

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **20 May 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 Leave to Appeal the Decision Regarding the Burden
and Standard of Proof**

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

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**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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Counsel Support Section

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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 Article 82(1)(d) of the Rome Statute (‘Statute’) issues the following ‘Decision on Defence Request for Leave to Appeal the Decision Regarding the Burden and Standard of Proof’.

I. Procedural history and submissions

1. On 28 January 2019, the Defence filed a motion requesting that the Chamber confirm that the standard of ‘beyond reasonable doubt’ applies in these proceedings and that the Office of the Prosecutor (the ‘Prosecution’) has to disprove the elements of a defence raised under Articles 31(1)(a) and (d) of the Statute beyond a reasonable doubt (the ‘Initial Request’).¹
2. On 5 April 2019, the Chamber issued a decision on the Initial Request (the ‘Impugned Decision’).² It reaffirmed that the Prosecution has the onus to prove the guilt of the accused and that the Chamber must be convinced of this guilt beyond reasonable doubt.³ It further stated that it is mindful of Article 67(1)(i) of the Statute and guaranteed that the Defence ‘has had and will continue to have every opportunity to present evidence on all the elements of the relevant Article 31 grounds.’⁴ Beyond that, the Chamber found that the interpretation of the application law will be set out in the judgment and that no further explanations were warranted at this point in the proceedings.⁵
3. On 12 April 2019, the Defence requested leave to appeal the Impugned Decision (the ‘Request’)⁶ on the issue:

‘[w]hether the Trial Chamber’s failure to issue a decision as to the burden and standard of proof applicable to Article 31(1)(a) and (d) violates Mr Ongwen’s right to a fair trial.’⁷ (the ‘Issue’)

¹ 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 two annexes, ICC-02/04-01/15-1423-AnxA and ICC-02/04-01/15-1423-AnxB.

² 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.

³ Impugned Decision, ICC-02/04-01/15-1494, para. 13.

⁴ Impugned Decision, ICC-02/04-01/15-1494, paras 14 and 15.

⁵ Impugned Decision, ICC-02/04-01/15-1494, para. 16.

⁶ 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), ICC-02/04-01/15-1499.

4. The Defence argues that the Issue arises from the Impugned Decision since the Initial Request sought an ‘immediate ruling’ of the applicable standard of proof for Article 31 defences which was not provided in the Impugned Decision.⁸
5. It further raises again its arguments previously formulated in the Initial Request that such ruling will impact the Defence’s presentation of evidence in order to justify that the issue significantly affects the fair and expeditious conduct of the proceedings.⁹
6. The Defence submits that, since the Issue concerns a question regarding the standard of proof, it ‘definitionally impacts the outcome of the case’.¹⁰
7. On 18 March 2019, the Prosecution filed a response to the Request, seeking that it be rejected (the ‘Response’).¹¹ It argues that the Issue does not significantly affect the fair and expeditious conduct of the proceedings¹² or the outcome of the trial.¹³ Additionally, the Prosecution submits that an immediate solution by the Appeals Chamber would not materially advance the proceedings.¹⁴

II. Analysis

8. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹⁵
9. The Chamber interprets the Issue presented by the Defence in the sense of whether the Chamber’s failure to *immediately* issue a full decision on the Initial Request violates the accused’s right to a fair trial. The Chamber considers this to be a discrete legal question which arises from the Impugned Decision and therefore an appealable issue pursuant to Article 82(1)(d) of the Statute.

⁷ Request, ICC-02/04-01/15-1499, paras 1 and 23.

⁸ Request, ICC-02/04-01/15-1499, paras 4 and 14.

⁹ Request, ICC-02/04-01/15-1499, paras 15 and 17.

¹⁰ Request, ICC-02/04-01/15-1499, para.19.

¹¹ Prosecution Response to the “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)”, ICC-02/04-04/15-1501.

¹² Response, ICC-02/04-01/15-1501, paras 4-6.

¹³ Response, ICC-02/04-01/15-1501, paras 7-8.

¹⁴ Response, ICC-02/04-01/15-1501, paras 9-11.

¹⁵ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

10. However, the Chamber does not consider that the Issue significantly affects the fair and expeditious conduct of the proceedings. The Defence argues that a ruling on the burden and standard of proof ‘is needed **now** as it impacts upon the way the Defence presents evidence’.¹⁶ However, apart from this vague statement, the Defence fails to present any convincing argument how the conduct of the proceedings is affected. It does not identify any specific witness or specific evidence that it would present (or not present) should an immediate ruling be provided by the Chamber.
11. The Impugned Decision clearly stated that the Defence has and will continue to have every possibility to present its evidence. The Chamber finds that the statutory framework and the Impugned Decision are sufficiently clear to enable the Defence to conduct the presentation of its evidence. Should the Defence consider that the calling of certain witnesses is necessary, it has the opportunity to do so – irrespective of the fact whether an immediate ruling on the burden and standard of proof has been provided. This, as other questions on the interpretation of the substantive law, will be done in the final judgement. Accordingly, the Chamber considers that the Issue does not affect the fair and expeditious conduct of the proceedings.
12. Regarding the Defence’s submission that every issue concerning the standard of proof automatically affects the outcome of the trial, the Chamber does not follow this argumentation. The Issue does not pertain to whether such ruling will be provided at all but only whether an immediate ruling is necessary. The Defence submits that there might be fair trial rights violations ‘that stem from legal uncertainty’.¹⁷ However, this is not an argument that the outcome of the trial would be affected. The Defence does not present any cogent argument that the failure to provide a ruling at this point in time has an impact on the content of the judgment. Consequently, the Chamber finds that the Issue does not significantly affect the outcome of the trial.
13. Since the Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the prerequisites of Article 82(1)(d) of the Statute are not met. Accordingly, the Chamber rejects the Request.

¹⁶ Request, ICC-02/04-01/15-1499, para. 15 (emphasis in the original).

¹⁷ Request, ICC-02/04-01/15-1499, para. 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

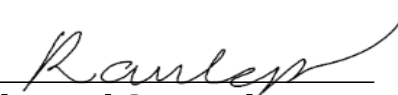
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 20 May 2019

At The Hague, The Netherlands