

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **21 December 2021**

**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**

**Amicus Curiae Observations Regarding the Relevance to this Case of the Convention  
 on the Rights of Persons with Disabilities**

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

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## Section I. Introduction

1. The undersigned amici were granted leave in this Appeal Chamber's decision from 24 November 2021 to file observations pursuant to rule 103 of the Rules of Procedure and Evidence. The issues on appeal include whether Mr. Dominic Ongwen should be relieved of criminal responsibility because of "mental disease or defect." The Appeals Chamber seeks, *inter alia*, observations concerning the legal interpretation of Article 31(1)(a) and (d) of the Rome Statute concerning grounds for excluding criminal responsibility, evidentiary considerations and burden and standard of proof.

2. Your amici are experts in mental health law including how international law affects persons with psychosocial and other disabilities in criminal justice systems. **Tina Minkowitz** is a licensed attorney with a master's degree in public international law. She represented the World Network of Users and Survivors of Psychiatry in the drafting and negotiation of the Convention on the Rights of Persons with Disabilities (CRPD) and was a member of the working group that produced a draft text. Her work since then has contributed to further developing the norms of legal capacity and liberty and security of the person. She has written book chapters and scholarly journal articles about the CRPD including its application to the insanity defense. **Robert D. Fleischner** is a licensed attorney who has represented persons with psychosocial and other disabilities in United States courts for nearly 50 years. He has written a book on guardianship and journal articles and book chapters on mental health and disability law.

## Section II. Summary of these Observations

3. Article 21 of the Rome Statute requires the International Criminal Court to apply the "applicable law," which includes "where appropriate, applicable treaties and the principles and rules of international law."

4. The Convention on the Rights of Persons with Disabilities is a near-universally ratified treaty which establishes the global standard for disability non-discrimination as both a principle and a set of specific norms relevant to all areas of substantive human rights law. The CRPD is relevant in this matter because the issues include whether Mr. Ongwen should be relieved of criminal responsibility because of "mental disease or defect."

5. The committee of experts that monitors compliance with the treaty has asserted that declarations of incapacity to be found criminally responsible are contrary to the CRPD "since

[they] deprive[] the person of his or her right to due process and safeguards that are applicable to every defendant."

6. Disability non-discrimination norms and principles require and allow courts and societies to conceptualize an alternative approach whereby the rules applicable to criminal responsibility are framed and applied so as to take account of the lived reality of persons with disabilities, including those who are experiencing temporary forms of disability, on an equal basis with others.

7. Amici suggest an approach in which the existence of distress or unusual perceptions does not result in a separate analysis of a defendant'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. Instead, the evidence of distress or unusual perceptions would be examined wherever it may be raised to negate the mental element of a crime or to establish the mental element of a partial or complete defense.

8. Applying this framework to this case resets the questions at stake: Did the defendant's state of mind at the time of committing the acts amount to *mens rea* as defined in Article 30 of the Statue, taking into account any distress or unusual perceptions he experienced at the time? Was any communication made to him that he understood to be a threat, taking into account such distress or unusual perceptions, and were his actions to avoid such threat reasonable in light of the circumstances as he understood them? A finding of culpability would not, then, hinge on whether or not a "mental illness" could be deduced in one way or another or on a finding of incapacity that places an individual outside the mutual obligations owed to other members of the community.

### **Section III. The CRPD must be considered and applied to issues of non-culpability based on mental disability in this proceeding.**

9. Article 31(1)(a) makes clear that "mental disease or defect" may serve as grounds for the exclusion of criminal responsibility where these are deemed to have destroyed the capacity of a person to appreciate the unlawfulness or nature of their conduct, or their capacity to control such conduct. The focus is therefore on identifying the presence or absence of impairments and determining their impact on the person's cognition and decision-making, giving rise to legal consequences for the person concerned.

10. Impairments (interacting with attitudinal and environmental barriers) are core components of the evolving concept of disability, as described within the Preamble of the

CRPD.<sup>1</sup> As is explained in more detail in Section IV of these Observations, the CRPD is a near-universally ratified treaty, which establishes the global standard for non-discrimination based on disability, as both a set of principles and a set of specific norms relevant to all areas of substantive human rights law.<sup>2</sup> "Equality before the law, equal protection before the law, and non-discrimination" which are at the heart of the CRPD, have the status of *jus cogens*.<sup>3</sup> The CRPD, in force since 2008, has 182 ratifications or accessions, including by Uganda and 119 other States Parties to the Rome Statute.<sup>4</sup>

11. Article 1 of the CRPD states that "[p]ersons with disabilities include those who have long-term physical, *mental*, intellectual or sensory *impairments* which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".<sup>5</sup> The Committee on the Rights of Persons with Disabilities (the Committee), the authoritative body interpreting the CRPD,<sup>6</sup> understands persons with "mental health conditions" to be persons with disabilities entitled to the guarantees of the Convention.<sup>7</sup> Accordingly, legal interpretations of Article 31(1)(a) of the Rome Statute necessarily entail an assessment of the rights and duties imposed by international criminal law as they apply to persons with disabilities.

12. As one of the core international human rights instruments,<sup>8</sup> both the text of the CRPD and the authoritative interpretation developed thereunder can inform the Court's analysis of non-culpability on the basis of "mental disease or defect" under Article 31(a) of the Statute. The CRPD is applicable law within the present case by virtue of being an "applicable treaty" within the meaning of Article 21(1)(b) of the Rome Statute. Further, the International Criminal Court must ensure that the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights".<sup>9</sup>

<sup>1</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html>.

<sup>2</sup> See, United Nations Department of Economic & Social Affairs/Disability, The CRPD, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

<sup>3</sup> <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>, at p. 161, citing the jurisprudence of the Inter-American Court of Human Rights in *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, requested by the United Mexican States, Inter-American Court of Human Rights, Series A, No. 18, paragraph 101.

<sup>4</sup> United Nations Department of Economic & Social Affairs/Disability, fn. 2 *supra*.

<sup>5</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html>. (emphasis supplied).

<sup>6</sup> The Committee is established and its duties are set forth in Articles 34–39 of the Convention.

<sup>7</sup> CRPD Concluding Observations to Spain (2019), CRPD/C/ESP/CO/2-3, paragraphs 8-9.

<sup>8</sup> <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx>.

<sup>9</sup> Article 21(3) of the Rome Statute.

13. It follows that interpreting the implications of “mental disease or defect” for criminal culpability must be determined consistently with the internationally recognised human rights standards flowing from the CRPD. The following sections of these Observations provide a detailed analysis of the normative content, scope and application of standards mandating non-discrimination and equality, and the implications of those on the understanding of “capacity”, within criminal legal processes as they apply to persons with disabilities.

14. The International Criminal Court should ensure consistent and harmonious interpretations of the Rome Statute with CRPD standards, in a similar way to the interpretation applied by certain human rights courts.<sup>10</sup> We further submit that the Court should consider the CRPD as *lex specialis* (as arising from its development and purpose as set forth above and more below), and should be given priority, with regard to the interpretation of terms under the Rome Statute that pertain to persons with disabilities, and specifically when interpreting and applying 31(1)(a) and (d).

15. In interpretation and application of the Statute with reference to the CRPD, the Court should also be guided by Article 31 of the Vienna Convention on the Law of Treaties (VCLT) on the general rules of treaty interpretation, a provision which may be considered part of international customary law.<sup>11</sup> Beyond the obligation to give effect to the ordinary meaning of terms, Article 31(3) VCLT specifies that: “There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. This provision gives rise to an approach to the interpretation of treaties which may be described as “system integration”, whereby treaties from regimes across the scope of different fields in international law are interpreted “through a process of reasoning that makes them appear as parts of some coherent and meaningful whole” to avoid “fragmentation”.<sup>12</sup> Furthermore, 120 of the 123 States Parties to the ICC are States Parties to the CRPD. Understood in this light, Article 31(1)(a) and (d) of the Rome Statute must be interpreted and applied harmoniously with, and in light of, the CRPD as subsequently adopted and relevant jurisprudence thereunder to ensure the coherence of international law.

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<sup>10</sup> See, e.g., Judgment on the merits, in *Case of Georgia v. Russia (II)* [GC], no. 38263/08, § 23, ECHR, 2021, <https://hudoc.echr.coe.int/fre?i=001-207757>.

<sup>11</sup> See, International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (13 April 2006) A/CN.4/L.682: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).

<sup>12</sup> Id. paragraph 414.

16. Should the International Criminal Court determine harmonious interpretations are not possible, the principle of *lex posterior derogat legi priori* applies.<sup>13</sup>

17. We submit therefore that the authoritative understanding and drawing out of legal ramifications of terms such as “mental disease or defect” and “capacity” as instructed by the CRPD must be given priority by the ICC, and that terms concerning disability that derive from or with reference to the Rome Statute should apply in a manner that ensures the Rome Statute’s compatibility with the later treaty, here being the CRPD.

**Section IV. The CRPD establishes the international law standards for disability non-discrimination, including in criminal justice systems.**

18. The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.<sup>14</sup> Accordingly, it acknowledges that all persons with disabilities are rights holders and that an impairment may not be used as a justification for limitation or denial of human rights. The CRPD obligates States Parties to take positive measures to dismantle social, cultural, economic, and, most pertinent here, legal barriers that prevent persons with disabilities from fully participating in society.

19. By ratifying or acceding to the CRPD, 182 nations have recognized the destructive history of stigma and discrimination against persons with disabilities and have adopted a social model of disability. This model, which was the fundamental framework for the negotiations of the Convention, focusses on the impact of society in shaping disability rather than on the individual’s specific personal characteristics.

20. In contrast, the medical model, which the CRPD decisively rejects, perceives a person with a disability through the lens of inherent limitations or impairments (“mental disease or defect” in the wording of the Rome Statute) that require diagnosis and often intervention by medical and social welfare professionals and upon which the person’s exclusion from full and equal participation in mainstream culture institutions, legal processes and in the exercise of human rights may be justified.

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<sup>13</sup> See, for example: William A. Schabas, Part 2 Jurisdiction, Admissibility, and Applicable Law: Compétence, Recevabilité, Et Droit Applicable, Art.21 Applicable law/Droit applicable, in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute (2<sup>nd</sup> edition)* (Oxford, September 2006), p. 517.

<sup>14</sup> CRPD, Article 1

<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#1>.

21. The social model, at its core, maintains that the socially engineered environments and attitudes play a central role in creating “disability”.<sup>15</sup> Therefore, the CRPD does not define “disability”. However, Article 1 states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.<sup>16</sup>

22. In both civil law and common law countries, the implication of non-culpability constructs is that persons found to be not culpable due to a “mental disease or defect” may be deemed to be a threat to society and subject to involuntary institutionalization. Although there is no provision for involuntary hospitalization in the Rome Statute, there are other serious and negative implications of the Section 31(a) incapacity defences which are contrary to the CRPD. Most important, they invoke the very conceptions of disability that the CRPD rejects and reinforce stigma and practices of exclusion such as guardianship and involuntary hospitalization and treatment. In subsequent paragraphs, we briefly describe the contours of the CRPD and explain why such defences are disallowed.

23. The principles upon which the CRPD is based are respect for the inherent dignity of persons with disability, non-discrimination, the full and effective participation of persons with disability in society, and equality of opportunity.<sup>17</sup>

24. In the CRPD’s Article 5, States Parties recognize that all persons are equal before and under the law and are entitled to the equal protection of the law.<sup>18</sup>

25. CRPD Article 12 requires that legal capacity, which all person have as a human right, may not be limited on the basis of disability. Article 12 requires that States Parties “shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”.<sup>19</sup>

26. The Committee on the Rights of Persons with Disabilities (Committee) has explained in a General Comment that legal capacity and mental capacity must be distinguished. Legal

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<sup>15</sup> CRPD, Preamble, paragraph 5, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/preamble.html#menu-header-menu>.

<sup>16</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html>.

<sup>17</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-3-general-principles.html>.

<sup>18</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-5-equality-and-non-discrimination.html>.

<sup>19</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html>.

capacity “is the key to accessing meaningful participation in society” and includes the capacity to be both a holder of rights and an actor under the law. Legal capacity to act under the law recognizes the person has “legal standing and legal agency simply by virtue of being human”.<sup>20</sup>

27. Mental capacity, on the other hand, “refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors”. Mental capacity is not an objective, scientific and naturally occurring phenomenon. Rather, “it is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.”<sup>21</sup> Accordingly, “unsoundness of mind” and other discriminatory labels are not legitimate reasons for the denial of legal standing or legal agency.<sup>22</sup>

28. Article 14 of the CRPD, a non-discrimination provision, requires States Parties to ensure that on an equal basis with others, persons with disabilities, “[e]njoy the right to liberty and security of person; [and] ... and that the existence of a disability shall in no case justify a deprivation of liberty”.<sup>23</sup>

29. UN human rights bodies have addressed the implications of CRPD Article 14 on criminal law generally and non-capacity defences specifically. The interpretations have also drawn on the requirements of Articles 12 and 13.

30. The Committee, for instance, has addressed defences based on lack of capacity in its Article 14 Guidelines<sup>24</sup> and in its reviews of reports filed by State Parties. “The Committee has established that declarations ... of incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations are contrary to [A]rticle 14 of the Convention since they deprive the person of his or her right to due process and safeguards that are applicable to every defendant”.<sup>25</sup>

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<sup>20</sup> General Comment 1 CRPD/C/GC/1 (2014)

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en)

<sup>21</sup> Id. at paragraph 14.

<sup>22</sup> Id.

<sup>23</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-14-liberty-and-security-of-person.html>.

<sup>24</sup> A/72/55,

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=A/72/55&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=A/72/55&Lang=en)

<sup>25</sup> Id. at paragraph 16. See also, Concluding Observations Report of Ecuador CRPD/C/ECU/CO/1, paragraph 29(b).

31. In its Concluding Observations to Kenya's initial report the Committee recommended that Kenya repeal provisions of its criminal code "concerning the declaration of insanity".<sup>26</sup> Likewise, in its comments to Belgium, the Committee recommended changes to laws to guarantee that persons with disabilities "who have committed a crime ... be tried under the ordinary criminal procedure, on an equal basis with others and with the same guarantees, although with specific procedural adjustments to ensure their equal participation in the criminal justice system".<sup>27</sup>

32. In 2009, the High Commissioner for Human Rights wrote that recognition of the legal capacity of persons with disabilities requires replacing criminal defences that are based on "mental or intellectual disability" with "disability-neutral" doctrines.<sup>28</sup>

33. At least one regional intergovernmental human rights body has taken a similar position. Using the CRPD to interpret a similar regional treaty,<sup>29</sup> the body has recognized that exoneration from criminal responsibility based on "mental disorder" is a manifestation of a denial of legal capacity and, therefore, a violation of the CRPD and the regional treaty.<sup>30</sup>

34. These interpretations of the High Commissioner for Human Rights, the Committee, and the regional body are admittedly a subject of controversy, supported by scholars, commentators, and advocates (including one of your amici)<sup>31</sup> while challenged by some others.<sup>32</sup> Still others have proposed various middle grounds.<sup>33</sup> However, notwithstanding any disagreements, the

<sup>26</sup> CRPD/C/KEN/CO/1 at paragraph 28.

<sup>27</sup> CRPD/C/BEL/CO/1 paragraph 28.

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBEL%2fCO%2f1&Lang=en). See also CRPD/C/TKM/CO/1, paragraph 30(b); CRPD/C/DEU/CO/1, 32(a) and (b).

<sup>28</sup> UN Human Rights Council, Annual Report of the UN High Commissioner for Human Rights and Reports of the High Commissioner and the UN Secretary General, UN Doc. A/HRC/10/48 at 15 (26 January 2009) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>.

<sup>29</sup> Organization of American States, Committee on the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS), Practical Guide for the Establishment of Supports for the Exercise of Legal Capacity by Persons with Disabilities, OEA/Ser D/XXVI.39 (2021), pages 22-23 (Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities must be re-interpreted in light of Article 12 of the CRPD) [https://www.oas.org/en/sare/publications/guia\\_practica\\_ceddis\\_eng.pdf](https://www.oas.org/en/sare/publications/guia_practica_ceddis_eng.pdf).

<sup>30</sup> Id. at page 20.

<sup>31</sup> See, e.g., Tina Minkowitz, Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead and Beyond, (2014) Griffith Law Review 23:434 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2930530](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930530).

<sup>32</sup> See, e.g., Michael L. Perlin, "God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence (2017) American Criminal Law Review 54:477. [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1636&context=fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1636&context=fac_articles_chapters).

<sup>33</sup> See, e.g., Clóna de Bhalís & Eilionóir Flynn, Recognizing Legal Capacity: Commentary and Analysis of Article 12 CRPD, (2017) International Journal of Law in Context 13:6, <https://voicesresearch.files.wordpress.com/2017/02/recognising-legal-capacity.pdf>.

view advanced by the Committee which is charged with interpreting and enforcing the CRPD, supported by other officials and bodies, is the one that deserves the deference of this Chamber.

35. Amici recognize that despite the rejection of the concept of non-culpability by reason of disability, neither the High Commissioner nor the Committee has provided much guidance on how the subjective element of a crime (*mens rea*) should be constructed in a criminal system in a way that respects Article 14 of the CRPD, taking into account the impact of the recognition of full legal capacity as required by Article 12. In the following section of these Observations we respectfully offer to provide that guidance.

#### **Section V. The Requirements of the CRPD should and can be applied harmoniously to Article 31(1)(a).**

36. The disability non-discrimination norms and principles expressed in the CRPD require and allow courts and societies to conceptualize an alternative approach to the rules applicable to criminal responsibility.

37. Like other human rights treaties, non-discrimination under the CRPD includes formal and substantive elements. An alternative approach to criminal responsibility requires both formal equality of treatment under the law (eliminating differential treatment based on an actual or perceived impairment) and substantive equality (ensuring that the framework enacted is equally relevant for persons with disabilities as for others). The Committee characterizes the synthesis of formal and substantive equality in the Convention as “inclusive equality”,<sup>34</sup> requiring transformative approaches that ensure all environments – social, physical, and legal – can include persons with disabilities on an equal basis as others.

38. A CRPD-amenable approach to criminal responsibility is one that is framed and applied to take account of the lived reality of persons with disabilities on an equal basis with others. This means both doing away with substantive and procedural norms that define a separate pathway for defendants with disabilities and ensuring that the substantive and procedural norms for all defendants are designed and applied inclusively, in consideration of the possibility that any defendant may be a person with a disability.

39. As discussed above, the term “persons with disabilities” includes those who may experience intense distress or unusual perceptions. Any person whose experience of intense

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<sup>34</sup> UN Committee on the Rights of Persons with Disabilities (CRPD), General comment on Article 5: Equality and non-discrimination, 9 March 2018, CRPD/C/GC/6, <https://digitallibrary.un.org/record/1626976?ln=en>, paragraphs 8-11; see also paragraphs 14-16 and 72(b).

distress or unusual perceptions (or whose mental health condition) is raised in the course of proceedings regarding charged criminal conduct is entitled to the guarantees of CRPD, which elaborate the implications of the peremptory norm of equality and non-discrimination with respect to disability, in the criminal proceedings against them.

40. Under the CRPD's approach, equal treatment means that defendants with disabilities may avail themselves of the same defences that are available to all other defendants, including duress and the absence of *mens rea*. The possibility to benefit from a defence must be substantively equal and not merely available in principle – that is, the mental state of a defendant with a disability, insofar as it is relevant to *mens rea* or defences such as duress, must be considered on its own terms rather than as an approximation to the mental state experienced by a non-disabled person. This is consistent with an approach suggested by Professor Christopher Slobogin prior to the CRPD adoption in his writing proposing the elimination of the insanity defence.<sup>35</sup>

41. Professor Slobogin accords significant weight to the subjective perspective of a defendant when assessing the existence of *mens rea* or the merits of a defence. That is, how a particular individual perceived the circumstances in which she or he acted, even if this perception may have been inaccurate. A *mens rea* analysis defined subjectively could result in acquittal if an individual's perceptions led him or her to intend a different result than that which occurs, or if the individual "is under a misapprehension as to the attendant circumstances (such as when a person intentionally shoots a gun at what he thinks is a dummy but which in fact is a real person)".<sup>36</sup>

42. Defining *mens rea* subjectively does not mean allowing the moral judgment of defendants to overrule that of the community expressed in the criminalization of any act. It means rather that a defendant should be judged based on his or her actual state of mind, irrespective of whether it conforms to what others might imagine as reasonable or expected in their objective circumstances. Explicit acknowledgement that the subjective dimension is invoked in an analysis of the mental element of any crime is required in order to ensure that persons with disabilities have the opportunity to benefit from the doctrine of *mens rea* on an equal basis with others.

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<sup>35</sup> Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Illness in Criminal Cases* (2000) *Virginia Law Review* 86:1199, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=216188](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=216188).

<sup>36</sup> *Id.*, p. 7.

43. *Mens rea* is an essential element of all crimes within the ICC’s jurisdiction. Article 30 of the Rome Statute defines intent and knowledge as the mental element of these crimes unless otherwise provided; intent is defined volitionally as to conduct (“means to engage in the conduct”) and volitionally or cognitively as to consequence (“means to cause that consequence” or “is aware that it will occur in the ordinary course of events”), and cognitively with respect to knowledge (“awareness that a circumstance exists or that a consequence will occur in the ordinary course of events”). Any analysis of *mens rea* under the Rome Statute can be applied inclusively to persons with disabilities, whose actual intent and knowledge must be analysed taking account of the particularities of an individual’s mental state that are uncommon in the general population but can be better understood in light of the person’s disability.

44. Although the CRPD requires that State Parties eliminate capacity-based defences, it nevertheless permits evidence of a person’s distress or unusual perceptions to be used to demonstrate whether and how a defendant’s subjective experience of the world may be relevant to negate *mens rea*. Capacity-based defences are rejected because they situate persons with disabilities outside the mutual obligations that are essential to a human rights-based community.<sup>37</sup> The resulting stigma deprives persons with disabilities of equal standing in their communities and reinforces practices of exclusion and segregation such as guardianship or involuntary psychiatric treatment.

45. In contrast, the use of disability-related evidence to negate *mens rea* upholds the core principles of full participation and respect for diversity enshrined in CRPD Article 3(c) and (d).<sup>38</sup> To refuse a defendant the opportunity to present evidence of distress or unusual perceptions to negate *mens rea* would likely violate the substantive equality dimension of CRPD Article 5 (equality and non-discrimination) together with Article 13 (access to justice).

46. Evidence of a person’s distress or unusual perceptions may also be used to demonstrate or establish an affirmative defence such as duress that entails an inquiry into a defendant’s mental state. Like *mens rea*, duress is not a disability-specific defence and the admission of evidence of disability conforms with the obligation to achieve substantive equality.

47. Under Article 31(d) of the Rome Statute, duress is exculpatory when it results 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

<sup>37</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, Article 29.

<sup>38</sup> <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#3>.

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.” The defendant’s mental state is invoked in the inquiry into whether she or he intended to cause greater harm. It is also highly relevant to how threats affect a particular individual, and how circumstances beyond a person’s control constitute a threat of imminent death or of continuing or imminent serious bodily harm.

48. As a communicative act, a threat depends for its impact on how it is understood by the recipient. A person who is experiencing intense distress or unusual perceptions, or whose mental processes are otherwise atypical compared with the general population, might understand the existence or seriousness of a threat differently than might be otherwise expected. Similarly, for circumstances under a person’s control to constitute a threat depends on how the individual constructs his or her understanding of those circumstances. This is linked with distress and unusual perceptions in two ways. Distress or unusual perceptions both shape a person’s understanding of his or her environment and can arise in response to challenging circumstances that offer no escape and pose a moral dilemma.<sup>39</sup> Given this mutual reinforcement of coercive circumstances and the mental states produced as a result, evidence of distress and unusual perceptions, as experienced by a particular defendant, cannot be separated from an inquiry as to the existence of duress.

49. In this approach the existence of distress or unusual perceptions does not automatically exclude criminal responsibility, any more than merely asserting an incapacity defence automatically excludes culpability. Unlike an incapacity defence, however, there need be no analysis of whether a “mental disease or defect” (a finding almost always based in significant part on medical evidence) has “destroyed” the defendant’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.

50. Instead, the evidence of distress or unusual perceptions would be examined wherever it may be raised to negate the mental element (*mens rea*) of a crime or to establish the mental element of a partial or complete defence such as duress. Relevant evidence would include direct testimony by the defendant and those who knew him or her well at the time, as well as expert testimony from diverse sources congruent with the social model of disability, including testimony based on experts’ interviews with the defendant. Such evidence would assist a Trial

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<sup>39</sup> See, generally, on the concept of moral injury: <https://moralinjuryproject.syr.edu>.

Chamber in understanding diverse mental states and processes that may be idiosyncratic or uncommon and how the distress and/or unusual perceptions experienced by a defendant could affect his or her formation of intent or construction of knowledge as relevant to a charged crime. Medical or psychological expertise would not be dispositive but would be accepted alongside that of less conventional experts such as peer support specialists and communication assistants.

51. If this framework were adopted, the question of burden of proof would be moot. As in every case, the prosecution would have the burden on proving *mens rea*. The burden of proof on defences would be allocated in the same manner as in any other case.

52. The Trial Chamber in this case denied any relevance to evidence of Mr. Ongwen's experience of distress and unusual perceptions other than as possible symptoms of a "mental disease or defect" that would exclude criminal responsibility.<sup>40</sup> Under our approach, the Chamber would accord relevance to such evidence directly as part of an examination of his individual responsibility under each of the crimes charged, and in considering the defence of duress. For example, was his "careful planning of complex operations"<sup>41</sup> affected by his distress or unusual perceptions in any way that would negate an inference that he meant to engage in that conduct? Did his experience of distress or unusual perceptions affect his understanding of his circumstances such that his actions were necessary and reasonable to avoid a threat as defined in Article 31(d)? The difference in approach may or may not change the outcome in a particular case but it allows for a more nuanced and contextual analysis of the mental state of defendants with disabilities.

## Conclusion

53. Applying this framework to this case resets the questions at stake as these:

- a) Did the defendant's mental state at the time of committing the acts amount to *mens rea* required for a determination of criminal responsibility, taking into account how his formation of intent or construction of knowledge with respect to the crimes charged may have been affected by his experience of distress and/or unusual perceptions?
- b) Was any communication made to him that he understood to be a threat of imminent death or of continuing or imminent serious bodily harm, taking into account any distress or unusual perceptions he was experiencing at the time

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<sup>40</sup> Trial Chamber Judgment, paragraphs 2450 *et seq.*

<sup>41</sup> *Id.*, paragraph 2521.

(including any distress or unusual perceptions that arose in reaction to such threat)?

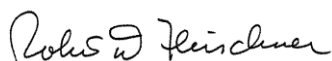
- c) Were his actions to avoid the threat necessary and reasonable in light of the circumstances as he understood them?

54. Article 31(a) then would be interpreted to be subsumed into Article 30 and Article 31(c) and (d), insofar as the determination as to *mens rea* and the mental element of defences would incorporate consideration of a defendant's experience of distress or unusual perceptions and how these affected his or her formation of intent, knowledge or other relevant mental state.

55. There would be no inquiry into whether a "mental illness" could be determined to have existed at the time a defendant committed the acts charged or its purported effect on a defendant's "capacity" to appreciate the wrongfulness of a criminalized act or to conform his or her conduct to the requirements of law.

56. The core value of Article 31(a) that is compatible with the CRPD norms is ensuring that criminal adjudication is fair to persons with disabilities by considering the ways in which their disability may be relevant to such adjudication. The CRPD requires that this be accomplished through inclusive design of the legal framework in contrast to approaches that further stigmatize persons with disabilities and reinforce their social exclusion.

Respectfully submitted,



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21 December 2021