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**International
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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

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)”

Source: The Office of the Prosecutor

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Introduction

1. The Chamber should reject the Defence's proposed approach to assessing article 31 issues, as outlined in its "Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Article 31(1)(a) and (d) of the Rome Statute" ("Request").¹

2. The Defence is wrong to frame article 31 only in terms of "burdens" on the Parties. Article 31(2) provides that the Chamber shall determine the applicability of article 31(1)(a) and (d) in this case. The Parties may assist the Chamber in discharging this obligation, including by raising the issue and adducing evidence, as has already occurred in this case. But the Chamber independently has the power and the duty to address articles 31(1)(a) and (d), including by calling its own evidence when necessary, regardless of any steps taken or not taken by the Parties. Accordingly, "burden of proof" as framed by the Defence simply does not arise.

3. The Prosecution of course accepts and embraces its obligation under article 66 to prove the Accused's guilt beyond reasonable doubt. However, that does not settle the issue raised in the Defence Request. Any ground for excluding criminal responsibility under article 31 must be based upon a substantial evidentiary basis in the record of the case. The Statute does not say who must present such evidence, although common sense suggests that the Defence will often both have an interest in doing so and be in a particularly good position to do so. What is clear from article 31 is that the ultimate responsibility for determining the applicability of article 31 grounds lies with the Chamber.

¹ ICC-02/04-01/15-1423 ("Request").

Submissions

4. As a preliminary matter, the Prosecution notes that article 31 refers to “grounds for excluding criminal responsibility,” not “defences.” The Defence’s repeated use of the term “defences”² and its insistence on delineating “burdens of proof” suggest that it has viewed the issue solely through the lens of the common law. The Prosecution, by contrast, has made a concerted effort to set aside national jurisdiction preconceptions (to which, in fairness, it too has been prone at times) and instead has striven to identify a reading of the Statute that recognises and respects the drafters’ attempt to build a *sui generis* legal system, one which incorporates aspects of both civil law and common law traditions. When viewed from this perspective, the approach proposed by the Defence is both unnecessary and counterproductive.

A. Article 31 Operates under the Direction of the Chamber Rather than the Parties.

5. As a starting point, the Prosecution notes that article 31(2) establishes that it is *for the Chamber* to decide whether article 31(1)(a) and (d) apply in any given case, irrespective of any party action. The parties may assist the Chamber in assessing potential grounds for excluding criminal responsibility, through the questioning of witnesses or by presenting expert or documentary evidence, as indeed has already occurred in this case. However, the ultimate responsibility for making a determination on the applicability of article 31 grounds lies with the Chamber. Even if no party raises the issue, the Chamber can, and must, act *proprio motu* if necessary to fulfil its truth-seeking function as the trier of fact. In this context, the Defence’s focus on “burdens” is misplaced, because no particular party is required to prove or disprove the elements of article 31(1)(a) or (d).

² Request, paras. 2, 4, 6-7, 10-11, 13-15, 17.

6. This approach furthers the truth-seeking function of the Chamber under the Statute,³ because the Chamber is authorised and obliged to determine the applicability of article 31 grounds, where appropriate, even if no party specifically requests that it do so. This also promotes fairness to the accused by eliminating the potential for situations known to arise in some adversarial jurisdictions, whereby, if an accused fails or declines to raise a ground that might exclude criminal responsibility, the court lacks power to intervene, even if evidence on the record suggests that such a ground should apply.

B. The Defence Request Misunderstands the Interaction of Articles 31, 66, and 67

7. Once an issue under article 31 has been placed before the Chamber, by one of the Parties or *proprio motu*, the Prosecution submits that the ultimate question becomes whether the Chamber is satisfied that the particular article 31 ground applies. Article 31 is silent as to the precise level of satisfaction required. However, while the Prosecution fully accepts and embraces its obligation under article 66 to prove the Accused's guilt beyond reasonable doubt, the Defence is wrong to suggest that articles 66 requires that the Prosecution affirmatively disprove beyond reasonable doubt all elements of any article 31 ground asserted by the Defence. Once again, the Defence's adversarial, common-law approach misapprehends the Chambers-guided procedure intended by the drafters of the Statute.

1. *Article 31 Requires A Basis in Evidence, but It Does Not*

Place Any Burden on Any Party

³ See, e.g., Statute, art. 69(3).

8. The Defence suggests that it bears an initial “evidential obligation” to put the mental condition of the Accused, or the circumstances allegedly constituting duress, at issue.⁴ This approach actually requires too much from the Defence, and it also fails to address all of the article 31(1)(a) and (d) requirements.

9. First, the Prosecution agrees that the mere assertion of a ground for excluding criminal responsibility cannot be the basis for a finding of applicability. Exclusion of criminal responsibility under article 31(1)(a) or (d) is a weighty proposition. Such a determination must always rest on a substantial evidential basis in the record of the case. However, there is no indication in the Rome Statute that such evidential basis must be put forward by one party or the other, and indeed the Prosecution understands that such evidence could be sought and presented by the Trial Chamber alone.⁵

10. Second, however, the Prosecution submits that article 31 must logically require evidence going to *all* the elements of an article 31 ground, *i.e.*, not just the existence of the mental disease or defect under article 31(1)(a), but also the impact of that mental condition on the accused’s cognitive or volitional capacities at the time of the alleged conduct. The lack of such evidence as to any one element would necessarily leave the Chamber without a sufficient basis upon which to determine that the asserted ground applies.

⁴ Request, para. 2 (“The Defence is required only to submit evidence before Trial Chamber IX (‘Chamber’) 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 ...”).

⁵ Rule 79(1)(b) of the Rules of Procedure and Evidence does require the defence, when notifying the Prosecutor of its intent to raise a ground under article 31(1), to “specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.” This rule supports the Prosecution’s view that a ground for excluding criminal responsibility must be based on evidence, and expresses a common-sense expectation that some such evidence will ordinarily come from the defence.

11. This approach is, in the Prosecution's submission, consistent with article 67(1)(i). Article 67(1)(i) speaks specifically and exclusively to "the burden of proof," *i.e.*, the Prosecution's ultimate burden of establishing guilt. Consequently, an accused may never be required to affirmatively prove that an element of a crime or mode of liability did not exist. However, that is quite different from requiring some substantial evidence (from whatever source) before a Trial Chamber will make a finding that article 31(1)(a) or (d) applies to relieve an accused of criminal responsibility.

12. The Prosecution also notes that the approach advocated by the Defence is by no means required by international human rights law. The European Court of Human Rights has clearly held that even reverse onus provisions in national criminal law can, in appropriate circumstances, be compatible with the presumption of innocence articulated in article 6(2) of the European Convention on Human Rights.⁶ *A fortiori*, human rights law does not require the Prosecution to prove all facts and issues in a case beyond reasonable doubt.

13. Finally, the Defence's reliance on the non-adoption of various proposals during the negotiation of the Rome Statute cannot carry the day. The committee report cited by the Defence⁷ does not offer any reasons for why the language quoted by the Defence was not included. A footnote to that proposal stated that "[s]uch a provision might be better discussed in the context of article 66, 67 or 31",⁸ suggesting that its non-inclusion in article 69 may have reflected simply a determination that it would be more appropriately included elsewhere, rather than any disagreement

⁶ *Salabiaku v France* (1988) 13 EHRR 379, para. 28; *see also* Eur. Comm. H.R., *H. v. United Kingdom*, Appl. No. 15023/89, Admissibility Decision, 4 Apr. 1990, available at <http://hudoc.echr.coe.int/eng?i=001-657>.

⁷ Request, para. 11.

⁸ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. III, A/CONF.183/13 (Vol. III), p. 58 n.195, available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf.

with its substance. The Prosecution also recalls that even a clear rejection of an affirmative burden on the defence to prove “defences” would not imply an intent to impose a burden on the Prosecution to disprove the same “beyond reasonable doubt”. In any event, absent a clear expression of intent, one cannot positively infer anything from the fact that the States Parties did *not* agree to include particular language in the Statute.

*2. The Approach Proposed by the Prosecution Will Best Promote
Fair and Efficient Proceedings*

14. The approach proposed by the Prosecution not only harmonises article 31, 66 and 67 of the Statute, it will also be more conducive to the fair and efficient administration of justice than the Defence’s approach. Imagine a case in which an accused admitted all the charged conduct, but falsely asserted an article 31(1)(a) grounds for excluding criminal responsibility and then refused the Chamber or the Prosecution access to critical evidence uniquely within his or her control, *e.g.*, by refusing to submit to a mental health examination. Under the standard proposed by the Defence, the ground for exclusion would be established merely by default, because the Prosecution would be effectively unable (as a result of the obstructive behaviour of the accused) to disprove the existence of the ground for exclusion. Moreover, under the Defence’s approach, even the Chamber itself would be precluded from determining the truth and preventing a miscarriage of justice, because the “burden of proof” would lie solely on the Prosecution.

15. Even when an accused is not being disruptive, requiring the Prosecution to disprove facts beyond a reasonable doubt can create serious obstacles to justice. Indeed, one of the principal reasons many legal jurisdictions shy away from

requiring the Prosecution to disprove issues like insanity is because of the concern that it would be very easy for the accused to “fake” insanity and to raise reasonable doubt, placing an impossibly onerous burden of proof on the prosecution.⁹ Again, the potential for abuse is particularly high where an accused refuses to cooperate with Prosecution-instructed mental health experts, or to submit to mental health examinations at all.

16. The very commentators relied upon by the Defence¹⁰ make the same point. For example, the Defence relies on Professor William Schabas—highlighting his discussion of the potential impact of article 66(2) and 67(1)(i) on article 31 issues¹¹—but neglects to quote him in full. Immediately after the language cited by the Defence at paragraph 14 of the Request, Professor Schabas goes on to opine that if the Court were to apply article 66(2) and 67(1)(i) “so as to impose a burden on the prosecution to establish sanity,” that would be “a result that was *surely unintended by the drafters of the Statute* and one that could wreak havoc with the work of the Prosecutor.”¹²

17. Similarly, while the Defence seeks support from the words of Professor Göran Sluiter,¹³ that writer was, in fact, uttering a warning. The text highlighted by the

⁹ See, e.g., Supreme Court of Canada, *R. vs. Chaulk* [1990] 3 S.C.R. 1303 at 1305, 1344 (referring to the various practical difficulties in disproving insanity, including the “virtual impossibility” of obtaining evidence of mental illness in the absence of the cooperation of the accused, and the problem of obtaining information about the accused’s sanity at the time of offence, rather than at the time of the trial); ICTY, *Prosecutor v. Delalic*, IT-96-21-T, Trial Judgement, 16 November 1998, paras. 1157-1158, 1160 (holding that an accused raising a claim of diminished or lack of mental responsibility must bear the burden of proving that claim to a balance of probabilities since the relevant facts are “peculiarly within his knowledge and should be established by him”).

¹⁰ See Request, paras. 14-15.

¹¹ See Request, para. 14, highlighted portion appearing at the top of page 7.

¹² See Annex A to the Request, ICC-02/04-01/15-1423-AnxA, p. 11 (emphasis added).

¹³ Request, p. 7, n. 5. The source cited by the Defence—Case Matrix commentary—paraphrases the original language from Sluiter, which is as follows: “For example, strict interpretation of Articles 66(2) and 67(1)(i) might result in burden of proof on the Prosecutor in all circumstances, which may be inconsistent with the operation of criminal law on the basis of certain assumptions (like the assumption of sanity of the accused).”

Defence (emphasis in italics added by the Prosecution) is as follows: “Indeed, a joint, strict interpretation of Articles 66(2) and 67(1)(i) might in all circumstances lead to the burden of proof on the Prosecution *which may turn to be inconsistent with criminal law* under certain assumptions such as assuming the sanity of the accused person.”¹⁴ In other words, rather than supporting the interpretation proposed by the Defence, these legal commentators warn that such an approach could render article 31(1)(a) largely unworkable.

3. *The Approach Proposed by the Prosecution Is Similar to Approaches Taken By This Court and Others in Analogous Circumstances*

18. Finally, the Prosecution notes that the approach it proposes is not foreign to this Court or to international law. Indeed, this Court and others have taken similar approaches to similar issues.

19. First, case law from the International Criminal Tribunal for the former Yugoslavia (ICTY) addressed a defence of insanity very similar to the article 31(1)(a) ground urged by the Defence in this case. Like the Rome Statute, the ICTY jurisprudence enshrined the principles that an accused must be proven guilty beyond reasonable doubt by the prosecution and that such burden may not be shifted upon the defence.¹⁵ Nevertheless, ICTY chambers placed a burden upon the defence to prove insanity by a preponderance of the evidence.¹⁶ The approach

Göran Sluiter, “Human rights protection in the ICC pre-trial phase,” in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), p. 462.

¹⁴ Request, p. 7, n. 5 (emphasis added).

¹⁵ ICTY Statute, art. 21(3); ICTY Rules of Procedure and Evidence, rule 87(A); *Prosecutor v. Milosevic*, ICTY Case No. IT-98-29/1-A, Appeals Judgment, 12 Nov, 2009, para. 20-22, 231.

¹⁶ *Prosecutor v. Delalic et al.*, ICTY Case. No. IT-96-21-A, Appeals Judgment, para. 582; *see also Prosecutor v. Delalic*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 1157-1158, 1160 (holding that an accused raising a claim of diminished or lack of mental responsibility must bear the burden of proving that claim to a balance of probabilities since the relevant facts are “peculiarly within his knowledge and should be established by him”).

proposed by the Prosecution in this case is effectively more defence-friendly than the practice at the ICTY.

20. Second, a balance of probabilities test has been applied at this Court in the related context of mitigating circumstances at sentencing.¹⁷ Although the procedural stance of post-conviction mitigation determinations is of course different, the substantive issues sometimes overlap with article 31 considerations, particularly because both diminished mental capacity and duress are specifically mentioned as mitigating circumstances in rule 145 of the Rules of Procedure and Evidence.

21. Third, Trial Chambers have adopted a procedure similar to that proposed by the Prosecution in the context of determining an accused's fitness to stand trial. In determining that issue, a Trial Chamber has an independent obligation to "satisfy itself that the accused understands the nature of the charges," even in the absence of a request from one of the parties. As the *Gbagbo* Pre-Trial Chamber explained, no particular burden of proof applies on any party; rather the "the role of the parties is better seen as assisting the Chamber in the exercise of its obligations."¹⁸ Similarly, the Trial Chamber in the instant case, when rejecting the Defence's claim that Mr Ongwen was unfit to stand trial, made no mention of any burden of proof issue in reaching its determination that it was "satisfied that Mr Ongwen understands the nature of the charges."¹⁹

¹⁷ *Lubanga* Sentencing Decision, ICC-01/04-01/06-2901, para. 34; *Katanga* Sentencing Decision, ICC-01/0401/07-3484-tENG-Corr, para. 34; *Bemba* Sentencing Decision, ICC-01/05-01/08-3399, para. 19; *Al Mahdi* Sentencing Decision, ICC-01/12-01/15-171, para. 74; *Bemba et al.*, Sentencing Decision, ICC-01/05-01/13-2123-Corr, para. 24.

¹⁸ ICC-02/11-01/11-286-Red, para. 56 ("Even in the absence of a request from one of the parties, the Chamber must ensure, as spelled out in rule 135 of the Rules, that proceedings do not take place against an unfit subject. Therefore, the role of the parties is better seen as assisting the Chamber in the exercise of its obligation.") In a recent filing, the Defence noted its agreement with the *Gbagbo* Pre-Trial Chamber's rejection of a burden of proof approach in that context. See ICC-02/04-01/15-1405-Red2, para. 31.

¹⁹ ICC-02/04-01/15-T-26-ENG ET, 6 December 2016, p. 20, lns. 3-4.

22. While admittedly none of the three scenarios just discussed is exactly like the determination of the applicability of an article 31 ground, the Prosecution submits that the Trial Chamber can and should take them into consideration in formulating its approach under articles 31, 66, and 67 of the Statute.

Conclusion

23. For the reasons set forth above, the Chamber should reject the Defence's "burden of proof" approach to article 31 and instead find that:

- i) pursuant to article 31(2), the Chamber alone has the obligation to determine the applicability of articles 31(1)(a) and (d); and
- ii) while the Parties may assist the Chamber in reaching a determination under article 31(2), neither Party is required to prove or disprove any raised ground for excluding criminal responsibility.



Fatou Bensouda, Prosecutor

Dated this 7th day of February 2019
At The Hague, The Netherlands