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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

Submission of *amicus curiae* observations by the National Institute of Military Justice (NIMJ)

Source: NIMJ – National Institute of Military Justice

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
Mr Krispus Ayena Odongo
Chief Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of the Victims
Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Ms Paolina Massidda

Others
Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

I. INTRODUCTION

a. Military Law, and the Expertise of the National Institute of Military Justice in Particular, is Pertinent Persuasive Authority at this Stage of the *Ongwen* Case.

1. The National Institute of Military Justice (NIMJ) is a 30-year-old civil society organization in the United States dedicated to the fair administration of justice in the U.S. armed forces and improved public understanding of military justice. NIMJ has no affiliation with the U.S. government or any other government. NIMJ's leadership includes former military attorneys, private practitioners, and legal scholars. You can find additional information about NIMJ at https://www.nimj.org/.

2. Dominic Ongwen was convicted of crimes that occurred in the context of armed conflict. Moreover, he was a military commander. Accordingly, military law could assist the Appeals Chamber and serve as persuasive authority. This is so for two reasons. First, the military law systems for which NIMJ has expertise (especially the United States) have extensive caselaw and expert works regarding the first and third issues that the Appeals Chamber identified. Second, while these military law authorities are not binding authority on the Appeals Chamber, the Chamber may find some of these authorities and doctrines closely analogous due to the shared circumstances of armed conflict in which both the NIMJ expertise and the *Ongwen* case reside. Finally, the subjects of NIMJ expertise were developed primarily as part of efforts to improve the quality of military criminal procedure, rather than in response to any sort of unique U.S. political or policy considerations.

b. Overview of Military Law

3. In the Uniform Code of Military Justice (UCMJ), the U.S. Congress established a self-contained military justice (court-martial) system defining crimes and procedures for the U.S. military.[1] However, Congress also delegated rulemaking power to the President to further

[1] U. S. CONST. art. I, § 8, cl. 14; 10 U.S.C. § 801-946a.

implement and supplement the UCMJ. Accordingly, the President publishes the RULES FOR COURTS-MARTIAL (R.C.M.) in the MANUAL FOR COURTS-MARTIAL (M.C.M.) by Executive Order.[2]

4. We limit our observations to the Grounds for Excluding Criminal Responsibility (defenses) and Cumulative Convictions (multiplicity) as they apply in a U.S. court-martial.

5. For the Appeals Chamber's convenience, we have attached an Appendix of the relevant rules and regulations.

II. GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

6. We discuss lack of mental responsibility (LMR), partial lack of mental responsibility, duress, and necessity.[3]

a. The Affirmative Defense of Lack of Mental Responsibility can be a Complete Defense to Some or All Court-martial Charges.[4]

7. The military rule mirrors federal (civilian) courts.[5] The lack of mental responsibility defense has been traced back to Babylonian and Hittite times and has been through many iterations and developments. Indeed, the defense has developed significantly since the adoption of the UCMJ in 1950 and in conjunction with civilian court developments.[6]

8. U.S. practice differs in two respects from the Rome Statute Article 31(1)(a). First, the UCMJ places the burden on the defense to prove lack of mental responsibility by "clear and convincing evidence," and the "or capacity to control his or her conduct to conform to the requirements of law" element is rejected.[7] The International Criminal Tribunal for the former

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[2] UCMJ art. 36, 10 U.S.C. § 836. The M.C.M. is generally similar in content and construct to the Rules of Procedure and Evidence applicable to International Criminal Court cases.
[3] Necessity is not a generally accepted defense at court-martial. *United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993); *United States v. Olinger*, 50 M.J. 805 (C.A.A.F. 1999).
[4] UCMJ art. 50a, 10 U.S.C. 850a. *See United States v. Mott*, 72 M.J. 319, 323 (C.A.A.F. 2013).
[5] *See* 18 U.S.C. § 17-Insanity defense. *See also*, CPT Charles E. Trent, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*. 99 MIL. L. REV. 1 (1983).
[6] CPT Charles E. Trent, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*. 99 MIL. L. REV. 1 (1983); Fank D. Winston, *Criminal Responsibility and Mental Capacity Under the Uniform Code of Military Justice.* 2 SANT CLARA L. REV. 32 (1962). *See* ¶120.b. Chap. XXIV, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951).
[7] *See* Trial decision at pt. 231, 72/1077 at 10-11.

Yugoslavia has adopted placing the burden on the defense to prove lack of mental responsibility "by a preponderance" of the evidence. For the U.S., such a ruling from another court would not be controlling or dispositive, but it "may be persuasive or instructive."[8]

9. Instead, it appears that the Statute contemplates a practice like that at court-martial. The defense bears the burden of presenting "some evidence, without regard to its source or credibility, [which] has been admitted upon which members [(the jury}] might rely on if they choose."[9] Once some evidence is admitted, the military judge must instruct the jury on the defense.[10]

10. Requiring the accused to prove the lack of mental responsibility does not offend the Constitution's Fifth Amendment Due Process clause.[11] Instead, the standard "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[12] And the prosecution retains the burden to prove guilt beyond a reasonable doubt.

11. The U.S. Court of Appeals for the Armed Forces (CAAF) considers that the defense of lack of mental responsibility enjoys a "special status," which "in part reflects the recognition that combat and other operational conditions may generate or aggravate certain mental health conditions, such as post-traumatic stress disorder."[13] "Historically [the court] has given preferential treatment [to the defense] even though the matter was not litigated at trial."[14]

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[8] *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. *See e.g.*, Kern v. Kern-Kosala, 35 Mich. App. 212 (Mich. Ct. App. 2017).
[9] *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007).
[10] *Id*. at 87; R.C.M. 920(e)(3), (5)(D).
[11] U.S. CONST. amend. V, cl. 4, *Medina v. California*, 505 U.S. 437 (1992); *United States v. Neal*, 68 M.J. 289, 298 (C.A.A.F. 2010).
[12] *Addington v. Texas*, 441 US 418, 423 (1979) (Harlan, J., concurring).
[13] *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007).
[14] *United States v. Navarette*, 79 M.J. 123, 129 (C.A.A.F. Aug. 10, 2021) (Stucky, C.J., dissenting).

12. An accused is presumed mentally competent at the time of the offense and trial.[15] If, however, the accused establishes, by clear and convincing evidence, that, at the time of the offense, he suffered from "a severe mental disease or defect, [and] was unable to appreciate the nature and quality or the wrongfulness of the acts," he may be found not guilty for lack of mental responsibility.[16] The evidence may come from a combination of lay and expert testimony. "Military law has never recognized an absolute rule that an accused must suffer from a psychosis in order to merit acquittal by reason of insanity."[17] "There is no premium placed upon lay opinion as opposed to expert opinion, nor on 'objective' as opposed to 'subjective' evidence. Thus, the court below applied an improper test by requiring 'clear and convincing objective evidence, not merely subjective medical opinion' of a lack of mental capacity."[18]

13. The accused's mental capacity is relevant at all stages of the proceedings, including, but not limited to, the arraignment, court-martial, and appeal. Accordingly, the M.C.M. has procedures and requirements for evaluating an accused's mental competence and any evidence to be presented in a trial.[19]

14. Assuming sufficient evidence is presented, the military judge must instruct the "jury" on the defense.[20] The jury, or the judge in a military judge-alone trial, can reach one of three findings, (1) guilty, (2) not guilty, or (3) not guilty only by reason of lack of mental responsibility.[21] Once the defense is presented, the prosecution has the burden to prove beyond reasonable doubt that the defense does not exist.[22] If the accused is found not guilty only

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[15] *United States v. Shaw*, 64 M.J. 460, 463 (C.A.A.F. 2007); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).
[16] UCMJ art. 50a, 10 U.S.C. § 850a.
[17] *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988).
[18] *United States v. Dubose*, 47 MJ 386, 388-89 (C.A.A.F. 1998); *See, e.g.*, United States v. Combs, 39 M.J. 288 (C.M.A. 1994).
[19] *See* Rules 706, 909, 912, 1105, 1203(e)(5), RULES FOR COURTS-MARTIAL (R.C.M.), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019).
[20] Part 6, MILITARY JUDGES' BENCHBOOK-Mental Responsibility. (Appendix at x.)
[21] *Id*. at 50a(c), § 850a(c).
[22] R.C.M. 916(b)(1); *United States v. Berri*, 33 M.J. 337, 343 (C.M.A. 1991).

because of lack of mental responsibility, then the procedures for commitment to a "suitable facility" shall be followed.[23]

b. The Defense of Partial Lack of Mental Responsibility is Available to an Accused.[24]

15. U.S. military law generally classifies offenses as general or specific intent crimes. Article 30 (Mental element) of the Rome Statute requires a specific intent or knowledge regarding the crime, "Unless otherwise provided." Thus, offenses under the Statute would be considered under the specific intent rubric. Like Article 32 of the Rome Statute, mistake of fact can be incorporated into the partial lack of mental responsibility.

16. U.S. military law allows the defense to apply to any offense requiring proof of specific intent, knowledge, willfulness, or premeditation *mens rea*.[25] The defense has no burden to prove the existence of this defense and, so long as "some evidence" of the defense has been admitted; the military judge must instruct the jury about the defense.[26] Availability of the defense is not limited to those with a mental health diagnosis.

c. The Special Defense of Duress is Available to an Accused.

17. It is a special defense to any offense *except* "killing an innocent person."[27] When there is "some evidence" presented of duress, the military judge "is required to instruct" the "jury" on the defense. The CAAF in *Vazquez*[28] surveys the history of the defense and its common law beginnings. The accused must have had a (1) "reasonable apprehension" that (2) "the accused or another innocent person" would (3) "immediately" suffer death or serious bodily injury if the accused "did not commit the act." A "reasonable apprehension" does not exist "if

[23] UCMJ art. 76b, 10 U.S.C. § 876b.
[24] R.C.M. 916(k)(2), M.C.M.
[25] *United States v. Kreutzer*, 61 MJ 293 (C.A.A.F. 2005); *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988).*See, e.g.*, *United States v. Berri*, 33 M.J. 337 (C.M.A. 1991).
[26] *United States v. Falcon*, 65 M.J. 386 (C.A.A.F. 2008).
[27] R.C.M. 916(a), ((h), M.C.M.; *United States v. Roberson*, 65 M.J. 43 (C.A.A.F. 2007); *United States v. Rankins*, 34 M.J. 326 (C.M.A. 1992) (duress can present a "choice of evils"), *see* *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (discussing the duress and necessity defenses in relation to disobedience of orders).
[28] *United States v. Vasquez*, 48 M.J. 426 (C.A.A.F. 1998).

the accused has any reasonable opportunity to avoid committing the act without subjecting [himself], or another innocent person to the harm threatened[.]." *Id*. An "obviously safe avenue of escape before committing the prohibited act" nullifies the defense of duress.[29]

18. When there is "some evidence" of the defense, "the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist."[30] The defense's immediacy element encourages individuals to report threats rather than breaking the law themselves.[31] It is occasionally argued that the defenses of necessity and duress are the same "choice of evils" defense. However, the defense of necessity is not a listed court-martial defense, and the CAAF has so far avoided deciding if the necessity defense is available at court-martial.[32]

d. The Accused's Mental State is also Relevant during Sentencing.

19. Even if not sufficient to be a defense, the rules allow the defense to present evidence of the person's mental state at the time of the offense as a matter of extenuation.[33]

III. CUMULATIVE CONVICTIONS (MULTIPLICITY)

20. The concurrence of crimes or cumulative convictions doctrine is called multiplicity at courts-martial. Under the multiplicity rubric, there are two distinct concepts: multiplicity for findings, unreasonable multiplication of charges for findings, and separately at sentencing. The doctrine derives from the Double Jeopardy Clause of the U.S. Constitution, the UCMJ, and several R.C.M.[34] The concept also addresses concerns with prosecutorial overreach and fear of exaggerated sentences—both issues of fairness.[35] Charges ruled multiplicious can be dismissed

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[29] *United States v. Rockwood*, 52 M.J. 98, 112 (C.A.A.F. 1999).
[30] RCM 916(b); *United States v. Vasquez*, 48 M.J. 426, 430 (C.A.A.F. 1998).
[31] *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976).
[32] *United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002).
[33] Rule 1001(d)(1)(A), M.C.M. Counsel and witnesses are cautioned at sentencing that the extenuating circumstances should not be presented in such a way to impeach the verdict of guilt. *Cf. United States v. Johnson*, 62 M.J. 31 (C.A.A.F. 2005); *United States v. Sowell*, 62 M.J. 150 (C.A.A.F. 2005).
[34] U.S. CONST. amend. V, cl. 2; *See* UCMJ art. 44(a), 10 U.S.C. § 844(a) (2018); R.C.M.907(b)(2(C); R.C.M. 307(c)(4).
[35] *United States v. Elespuru*, 73 M.J. 326, 328 n. 1 (C.A.A.F. 2014).

or consolidated at the military judge's discretion. Dismissal is not always automatic because of the contingencies of proof doctrine. For example, there are cases where the known facts and admissible evidence suggest that the same conduct may have violated two or more statutes. A prosecutor can, in this situation, properly charge a violation of each of several statutes separately. When challenged, the prosecutor may then successfully argue that the multiple charges are alleged for "contingencies of proof."

> It is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not. In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law. In cases where offenses are pleaded for exigencies of proof, depending on what the plea inquiry reveals or of which offense the accused is ultimately found guilty, the military judge may properly accept the plea and dismiss the remaining offense.[36]

21. Suppose the accused is convicted of multiple charges in a contested case. In that case, the prosecution can elect which charge(s) should be dismissed or consolidated into one for sentencing, or the military judge may dismiss or consolidate the charges for sentencing purposes. In practice, it is the most serious charge according to the potential sentence that is retained.[37] The standard for appellate review is whether the military judge abused her discretion. The appellate court may also allow the government to choose which multiplicious charge is dismissed.[38] Note that failure to timely challenge multiplicious charging is a waiver of the issue unless the appellate court finds there has been "plain error."[39]

a. Multiplicity

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[36] United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014) citing United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010).
[37] United States v. Hardy, 77 M.J. 438, 440 (C.A.A.F. 2018); United States v. Cardenas, 80 M.J. 420, 422 (C.A.A.F. 2021).
[38] *See* United States v. Cardenas, 80 M.J. 420, 422 (C.A.A.F. 2020).
[39] *See, e.g.* United States v. Coleman, 79 M.J. 100, 102 (C.A.A.F. 2019).

22. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides, in part: "nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb." Courts have interpreted this provision to provide an accused with three protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for convictions that amount to a single criminal offense.[40] "The Fifth Amendment's Double Jeopardy Clause precludes a court, contrary to the intent of Congress, from imposing multiple convictions and punishments under different statutes for the same act or course of conduct." The U. S. Supreme Court says,

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.[41]

23. The "*Blockburger* elements test" then is the norm at courts-martial and "focuses on a strict facial comparison of the elements of the charged offenses."[42]

24. The first step is to determine is if the charges are based on separate acts. If so, the charges are not multiplicious because separate acts may be charged and punished separately. The second step is to look at legislative intent within Congress to see if legislative intent is expressed overtly to consider the charges as multiplicious. If there is no overt expression of congressional intent, the third and final step is to see if it is possible to infer Congress's intent

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40 James C. Cissel, *Federal Criminal Trials* § 1001 (1995 supp.) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Ball*, 163 U.S. 662 (1896); *Ex Parte Lange*, 163 (1873)).

41 *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020); *United States v. Coleman*, 79 M.J. 100, 102 (C.A.A.F. 2019).

42 *United States v. Coleman*, 79 M.J. 100, 103 (C.A.A.F. 2019).

based on the elements of the violated statutes and their relationship to each other. Specifically, suppose each statute requires proof of an element not contained in the other. In that case, it may be inferred that Congress intended for an accused to be charged and punished separately under each statute.[43]

25. The prosecution must prove both a wrongful act—*actus reus* and the appropriate criminal intent—*mens rea* to convict a criminal defendant. Article 7(1)(k) of the Rome Statute does not define with particularity an *actus reus*. Instead, it criminalizes any act "similar to any other act referred to in article 7, paragraph 1, of the Statute" that causes "great suffering or serious injury to body or to mental or physical health, by means of an inhuman act." By necessity, the identity of that act in the pleadings becomes a part of the second element of an Article 7(1)(k) offense and, therefore, part of the multiplicity analysis.

b. Unreasonable Multiplication of Charges for Findings or Sentence

26. The President has prescribed that "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges."[44] And the double jeopardy principle extends to multiple punishments for the same offense at a single criminal trial.[45]

27. "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion."[46] For example, (1) the "long-standing preference for trying all known offenses at a single trial," contrary to the civilian practice of separating offenses not part of the same transaction; and (2) "the existence of broadly worded offenses unknown in civilian society," such as Articles 133 and 134.[47] Prosecutors have been cautioned against

[43] *Id.*
[44] R.C.M. 307(c)(4).
[45] *Ohio v. Johnson*, 467 U.S. 493 (1984); *Ball v. United States*, 470 U.S. 856 (1985).
[46] *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).
[47] *Id.* UCMJ art. 133, 10 U.S.C. § 933 (2018), criminalizes "conduct unbecoming an officer and a gentleman." UCMJ art.134, 10 U.S.C. § 934 (2018) (the General Article), criminalizes "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital [under state or federal laws]."

overreaching, and military judges have been encouraged to "exercise sound judgment to ensure that imaginative prosecutors do not needlessly "pile on" charges against a military accused."[48]

28. The CAAF has approved a "framework" of non-exclusive factors to help decide if charges were *unreasonably* multiplied at trial:

> (1) Did the accused object at trial on that ground? [49]
>
> (2) "Is each charge and specification aimed at distinctly separate criminal acts?"
>
> (3) "Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?"
>
> (4) "Does the number of charges and specifications *unfairly* (read unreasonably) increase the appellant's punitive exposure?"[50] and
>
> (5) "Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?"[51]

29. We should acknowledge here the continuing course of conduct analysis, sometimes called "the unit of prosecution" principle, may influence a multiplicity decision. For example, how might an assault be charged, or a conspiracy, or some other offense for which a series of acts, each independently a crime, are required to complete the crime. The Army Court of Criminal Appeals summarized the concern in *United States v. Clarke*.[52] "Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts." In this situation the military judge will defer ruling on a multiplicity motion until all the evidence has been heard and she is preparing her jury instructions. "However, once the matter was clear from the evidence of record, it was

[48] United States v. Foster, 40 M.J. 140, 144 n.4 (C.M.A. 1994).
[49] This factor merely establishes the standard of appellate court review. Failure to object at trial places the burden on the appellant to not only establish error but also that the error was clear or obvious and that the error resulted in material prejudice to his substantial rights. *See* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018).
[50] The court reads the term "unfairly" to mean "unreasonably" in the fourth factor. *Quiroz*. 55 M.J. at 339.
[51] *Id.* at 337, 339.
[52] United States v. Clarke, 74 M.J. 627 (A. Ct. Crim. App. 2015).

incumbent on the trial judge—and subsequently the Court of Military Review—either to consolidate the specifications or to dismiss a specification as multiplicious."[53]

30. In short, even if offenses are not multiplicious as a matter of law for double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.[54]

31. A review of Rule 145, ICC RULES OF PROCEDURE AND EVIDENCE (2013), suggests that a multiplicity for sentencing (cumulative convictions) analysis is contemplated by its language. It would not be stretching the language to consider multiplicious convictions in two ways. (1) based on the same facts and course of conduct is the "culpability of the convicted person" overstated by cumulative convictions; or, (2) is not a multiplicious for sentence (cumulative convictions) analysis appropriate to "the circumstances of manner, time, and location" when adjudging a sentence?

32. Before entering pleas, a motion to dismiss or merge multiplicious charges must be made unless the military judge allows a late challenge for a good cause.[55] The military judge has the discretion to determine the appropriate remedy for an unreasonable multiplication of charges. If the military finds unreasonable multiplication, the proper remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification."[56] While finding that charges were not unreasonably multiplied for findings, the military judge may still determine that the offenses are unreasonably multiplied for sentencing due to the exigencies of proof. In that case,

[53] *United States v. Morris*, 18 M.J. 450, 451 (C.M.A. 1984).
[54] *Quiroz*. 55 M.J. at 338, 339.
[55] R.C.M. 307(c)(4), 906(b)(12), 907(b)(12).
[56] R.C.M. 906(b)(12)(A).

the maximum punishment authorized for those offenses would be the maximum punishment for the offense carrying the greatest maximum punishment.[57]

33. We note that neither Articles 76 nor 78 appear to address cumulative convictions as a factor in sentencing specifically.

Franklin D. Rosenblatt, Director of Litigation

on behalf of

NIMJ – National Institute of Military Justice

Dated this 21st day of December 2021

At Jackson, Mississippi, USA

[57] R.C.M. 906(b)(12)(B).

APPENDIX TO OBSERVATIONS OF NIMJ

Comparison between UCMJ Art. 50b and Rome Statute Articles 30 and 31.

U.S. Military Judge's Benchbook: excerpt of instructions on the affirmative defense of lack of mental responsibility.

Rule 909, RULES FOR COURTS-MARTIAL (R.C.M.), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019).

COMPARISON OF UCMJ TO ROME STATUTE ON AFFIRMATIVE DEFENSES

UCMJ, Fed. Dist. Ct., Mil. Comm.	Rome Statute
Art. 50a	Art. 31
(LMR) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts.	The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, *or capacity to control his or her conduct to conform to the requirements of law*.
(Coercion or duress.) It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. **Note**. Current caselaw requires it be a third-party causing the duress and the circumstances must be beyond the accused's control.	The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.
	Art. 30
The UCMJ has general and specific intent crimes. A general intent crime does not require a specific state of mind. A specific intent offense may be defended based on lack of knowledge, lack of intent, partial lack of mental responsibility, mistake of fact, duress.	Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court *only if* the material elements are committed with intent and knowledge. For the purposes of this article, "knowledge" means awareness that a circumstance exists, or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

MILITARY JUDGES BENCHBOOK
RELEVANT EXCERPT of
JURY INSTRUCTIONS

6-3. PRELIMINARY INSTRUCTIONS ON MENTAL RESPONSIBILITY

MJ: There are indications from the (evidence presented so far) (state any other basis) that you may be required to decide the issue of the accused's mental responsibility at the time of the offense(s) charged in (state the relevant charges and specifications). I will now instruct you on certain legal principles and procedures which will assist you in deciding this issue.

6-4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

MJ: The evidence in this case raises the issue of whether the accused lacked criminal responsibility for the offense(s) of (state the alleged offense(s)) as a result of a severe mental disease or defect. (In this regard, the accused has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you first find that the government has proved beyond a reasonable doubt each element of the offense(s) of (state the alleged offense(s)). In other words, you will vote first on whether the government has proved beyond a reasonable doubt each element of the offense(s).

I will instruct you later on the required number of votes for a finding of Guilty. If your vote results in a finding of Not Guilty, you will return a finding of Not Guilty and you do not consider the issue of mental responsibility. On the other hand, if your vote results in a finding of Guilty (of the offense or a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) of (state the alleged offense(s)). This will require a second vote. I will instruct you later on the number of votes required for a finding of Not Guilty Only by Reason of Lack of Mental Responsibility. For this second vote, each member must vote, regardless of your vote on the elements of the offense(s).

MJ: Regarding this second vote, you are advised of the following. The accused is presumed to be mentally responsible. This presumption is overcome only if you determine, by clear and convincing evidence, that the accused was not mentally responsible. Note that, while the government has the burden of proving the elements of the offense(s) beyond a reasonable doubt, the defense has the burden of proving by clear and convincing evidence that the accused was not mentally responsible. As the finders of fact in this case, you must first decide whether, at the time of the offense(s) of (state the alleged offense(s)), the accused actually suffered from a severe mental disease or defect. The term "severe mental disease or defect" can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders. If the accused at the time of the offense(s) of (state the alleged offense(s)) was not suffering from a severe mental disease or defect, (he) (she) has no defense of lack of mental responsibility.

If you determine that, at the time of the offense(s) of (state the alleged offense(s)), the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.

If the accused was able to appreciate the nature and quality and the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible regardless of whether the accused was then suffering from a severe mental disease or defect.

On the other hand, if the accused had a delusion of such a nature that (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) acts, the accused cannot be held criminally responsible for (his) (her) acts, provided such a delusion resulted from a severe mental disease or defect.

To summarize, you must first determine whether the accused, at the time of (this) (these) offense(s), suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that the accused did suffer from a severe mental disease or defect, then you must further consider whether (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct. If you are convinced by clear and convincing evidence that the accused suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct, then you must find the accused Not Guilty Only by Reason of Lack of Mental Responsibility. Again, the accused has the burden of establishing a lack of mental responsibility by clear and convincing evidence. By "clear and convincing evidence," I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirement of clear and convincing evidence does not call for conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence. The facts to which the witnesses have testified must be distinctly remembered and the witnesses themselves found to be credible. In deliberating on this issue, you should consider all the evidence, including that from experts (and laypersons), as well as your common sense, your knowledge of human nature, and the general experience that most people are mentally responsible.

6-5. PARTIAL MENTAL RESPONSIBILITY

MJ: An issue of partial mental responsibility has been raised by the evidence with respect to (state the applicable offense(s)).

In determining this issue you must consider all relevant facts and circumstances and the evidence presented on the issue of lack of mental responsibility (except __________). (You may also consider __________.)

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to __________) (that the accused knew that __________) (that the accused's acts were willful (as opposed to only negligent)) (__________).

An accused may be sane and yet, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (__________), may be mentally incapable of (entertaining (the premeditated design to kill) (the specific intent to __________) (having the knowledge that __________) (acting willfully) (__________).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_________) of such consequence and degree as to deprive (him/her) of the ability to (act willfully) (entertain (the premeditated design to kill) (the specific intent to __________)) (know that __________) (__________).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. If you are not satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s), was mentally capable of ((entertaining (the premeditated design to kill) (the specific intent to __________)) (knowing that __________) (acting willfully in __________) (__________), you must find the accused Not Guilty of (that) (those) offense(s).

It is essential that you remember that the defense of lack of mental responsibility and the defense of partial mental responsibility are separate and distinct. For the defense of lack of mental responsibility, the burden is on the defense to prove, by clear and convincing evidence, the accused's lack of mental responsibility. On the other hand, any evidence of partial mental responsibility may be considered by you in deciding whether the government has proven beyond a reasonable doubt that the accused had the required (state of mind) (specific intent) to commit the offense. The same evidence, however, may be considered with respect to both types of defenses.

MJ: Remember that (<u>state the lesser included offense raised</u>) is a lesser included offense of the offense of (<u>state the alleged offense</u>). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to __________) (knew that __________) (willfully __________) (__________). In this regard, the instructions I just gave you with respect to the accused's partial mental responsibility and ability to (premeditate) (know) (form the specific intent) (act willfully) (__________) do not apply to the lesser included offense of (<u>state the lesser included offense raised</u>).

6-6. EVALUATION OF TESTIMONY

MJ: In considering the issue(s) of mental responsibility, (and partial mental responsibility,) you may consider evidence of the accused's mental disease or defect (and mental condition) before and after the alleged offense(s) of (state the alleged offense(s)), as well as the evidence as to the accused's mental disease or defect (and mental condition) on that date. The evidence as to the accused's mental disease or defect (and mental condition) before and after that date was admitted for the purpose of assisting you in determining the accused's mental disease or defect (and mental condition) on the date of the alleged offense(s).

You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (__________) who testified as expert witnesses. Experts in a particular field are permitted to give their opinion. In this connection, you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect. What psychiatrists (and psychologists) may or may not consider a severe mental disease or defect for clinical purposes, where their concern is treatment, may or may not be the same as a severe mental disease or defect for the purpose of determining criminal responsibility. Whether the accused had a severe mental disease or defect (or mental condition) must be determined by you.

(There was also testimony of lay witnesses, with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the each witness's circumstances, opportunity to observe the accused and to know the facts to which the witness has testified, and willingness and capacity to expound freely as to his/her observations and knowledge. You may also consider the basis for the witness's opinion and conclusions, and the time of their observations in relation to the time of the offense charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness's observation of the accused and the nature and length of time of the witness's contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental disease or defect (or mental condition) and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.

Rule 909. Capacity of the accused to stand trial by court-martial

(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

Discussion

See also R.C.M. 916(k).

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with subsection (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall commit the accused to the custody of the Attorney General.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in subsection 4241(d) of title 18, United States Code. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, action shall be taken in accordance with section 4246 of title 18, United States Code.