

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **28 January 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 and B

**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**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda
Caroline Walter
Orchlon Narantsetseg

States' Representatives

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

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') files this motion to supplement oral submissions made during the Defence's opening statement.¹
2. It is submitted that to exclude criminal responsibility under either Article 31(1)(a) or (d) of the Rome Statute ('Statute'), the Prosecution must disprove each element of the defence beyond a reasonable doubt. 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, which has already occurred in this case. To impose a burden of proving the defence on the Accused would violate the terms of the Statute pursuant to Articles 66 and 67(1)(i). The legal burden of proof remains at all times on the Prosecutor, who must disprove beyond a reasonable doubt the elements of the mental condition or the duress defence. If the Prosecutor cannot do this, the defences under Articles 31(1)(a) and (d) succeed and the Accused must be acquitted.
3. The burden and standard of proof outlined at paragraph 2 is referred to below as the 'BRD Standard'.
4. The Defence respectfully requests that the Chamber issue an immediate ruling confirming that the BRD Standard applies in these proceedings and that Prosecution bears the burden of disproving beyond a reasonable doubt each element of the defences raised under Articles 31(1)(a) and (d).
5. An immediate ruling is required in order to safeguard the rights of the Accused. The Accused is entitled to know the standard by which he is to be judged, as it will directly impact upon the nature of the arguments raised and the evidence adduced during the course of the trial. In particular, an immediate ruling is warranted to prevent a violation of Articles 67(1)(b), (e), (g) and (i).

¹ ICC-02/04-01/15-T-179-CONF-ENG, p. 82, line 5 to p. 83, line 20.

II. APPLICABLE LAW AND SUBMISSIONS

A. The Founding Documents of the ICC Require the Application of the BRD Standard

6. The legal and evidential burden of proof for these defences at the ICC cannot deviate from the explicit wording of the Statute, which contains provisions that uniquely limit the evidential obligations of the Accused.
7. The Statute prohibits imposing the burden of proof on the Accused to prove the defences of mental condition or duress. The legal burden of proof remains with the Prosecutor at all times.
8. Article 66 of the Statute is clear that the only relevant question for the Court to consider in its decision on conviction is whether it is convinced that the Accused is guilty beyond reasonable doubt:
 - (1) Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
 - (2) The onus is on the Prosecutor to prove the guilt of the accused.
 - (3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.
9. The effect of Article 67(1)(i) of the Statute is such that the Accused is protected from any reversal of the burden of proof or any onus of rebuttal:
 - (1) In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - (2) [...]
 - (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
10. The Statute does not mandate the application of an alternative burden of proof where the Accused raises a defence under Article 31(1). Importantly, Article 31 places no alternative evidential or legal burden of proof on the Accused:
 - (1) ...a person shall not be criminally responsible if, at the time of that person's conduct:

- (a) 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;

[...]

- (d) 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.

11. It was demonstrably the intention of the drafters of the Statute that the BRD standard should apply to defences. Importantly, it is clear from the Report of the Preparatory Committee on the Establishment of an International Criminal Court ('Committee') that the Committee decided not to include a provision (then proposed under Article 69(7)) requiring the Accused to prove any defence on the balance of probabilities. The Chamber should give considerable weight to the fact that the following wording was considered by the Committee and does not appear in the Statute: "[w]ith regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases."² The Committee's exclusion of the proposed Article 69(7) from the Statute – which must be viewed in the context of the explicit inclusion of Article 67(1)(i) – demonstrates that the BRD Standard is the standard applicable to Articles 31(1)(a) and (d).

12. Article 21(1) of the Statute states that Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.

² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume III, A/CONF.183/13(Vol. III), p. 58, available at: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf. See also the proposal from Iraq concerning proposed Article 69(7), which suggests the following wording: '7. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt. With regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused. NOTE. This proposal will require the deletion of the second sentence from article 66, which reads: "The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt"', A/CONF.183/13(Vol. III), p.307

- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
13. Pursuant to Article 21(1)(a), the language of the Statute is controlling.³ The defences set out in Article 31(1)(a) and (d) must therefore operate only within the framework set out at Articles 66 and 67(1)(i). The straightforward statutory language prohibits imposing any reversal of the burden of proof on the Accused. To suggest otherwise – for instance to impose an obligation that the Accused prove the existence of a mental condition or duress on the balance of probabilities – would be to impose on an Accused a higher evidential burden of proof than that envisaged by the Statute, which would violate the protection afforded to the Accused under Article 67(1)(i).
14. Commentators support the contention that the Prosecution bears the burden of disproving Article 31 defences beyond a reasonable doubt. The Accused need only raise the issue of the defence with some evidence. At that point, the Prosecution bears the burden of refuting the defence beyond a reasonable doubt. For instance, Professor William Schabas states:

Article 67 of the Rome Statute which shields the accused from “any reversal of the burden of proof or any onus of rebuttal”, may *compel the less onerous requirement that the accused only raise a reasonable doubt*.⁴

Professor Schabas further suggests that

[d]uring the *Celebici* trial before the International Criminal Tribunal for the former Yugoslavia, one of the accused raised a plea of lack of mental capacity, or insanity. The Trial Chamber considered that the accused was presumed to be sane, despite an absence of prosecution evidence, and that it was for the accused to establish the contrary. Not only was the accused required to lead evidence of insanity, the Trial Chamber also held that the accused had a burden to prove this according to the preponderance of evidence standard. As the Trial Chamber explained, “[t]his is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar

³ ICC-01/04-01/07-717, para. 508 (“the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution.”) cited in ICC-01/05-01/08-3343, para. 9 and 10 and ICC-01/05-01/08-3343, para. 69 and 70.

⁴ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Ed. (Oxford University Press, 2016), p. 641 (emphasis added), *see* Annex A, p. 7.

knowledge is on the person with such knowledge or one who raises the defence.” *Given the combined effect of articles 66(2) and 67(1)(i) of the Statute, would the International Criminal Court not conclude otherwise? At the very least, it seems appropriate for the Court to rule that the accused is only required to raise a reasonable doubt as to mental condition, an approach with which many legal systems have been able to live.*⁵

15. Further, it is submitted that the jurisprudence of the *ad hoc* tribunals is inapposite as concerns the applicable burden and standard of proof at the ICC where an Accused raises a defence under Article 31(1).⁶ In light of this, and as the wording of Articles 66 and 67(1)(i) is imperative and unequivocal, recourse to the jurisprudence of the *ad hoc* tribunals as a means of supplementary interpretation is not justified in the present circumstances.

⁵ William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Ed. (Oxford University Press, 2016), pp. 1048-1049 (emphasis added), see Annex A, p. 10. In the same context, Mark Klamberg states: “[t]his defence [Article 31(1)(a)] concerns the mental state of the defendant at the time of the commission of the crime, not at the time of the trial. One question is whether the defendant should conclusively prove the defence of insanity, or merely raise the defence shifting the burden of negating it to the prosecutor? In *Delalic et al.*, one of the accused pleaded lack of mental capacity, or insanity. The Trial Chamber considered that the accused was presumed to be sane. It was for the accused to rebut the presumption of sanity on the balance of probabilities. The Trial Chamber held that “[t]his is in accord and consistent with the general principle 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”. (*Prosecutor v. Delali et al.* (case no. IT-96-21), ICTY T. Ch., 16 November 1998, paras. 78, 603, 1157–1160, 1172). *Turning to the ICC, the combined effect of Articles 66(2) and 67(1)(i) would render it appropriate to rule in such cases that the accused is only required to raise a reasonable doubt as to the mental condition.* Rule 79(1) provides, *inter alia*, that the defence shall notify the Prosecutor of its intent to raise a ground for excluding criminal responsibility provided for in Article 31(1)”, ICC Case Matrix Commentary, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/> (emphasis added). Mr Klamberg also maintains that “[t]he right against a reversal of the burden of proof and against an onus of rebuttal is a corollary of Article 66 laying down the presumption of innocence and placing the burden of proof on the prosecution. Article 67(1)(i) reverse onus provision has been considered as quite original since, considering the absence of typical reverse onus provisions in the ICC Statute, its real purpose would apparently be its application to judge-made reverse onus provisions [see Schabas, 2010, p. 816]. By explicitly ruling out any reversal of the burden of proof, the Rome Statute goes beyond most human rights norms – the ECHR, for example, also contains the presumption of innocence, but does allow reversals within certain limits [see Schabas, Article 66, 1999, MN 22; and Schabas, 2010, pp. 784-785 with further references]. *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* [see Sluiter, 2009, p. 462].’ <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-6/#c2142> (emphasis added).

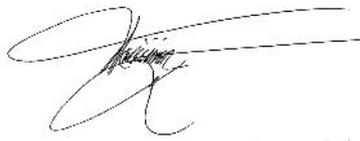
⁶ Fundamental differences between the nature and purpose of the statutes of the *ad hoc* tribunals (temporary institutions founded by United Nations Security Council resolutions) and the ICC (a treaty-based permanent court) demonstrate that, in the present circumstances, reliance upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and International Criminal Tribunal for Rwanda (‘ICTR’) is apt to mislead. Unlike the statutes of the ICTR and ICTY – which are ‘are retrospective and [...] not themselves [substantive criminal] law’ but ‘rather, pointers to a law existing in some form in the rarefied sphere of international law’ – the Statute is a non-retroactive written instrument the purpose of which is to function as a code of criminal law and procedure. (Zahar and Sluiter, *International Criminal Law: A Critical Introduction*, (2008), p. 80, see Annex B, p. 5). Under Article 21 of the Statute the Court *shall* apply the Statute ‘in the first place’ before all other sources of law. The Statute therefore bears a primacy within ICC proceedings that is not comparable to the statutes of the ICTY and ICTR. Importantly, the statutes of the *ad hoc* tribunals differ fundamentally also in content from that of the ICC. Crucially, none of the *ad hoc* tribunals contain a provision that prohibits the imposition on the Accused of ‘any reversal of the burden of proof or any onus of rebuttal’, such as that provided by Article 67(1)(i) of the Statute.

16. Article 66 sets out in clear and uncomplicated terms: that the Accused is presumed innocent until proven guilty; that the onus of proof lies with the Prosecutor; and that the BRD Standard is the only relevant standard applicable to the Chamber's determination of guilt. Article 67(1)(i) clearly states that the Accused has the right "not to have imposed [...] any reversal of the burden of proof or any onus of rebuttal." To attempt to go beyond the Statute in these circumstances would violate its primacy under Article 21. Further, it would be inconsistent with Article 32 of the Vienna Convention on the Law of Treaties, which states that "recourse may be had to supplementary means of interpretation [...] when the interpretation [...] (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

III. RELIEF SOUGHT

17. For the reasons stated above, the Defence respectfully requests that the Chamber issue an immediate ruling confirming that the BRD Standard applies in these proceedings and that the Prosecution bears the burden of proof to disprove each element of the defences raised under Articles 31(1)(a) and (d) beyond a reasonable doubt.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 28th day of January, 2019

At London, United Kingdom