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No.: **ICC-02/04-01/15**
Date: **26 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 with Public Annexes A, B, and C

Defence Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Article 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:

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I. INTRODUCTION

1. On 19 January 2019, the Single Judge of Trial Chamber IX issued the "Decision on Defence Request for Leave to Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute" ('Decision').[1] The Decision granted the Defence request for leave to reply on specific issues raised in the Prosecution and the Common Legal Representative of Victims ('CLRV') responses to the initial "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" ('Defence Request').[2] Pursuant to the Decision, the Defence is replying to the two issues identified from the Prosecution response and the one issue identified from the CLRV response.

II. SUBMISSIONS

A. A burden of proof is necessary for a determination of guilt or innocence when a defence is raised under Article 31(1)(a) and (d)

2. In its response, the Prosecution asserts that the only issue under Article 31 is one of applicability and not one of burden of proof. This claim is misguided and conflates two different procedural points in the process of considering substantive defences that constitute grounds for excluding criminal responsibility. There is an initial point at which the Court must determine whether the evidence raises a defence.[3] A second determination is then required at the end of the case when the Court must make a finding whether or not the defence is established. The Defence Request is focused on the second procedural point – the final decision on the defence, which is ultimately a decision on guilt or innocence.

3. It is true that the issue of an Article 31 defence must be raised; in other words, not all cases will involve defences of duress or mental illness. The Court must decide that the defence is applicable in the sense that the defence has been raised on the evidence in the case. Although Article 31(2) refers to the Court's determination of the "applicability" of grounds to exclude criminal responsibility, this provision was designed to adapt defences to the case at hand and

[1] ICC-02/04-01/15-1455.
[2] ICC-02/04-01/15-1423.
[3] *See, e.g.,* the discussion of a defence of undue influence or duress (une force ou une contrainte) in which the Cour d'Assises finds the defence raised and, ultimately, acquits the Accused in *Rennes, 29 sept. 2017, no. 38/2017*, Annex C.

to decide on the applicability of defences within the Statute, but not listed in Article 31(1).[4] Article 31(2) does not address the burden and standard of proof for defences. The final decision on a defence that excludes criminal responsibility is a decision whether the defence is established and it is this determination that requires a burden and standard of proof.

4. The Defence submits that there is an initial step in which the Court decides that there is some factual evidence that raises the defence. This is a low threshold, referred to as an evidential obligation or raising a reasonable doubt.[5] Once this obligation or burden is discharged through some evidence raising the defences, as is clearly occurring in this case, the first step is completed.

5. When the Court reaches the point of deliberations, there must be a second determination whether or not the elements of the defence are met. In paragraph 5, the Prosecution asserted that "no particular party is required to prove or disprove the elements of article 31 (1) (a) or (d)." However, the determination whether the defences are met necessarily entails a burden and standard of proof.[6] It is more than an evidential obligation. At this point, there is a need

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[4] The drafters appeared to be concerned with defences that were not listed with Article 31. This included defences elsewhere within the Statute and possible defences that were outside the Statute. They also appeared to be concerned that evidence of a defence could be used in mitigation. *See*, *The Legislative History of the International Criminal Court* (2nd Edition, 2016), in Annex A. The 1998 Prep-Com Draft contained an Article 34 that specified criteria for the recognition of grounds for excluding criminal responsibility not enumerated in the draft statute (p. 293, Annex A). The legal sources for identifying non-enumerated grounds appear to have been moved to Article 21 of the Rome Statute. The Zutphen draft of 1998 indicates (Article 25 [L], p. 295) in a footnote (footnote 260 of Annex A) that what would become Article 31(2) of the Rome Statute was considered connected in some way to the legal sources enumerated in the 1998 Prep-Com Draft Article 34(1). The bracketed text in the Zutphen draft Article 25 [L](2) does not appear in the "Text Transmitted by Drafting Committee to Committee of the Whole *[sic]*" (p. 291, Annex A) which may indicate that the relationship between Article 31(2) was not considered as part of the assessment of codified grounds for excluding responsibility. Additionally, the requirement in Article 31(2) to consider a ground for excluding criminal responsibly only shifted to the imperative (e.g. 'shall') for the court in the "Text Transmitted by Drafting Committee to Committee of the Whole *[sic]*" (p. 291, Annex A) – previously the assessment was discretionary (e.g. 'may'*). See also Rome Statute of the International Criminal Court: A Commentary* (3rd Edition 2016), Annex B. This section describes paragraph 2 of Article 31 of the Rome Statute as permitting adjustments to the Court's authority to adapt listed grounds to the case before it and to decide on the inclusion of non-listed defences that are found elsewhere in the Statute.

[5] See Professor Schabas' commentary, cited in the Defence Request, Annex A, p. 7, referring to a low threshold as raising a reasonable doubt. William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute, 2nd Ed. (Oxford University Press, 2016), p. 641.

[6] In ICC-02/04-01/15-460 the Single Judge previously ordered the Defence to notify grounds for excluding responsibility and point to evidence in support ("as a general rule, the Single Judge concurs with Trial Chamber II's conclusion that defence counsels have a 'responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a determination to rely on such ground has been made'", para. 10; "[…] the information currently available to the Defence is sufficient to allow it to determine whether it intends to raise the existence of grounds for excluding criminal responsibility. Indeed, the Single Judge notes that several of the potential grounds for excluding criminal responsibility, e.g. on the ground of mental disease or defect under Article 31(1)(a) of the Statute, could generally be advanced on the basis of information solely within the Defence's control.", para. 15; "the Single Judge grants the First and Second [Prosecution] Requests and directs the Defence to notify whether it intends to rely on any defence pursuant to Article 31 of the Statute and, if so, to provide the Chamber and the participants with the information required under, as appropriate, Rules 79(1) and 80(1) of the Rules, including names of the witnesses and any other evidence upon which it relies upon to establish the defence(s)", para. 17; and "The Single Judge observes that

to know which party bears the risk of non-persuasion. If the burden is on the Defence, the Court will need to decide if the Defence has proved all elements of the defence. If the burden is on the Prosecution, the Court will need to decide if the Prosecution has refuted one or more of the elements of the defence.

6. Although other courts, such as the ICTY or the ECtHR, may accept a burden of proof on the Defence for insanity, the ICC Statute does not permit this interpretation or application for either insanity or duress. In paragraph 12, the Prosecution refers to the ECtHR permitting a "reverse onus." It is notable that Article 67 uses similar language, but specifically states the opposite-that there shall *not* be a reverse burden of proof on the Defence. The language is unequivocal and clear.

7. A reason for excluding criminal responsibility, which is referred to as a defence in many jurisdictions, pursuant to Article 31 (1) (a) or (d) relates directly to guilt or innocence. If the Court determines that an accused committed what would otherwise be a crime under duress or as a result of a mental illness defence, the Accused is not guilty. This is clearly stated in the statute: "a person shall not be criminally responsible" if one of the defences is established.

8. Given that Article 31 defences are an integral part of a determination of guilt or innocence, the general provisions of Articles 66 and 67 apply. As laid out in the Defence's initial Request for a Ruling, Article 67 (1) (i) guarantees to an accused: "Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal." We submit that this language is clear. There should be no reversal of the burden of proof to require the Defence to prove Article 31 defences.

9. Accordingly, the Defence requests that the Court find, pursuant to Articles 66 and 67, that the burden of proof falls on the Prosecution to refute defences raised under Article 31 (1) (a) and (d) beyond a reasonable doubt.

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a proper notification should also set out, in general terms, an indication of which of the charged crimes would, in the Defence submission, be covered by the alleged ground for excluding criminal responsibility.", para. 17) and noted that this enabled the Prosecution to respond ("Such advance notification allows the Prosecution to adequately respond to the Defence and prepare its case for trial […]", para. 9; "Noting that part of the purpose of Rule 79 and 80 notifications is to enable the Prosecution to respond to any affirmative defences […]", para. 18, emphasis added).

B. Mitigating circumstances and fitness to stand trial are not appropriate analogies for Article 31 defences

10. In paragraphs 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. Neither situation raises an issue that goes to the basic guilt or innocence of the accused. As such, any issues on burdens of proof or lack thereof for mitigating circumstances and fitness issues are qualitatively different from the burden of proof issues with defences.

11. Mitigating circumstances may include mental illness or duress, but arise in a fundamentally different context from defences to the charged crimes. Unlike Article 31 defences, which exclude criminal responsibility, mitigating circumstances constitute reasons to lessen the severity of a sentence. Article 31 is clear that, on the basis of the grounds listed, "a person shall not be criminally responsible." The defences serve the function of negating the guilt of an accused for charged offenses. Crimes and defences have elements that must be found to exist. Only then can guilt or innocence be established. There is no similar finding required for mitigating circumstances. Instead, mitigating circumstances, like aggravating circumstances, are reasons for imposing a specific sentence. As Rule 145 of the Rules of Procedure and Evidence provides, in making a sentencing determination, the Court shall "[b]alance all the relevant factors." The Court does not have to make a finding beyond a reasonable doubt that a particular sentence is appropriate.

12. Article 31 defences do not involve a balancing test. The Court must make a finding that each element exists or does not exist in order to determine an accused's guilt or innocence of a crime. The guilt/innocence determination is the fundamental finding in a criminal trial that entails a greater protection of a specific burden of proof on the Prosecution and a finding beyond a reasonable doubt.

13. Similarly, a finding on fitness to stand trial does not relate to guilt or innocence. If an accused is not fit to stand trial, the trial is postponed, but does not represent a determination of guilt or innocence. Rule 135 is a discretionary rule, providing that the Court "may" order an evaluation of the Accused. In contrast, findings of elements of crimes and defences are not discretionary. They are mandatory for a determination of guilt or innocence. Moreover, the function of a determination of fitness to stand trial is qualitatively different from a finding on an Article 31 defence. Fitness to stand trial is a preliminary determination that is a precursor to conducting the trial on the basis of fairness in the proceedings. Article 31 defences, on the

other hand, are an integral part of the determination of the criminal responsibility of the Accused.

14. As a result, the absence of specific burdens of proof for mitigating circumstances or fitness to stand trial do not shed light on the issue before the Court on the burden and standard of proof for Article 31 defences that relate to guilt or innocence of the Accused.

C. The Defence Request is timely

15. In paragraph 8 of its response, the CLRV asserts that the Defence Request is “untimely and should be rejected in limine.” As the CLRV points out, however, there is no specific time limit in the ICC’s legal texts with regard to Article 31 defences.[7] They further highlight the applicability of Article 64(2) on ensuring “that a trial is fair and expeditious” when the timing parameters are absent.[8]

16. The Defence Request is timely in asking for a determination on the important burden and standard of proof issues prior to the close of evidence in order to facilitate a fair and expeditious process. There is a crucial need for a finding on the burden and standard before the case ends. The Accused has a right to know the standard by which he will be judged. It impacts decisions on testimony to be adduced from witnesses. Moreover, both parties and the victims need to know the burden and standard of proof for purposes of final submissions.

17. The Defence further submits that the request for a ruling on the burden and standard of proof is dissimilar to other types of motions. In paragraph 9 of its response, the CLRV refers to an untimely request for a stay by analogy. In this instance, the Defence is not asking for a stay nor any other action that could delay the progress of the trial. Instead, a decision on the Defence Request is likely to expedite the proceedings at trial and post-trial.

18. Consequently, the Defence submits that it is in the interests of a fair and expeditious trial for the Court to issue a ruling now on the burden and standard of proof for grounds raised under Article 31(1)(a) and (d).

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[7] ICC-02/04-01/15-1441, para. 9.
[8] *Ibid*.

III. RELIEF

19. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:

> Reject the arguments of the Prosecution and the CLRV and issue a ruling that the Prosecution bears the burden of proof beyond a reasonable doubt to refute defences raised under Article 31 (1) (a) and (d).

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 26th day of February, 2019

At The Hague, The Netherlands