

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No.: ICC-02/04-01/15 A
Date: 15 November 2021**

THE APPEALS CHAMBER

Before:

**Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze**

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public Document

**Request to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of
Procedure and Evidence on behalf of the Public International Law & Policy Group**

Source:

Public International Law & Policy Group

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

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Ms Beth Lyons

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Legal Representatives of the Applicants

Ms Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Public International Law & Policy Group (“**PILPG**”) hereby requests leave to submit observations pursuant to paragraphs 20–21 of the Appeals Chamber’s Order of 25 October 2021.

I. Relevant Expertise of the Public International Law & Policy Group

2. Led by a team of experienced international legal experts and academics, PILPG is a global *pro bono* law firm that provides free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecutions. Founded in 1995, PILPG has provided training, research assistance, and advice to states and organisations, including the ECCC, the Iraqi Special Tribunal, the STL, the ICTR, the ICTY, the SCSL, and the International Crimes Division of the Ugandan High Court. PILPG’s international litigation expertise includes its successful representation of the SPLM/A in the PCA *Abyei Arbitration* against the Government of Sudan. PILPG’s work on the documentation of international crimes against the Rohingya was cited more than twenty times in the Court’s *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in Bangladesh/Myanmar*. The Appeals Chamber cited PILPG’s amicus brief in the *Prosecutor v. Bosco Ntaganda* case on the meaning of “attack” four times in its appeal judgement.

3. PILPG Co-Founders Dr. Paul R. Williams¹ and Dean Michael Scharf;² Managing Director Professor Milena Sterio;³ Senior Legal Advisors Dr. Yvonne Dutton,⁴ Adrienne Fricke,⁵ Jonathan Worboys,⁶ and Dr. Margaret deGuzman;⁷ Senior Peace Fellows Gregory Townsend⁸

¹ Dr. Paul R. Williams is a co-founder of PILPG and the Rebecca I. Grazier Professor of Law and International Relations at American University’s School of International Service and Washington College of Law.

² Michael Scharf is a co-founder of PILPG and Dean of the Law School and the Joseph C. Hostetler-Baker Hostetler Professor of Law at Case Western Reserve University. Previously, Dean Scharf served as Special Assistant to the International Co-Prosecutor of the ECCC, and during the elder Bush and Clinton Administrations, he served in the Office of the Legal Adviser of the U.S. Department of State, where he helped draft the Statute, Rules, and Security Council Resolution establishing the ICTY.

³ Milena Sterio is the Charles R. Emrick Jr. – Calfee Halter & Griswold Professor of Law at Cleveland-Marshall College of Law and a former Adjunct Law Professor at Cornell, where she taught the International War Crimes Clinic. She has served as a maritime piracy law expert at meetings of the United Nations Contact Group on Piracy off the Coast of Somalia, and as a member of the Piracy Expert Group, a PILPG-led academic think tank.

⁴ Dr. Yvonne Dutton is a Professor of Law at Indiana University McKinney School of Law, and her scholarship focuses on the ICC and international criminal law matters.

⁵ Adrienne L. Fricke, J.D., M.A., is a Senior Fellow at the Harvard Humanitarian Initiative where she engages in research relating to policy initiatives to improve access to healthcare for Syrian refugees, and a consultant specialising in human rights and refugee-related issues in the Middle East and Africa.

⁶ Jonathan Worboys, barrister, specialises in international criminal law, public international law, and human rights.

⁷ Dr. Margaret deGuzman is a James E. Beasley Professor of Law and Co-Director of the Institute for International Law and Public Policy at Temple University’s Beasley School of Law.

⁸ Gregory Townsend is a lecturer at The Hague University, as well as a former practitioner at the ICTR, UNMIK, ICTY, SCSL and STL, ICC list and former duty counsel, and member of the ICC ACLT.

and Jennifer Trahan;⁹ as well as Chihiro Isozaki, Greta Ramelli, Sindija Bēta, Laura Hamilton, Isabela Karibjanian, Alexandra Koch, and Kendahl Tyburski, contributed to this Request for Leave.

II. Legal Questions, Principal Argument, and Summary Conclusions: Art. 66(2) and art. 67(1)(i) of the Rome Statute require the defendant to raise a reasonable doubt as to mental disease or defect or duress in accordance with art. 31 (1)(a) and (d) of the Rome Statute

4. An important issue in this case is whether the burden of proof in relation to the applicability of the grounds excluding criminal responsibility enshrined in art. 31(1)(a) and (d) of the Rome Statute rests on the prosecution or shifts to the defence. This question is not governed by general principles of international law; the courts of national and international jurisdictions remain split on the issue. National and international practice suggests the Court may take one of three approaches: (1) require the defendant to prove the existence of any grounds of mental disease or duress beyond reasonable doubt; (2) require the defendant to prove the grounds of mental disease and defect or duress on “the balance of probabilities”;¹⁰ (3) permit the defendant to raise a reasonable doubt as to mental disease or defect or duress while maintaining the burden on the prosecution to disprove the defense beyond a reasonable doubt.¹¹ PILPG argues that approach 3 is most appropriate for the ICC in light of its negotiating history, the Rome Statute, and compelling judicial policies.

a. The negotiating history of the Rome Statute supports the third approach

5. The drafters specifically considered and ultimately rejected an Israeli proposal for art. 44(5) *bis* (later art. 69(7)) that would have placed the burden of proof with respect to affirmative defences on the defendant.¹² The prohibition of a reversal of the burden of proof was prompted by South Africa’s constitutional constraints¹³ and was reflected in art. 67(1)(i).¹⁴ This evinces

⁹ Jennifer Trahan is a Clinical Professor at NYU’s Center for Global Affairs; she is also Convenor of the Global and Institute for the Prevention of Aggression and appeared as an amicus in the Afghanistan situation.

¹⁰ See, e.g., *Celibici*, Case no. IT-96-21, ICTY T. Ch. [1998].

¹¹ Approach 1 and 2 would shift the burden of proof regarding mental disease or defect or duress to the defendant, whereas in 3, the burden of proof remains with the prosecution.

¹² *Proposal Submitted By Israel For Articles 44, 45 and 47*, PrepCom, A/AC.249/WP.53 [1996], available at <https://www.legal-tools.org/doc/0f868d/pdf>. See also *Report of the PrepCom*, A/CONF.183/13, Vol. III, 58, available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf.

¹³ *S v. Zuma*, Case No.: CCT/5/94, para. 39, [1995]; MH Mthembu, *The Constitutionality of Presumptions in South African Law*, 31: 2 CILSA 213, 223 [1998]; Hakan Friman, *Inspiration From the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court*, 3 Law Pract. Int 373, 381 [2003].

¹⁴ *Draft Proposal For Article 67*, A/CONF.183/C.1/WGPM/L.42, art.67(1)(j) [1998], available at <https://www.legal-tools.org/doc/910fca/pdf>; *Texts Adopted on First Reading*, art. 67, A/CONF.183/DC/R.109 [1998], available at <https://www.legal-tools.org/doc/526904/pdf>.

that the drafters read the language of art. 67(1)(i) as supporting approach 3, disallowing any burden of proof from being placed on the defendant.

b. Placing any burden of proof on the defence would contravene the drafters' understanding of the presumption of innocence contained in art. 66

6. Art. 66 applies at all stages of the proceedings without exceptions and is amplified by the related defendant's rights enshrined in art. 55(2)(b), 67(1)(g), and 67(1)(i).¹⁵ In *Bemba*, Trial Chamber III clarified the application of art. 67(1)(g) in conjunction with art. 67(1)(i), holding that the accused is entitled to remain silent and not to have imposed on them "any reversal of the burden of proof or any onus of rebuttal."¹⁶ The combined effect of these provisions indicates that the interpretation of the presumption of innocence in the Rome Statute goes beyond standard human rights norms.¹⁷

c. ICTY precedent is not a persuasive authority on the issue of burden of proof

7. Although the ICTY Trial Chamber concluded in *Celebici* that "the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence,"¹⁸ the combined effect of art. 66(2) and art. 67(1)(i) of the Rome Statute renders the ICTY approach incompatible with the ICC context.¹⁹ The drafters of the Rome Statute intentionally adopted a different approach to the burden of proof regarding defences than that applied at the ICTY, or in some national jurisdictions.²⁰

d. The ICTY erred in describing approach 2 as a "general principle of law" in *Celebici*, given the divergence in approaches amongst different national courts

¹⁵ Marc Klamberg, *Commentary on the Law of the ICC*, 482, available at <https://www.legal-tools.org/doc/aa0e2b/pdf/>.

¹⁶ *Prosecutor v. Bemba*, Case Nos. ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, ICC-01/05-01/08-2500, ICC T. Ch. III, para. 19, 6 Feb. 2013.

¹⁷ For example the European Convention of Human Rights allows for reversals of the burden of proof within clear limits. See William A. Schabas, *Article 66 – Presumption of Innocence*, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Otto Triffterer ed.), 833–43 [1999]; see also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 784–85 [2010].

¹⁸ *Celebici*, Case no. IT-96-21, ICTY T. Ch., paras. 78, 603, 1157–1160, 1172 [1998]; See also *Celebici*, Case no. IT-96-21-A, ICTY A.C., paras. 582, 590 [2001].

¹⁹ Note that there is no provision equivalent to article 67(1)(i) of the ICC Statute in the ICTY statute.

²⁰ Marc Klamberg, *Commentary on the Law of the ICC*, 482 (speaking to the application of arts. 66(2), 67, and 79(1) to art. 31(a), of which there is no equivalent in the ICTY statute), available at <https://www.legal-tools.org/doc/aa0e2b/pdf/>. See also William A. Schabas, *An Introduction to the International Criminal Court*, 240 [2011]; Marc Klamberg, *Burden of Proof, Standard of Proof and Evaluation of Evidence*, in *Evidence in International Criminal Trials*, 126–27 [2013].

8. While the *Celebici* Trial Judgment cited to several jurisdictions that placed the evidentiary burden for proving affirmative defences on the accused,²¹ this approach is by no means settled law or sufficiently uniform to be considered a “general principle.”²²

9. A number of national and subnational jurisdictions require the prosecution to disprove affirmative defences as part of a strict interpretation of the presumption of innocence.²³ Other jurisdictions do not engage in adversarial burden shifting; rather, some mandate court-ordered investigations into the issue of mental disease or defect.²⁴ Further, divergence exists within national jurisdictions as well, resulting in a lack of consensus.²⁵

III. Summary Conclusion

11. Based on the arguments above, PILPG submits that the Rome Statute only requires the accused to raise a reasonable doubt as to the applicability of the ground excluding criminal responsibility. PILPG will provide further analysis and practical guidance as to what this standard should entail for the defence in practice.

Respectfully submitted for the Public International Law & Policy Group:

Professor Michael P. Scharf



Dated: 15 November 2021

Done at Cleveland, Ohio

²¹ *Celebici*, Case no. IT-96-21, ICTY T. Ch. paras. 1171–72 [1998] (primarily relying on the approach taken in section 2 of the English Homicide Act).

²² See Imogen Saunders, *General Principles as a Source of International Law* [2021].

²³ See, e.g., Russian Criminal Procedural Code, art. 14 (2) and (3) [2001]; Code of Criminal Procedure of the Azerbaijan Republic, art. 21 (3) [2000]; *Patula v. People*, G.R. No. 164457, 685 PHIL 376-411 [2012].

²⁴ See, e.g., Cyprus Criminal Procedure Rules, Ch 155 of the Laws, art. 70(1) [1959].

²⁵ E.g., although the federal standard in the United States for both mental disease and defect and duress places the burden of proof of those defences on the defendant, see *Dixon v. United States*, 548 U.S. 1 [2006]; Comprehensive Crime Control Act, 18 U.S. Code § 17 [1984] (overruling *Davis v. United States*, 160 U.S. 469 [1895]), there is a variance in approaches taken at the state level. While a majority of states place some burden of proof on the defendant to prove insanity, eleven states require no burden to be placed on the defendant with respect to mental disease and defect, placing the entire burden on the prosecution. Compare *People v. Kohl*, 72 N.Y.2d 191, 196 [1988] with CO Rev Stat § 16-8-105(2) [2017].