. 2.

10. It is also not clear how the Chamber concluded that a matter of law such as that raised by the request should have been raised earlier at the time of the notice, but that it is now too late to provide an answer to said question. The Trial Chamber has no textual basis for the proposition that it should have been raised earlier: no such prohibition is stated in the Statute, rules, or regulations. Moreover, in examining the merits of the Defence request, rather than dismissing it on procedural grounds, the decision implicitly recognises that such a ruling (a) is possible before judgment and (b) might be warranted.
11. The decision not to take a decision should be seen in the context of the reasoning where the Trial Chamber also acknowledges that “[t]he contours of [Article 67(1)(i)] have not been fully fleshed out by this Court in the context of Article 31 of the Statute.”¹⁷ This statement from the Chamber underscores the Defence original position that

An 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.¹⁸

12. Further in the merits, the Trial Chamber states that since the Defence has maintained that it is under an evidential obligation, it has and will have every opportunity to present evidence, and is already presenting such evidence.¹⁹ The Trial Chamber encouraged the Defence to put forward all evidence.²⁰
13. Yet, the Chamber’s implicit argument²¹ that since the Defence acknowledges it is under an evidential burden that therefore no decision is required at this time is false. Such an argument proceeds on a false premise. The Defence position was that the evidential burden is discharged simply by raising notice.²² The Defence position was not that an entire Defence case must be presented in order to satisfy the notice requirement.

¹⁷ Decision, para. 14.

¹⁸ ICC-02/04-01-15/1423, para. 5.

¹⁹ *Ibid.*, para. 15.

²⁰ *Ibid.*, para. 15.

²¹ Decision, para. 15.

²² ICC-02/04-01-15/1423, para. 2 (“The Defence is required only to submit evidence before Trial Chamber IX [...] as to the existence of the mental condition or the circumstances giving rise to duress. The Accused is therefore only under an evidential obligation to raise the defence, which has already occurred in this case.”).

14. In conclusion, whether the Trial Chamber's failure to issue a decision as to the burden and standard of proof applicable to Articles 31(1)(a) and (d) violates Mr Ongwen's right to a fair trial is a discrete issue that arises out of the decision.

B. The Issue significantly affects the fair and expeditious conduct of proceedings

15. *The resolution of the issue significantly affects the fair conduct of proceedings.* The central premise of the Defence request was that a decision is needed **now** as it impacts upon the way the Defence presents evidence and therefore the rights of the Accused under Article 67. Failure to get a definitive answer on this issue risks violation of non-derogable minimum guarantees under the Rome Statute. The Defence noted *inter alia* "an immediate ruling is warranted to prevent a violation of Articles 67(1)(b), (e), (g) and (i)."²³ The Trial Chamber also accepts that the issue is tightly connected to fair-trial rights as it explicitly cites to several fundamental rights of the Accused.²⁴ Absent an explanation setting out the contrary, the Decision therefore impacts upon the fairness of proceedings.
16. The litigation has demonstrated there is a multiplicity of views on the correct standard of proof. The Trial Chamber previously granted a reply "particularly [...] as the burden and standard of proof for Article 31(1)(a) and (d) defences is an issue of first impression for the Court".²⁵ These facts all point to the need for an immediate ruling. The standard and burden to which the Prosecution is held impacts upon a multitude of aspects during the Defence case from allocation of resources and time, to structuring a final brief, and whether to call certain witnesses.
17. To ask the Defence to carry this burden of not knowing what legal standard the Trial Chamber is applying to the evidence is unfair to the Accused. It is more egregious when considered against the potential violation of fair trial rights under Article 67 that might follow from proceeding on an incorrect understanding of the standard to be applied. Such a ruling leaves the Defence further guessing as to which standards will be applied and therefore what evidence should be presented and what actions should be taken. An absence of a decision is still a kind of decision – it is a decision to leave the Defence in the dark as to the standard by which Mr Ongwen's accusations will be judged.

²³ Decision, para. 5.

²⁴ *Ibid.*, paras 13 and 14.

²⁵ ICC-02/04-01/15-1455, para. 5.

18. *The resolution of the issue significantly affects the expeditious conduct of proceedings.* The Defence needs to know the standard and burden of proof that will be applied so that Mr Ongwen can exercise his Article 67(1)(e) right to present a defence. As described below, the issue is one which can impact upon the outcome of the trial. A failure to address the issue now therefore can lead to extra evidence presentation and argumentation, a re-trial, re-presentation of evidence, or presentation of additional evidence upon appeal. That impacts upon expeditiousness.

C. The Issue significantly affects the outcome of the trial

19. An issue that touches on the standard of proof involved in establishing a conviction or leading to an acquittal definitionally impacts upon the outcome of the case.
20. The Defence proceeding to work under an incorrect legal standard due to the issue may lead to fundamental fair trial violations that stem from legal uncertainty. The incorrect application of a legal standard combined with the harm and prejudice it caused an accused's case is precisely the kind of error that leads to a miscarriage of justice and/or a re-trial or unduly lengthy appeals.

D. Immediate resolution of the Issue by the Appeals Chamber could materially advance the proceedings

21. The Defence avers that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings in the *Ongwen* case.
22. The Trial Chamber has granted leave to appeal on the discrete issue of whether “whether the dismissal of the Initial Requests in limine, on grounds of untimeliness, is consistent with the rights of the accused”.²⁶ Although that issue concerns a matter that is legally different. As with that issue, the present issue “can potentially have a substantial impact on the trial”.²⁷ Whether the Trial Chamber must provide a decision on this issue has a similarly serious character. Clarifying such the issue through Appeal Chamber guidance will materially advance the proceedings.

²⁶ ICC-02/04-01/15-1493, para. 11.

²⁷ *Ibid.*, para. 15.

II. RELIEF

23. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue: *whether the Trial Chamber's failure to issue a decision as to the burden and standard of proof applicable to Articles 31(1)(a) and (d) violates Mr Ongwen's right to a fair trial.*

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 12th day of April, 2019

At The Hague, The Netherlands