

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **11 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

**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: 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**

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I. INTRODUCTION

1. The Defence requests leave to reply to the responses of the Prosecution¹ and CLRV² 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.”³
2. Regulation 24 (5) of the Regulations of the Court provides: “Participants 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.”
3. Three new issues were raised that could not reasonably have been anticipated by the Defence. Alternatively, if the Court finds that any of the identified issues were either not new or were reasonably anticipated, the Defence respectfully requests that the Court permit a reply in the interests of justice to assist the Court in deciding the burden and standard of proof issue. This is an issue of first impression for the Court. It is of great consequence in this case as well as in future cases.

II. SUBMISSIONS

4. *First issue.* In its response, the Prosecution stated the issue as one of “applicability” rather than burden of proof. In fact, in para. 5, the Prosecution asserts that “no particular party is required to prove or disprove the elements of article 31 (1) (a) or (d).” This is a new issue and could not have been reasonably anticipated because the Prosecution assertion misunderstands the function of a burden of proof in a trial at the ICC. Unlike a domestic civil law system, evidence in a trial at the ICC is not primarily adduced by the judges. Instead, it is the parties that must adduce evidence and, consequently, must meet burdens of proof on elements of crimes and defences. The “applicability” of a ground for excluding liability under Article 31 is solely the preliminary finding by the Court. At that point, either the Defence or the Prosecution must satisfy the Court of the existence or absence of the defence. The Defence requests leave to reply in order to respond and explain why the applicability approach proffered by the Prosecution is incorrect under the ICC Statute.

¹ ICC-02/04-01/15-1439.

² ICC-02/04-01/15-1441.

³ ICC-02/04-01/15-1423.

5. *Second issue.* In paras. 20 and 21 of its response, the Prosecution raises mitigating circumstances and fitness to stand trial as similar, although not exact, situations to Article 31 defences. Suggesting a parallel with mitigating circumstances and fitness issues poses new issues and could not have been reasonably anticipated because the supposed analogies are inapt. Fitness to stand trial is a pre-trial, preliminary determination. Mitigating circumstances may include mental illness or duress, but arise in a fundamentally different context from defences to the charged crimes. Neither raises an issue that goes to the basic guilt or innocence of the accused. As such, the issues on burden of proof are qualitatively different with defences. The Defence requests leave to reply in order to respond to why these examples are without merit in the Court's examination of the burden and standard of proof for defences raised under Article 31 (1) (a) and (d).
6. *Third issue.* In 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. Each of the three issues is an unanticipated new issue raised in the pleadings. In addition, each issue is highly important for a fair and expeditious decision on the burden and standard of proof for the Article 31 (1) (a) and (d) defences. Particularly where this is an issue of first impression for the Court, the Defence requests leave to reply in the interests of justices in order to assist the Court in its determination of the meaning of the Statute.

III. RELIEF

8. For the reasons described above, the Defence respectfully requests leave to reply to the Prosecution Response and the CLRV Response to the Defence Request for a ruling on the burden and standard of proof for Article 31 (1) (a) and (d) defences.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 11th day of February, 2019
At Kampala, Uganda