

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: **14 November 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

Application for Leave to Submit Observations *Amici Curiae*

**Source: Tina Minkowitz, New York, United States of America
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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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I. Introduction

1. The Applicants are experts in mental health law including how international law affects persons with psychosocial and other disabilities in criminal justice systems. They respectfully apply for leave to submit an *amici curiae* observation in the form of a written brief pursuant to Rule 103(1) of the Rules of Procedure and Evidence.

2. This application is in response to the Appeals Chamber’s interest in observations from *amici curiae*, including experts in mental health law, on the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility due to mental disease or defect or duress.¹ If leave is granted, the Applicants will provide observations on the requirements of the Convention on the Rights of Persons with Disabilities (“the CRPD”) in regard to the grounds for excluding criminal responsibility. The Applicants’ submission may assist the Appeals Chamber in the proper determination of the legal standards under international law for excluding criminal responsibility.

II. Procedural History Relevant to this Application

3. On 4 February 2021, Trial Chamber IX convicted Mr Dominic Ongwen of crimes against humanity and war crimes.

4. The Trial Chamber concluded that Mr Ongwen “did not suffer from a mental disease or defect at the time of the conduct relevant under the charges” and, therefore, Article 31(1)(a) of the Statute is not applicable.² The Trial Chamber found that a large number of witnesses “did not provide any testimony which could corroborate a historical diagnosis of mental disease or defect”.³ Furthermore, the Trial Chamber noted that many of Mr Ongwen’s actions “involved careful planning of complex operations, which is incompatible with a mental disorder”.⁴

5. In relation to article 31(1)(d) of the Statute, the Trial Chamber found that inasmuch as Dominic Ongwen’s acts “were [...] free of threat of imminent death or imminent or continuing serious bodily harm ... [d]uress as a ground excluding criminal responsibility under Article 31(1)(d) of the Statute is ... not applicable”.⁵

¹ Order inviting expressions of interest as *amici curiae* in judicial proceedings, 25 October 2021, para. 10. https://www.icc-cpi.int/CourtRecords/CR2021_09458.PDF.

² [Conviction Decision](#), para. 2580.

³ [Conviction Decision](#), para. 2520.

⁴ [Conviction Decision](#), para 2521.

⁵ [Conviction Decision](#), para. 2676.

6. On 21 July 2021, the Defence filed its appeal brief against the Conviction Decision, arguing on several grounds that the Trial Chamber erred by rejecting the affirmative defences.⁶

7. On 25 October 2021, the Appeals Chamber invited qualified scholars and practitioners to request leave to submit observations on the merits of the legal questions concerning criminal responsibility.

II. Specific issues to be addressed

8. 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”.⁷ The CRPD is a near-universally ratified treaty (ratified by 182 countries) 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.⁸ The provisions of the CRPD are relevant because the issues on appeal include whether Mr. Ongwen should be relieved of criminal responsibility because of “mental disease or defect”. Mental disease and mental defect are squarely within the meaning of the phrase “persons with disabilities” as it is used in the CRPD.⁹

9. CRPD Articles 12, 13 and 14 address respectively, the equal legal capacity of persons with disabilities as others in all aspects of life, equal access to justice by persons with disabilities, and equal guarantees related to deprivation of liberty.¹⁰ The committee of experts that monitors compliance with the treaty has asserted in its Guidelines on Article 14 that declarations of incapacity to be found criminally responsible are contrary to Article 14 “since [they] deprive[] the person of his or her right to due process and safeguards that are applicable to every defendant” and called on states to remove those declarations from the criminal justice system.¹¹ For instance, the Committee has called for repeal of a statute providing for an affirmative insanity defence.¹²

⁶ [Appeal Brief](#), paras. 212-219 and 320-650.

⁷ <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

⁸ 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>.

⁹ “Persons 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.” CRPD, Article 1

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

¹⁰ <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#1>.

¹¹ United Nations Gen. Assembly, Official Record, 72d session, Supplement No. 55 (A/72/55), Report of the Committee on the rights of persons with disabilities, Annex, Guidelines on the right to liberty and security of

10. The Office of the High Commissioner for Human Rights (OHCHR) has also stated that recognizing the legal capacity of persons with disabilities means abolishing defences based on the denial of criminal responsibility because of the existence of a mental or intellectual impairment.¹³

11. People who experience serious distress or unusual perceptions experience negative social impacts of having these experiences associated as a matter of law with lack of moral agency. The stereotype that such individuals cannot control their behaviour and represent a threat to society is the basis for involuntary civil psychiatric commitment as well as involuntary forensic commitment following an acquittal for lack of criminal responsibility.

12. 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.

13. Your applicants will rely in part on the work of law professor Christopher Slobogin, who, writing independently of the CRPD, has called for elimination of the “insanity defense” and demonstrated how evidence of a person’s distress or unusual perceptions could be used alternatively to demonstrate whether and how a defendant’s subjective experience of the world may be relevant to negate *mens rea* or establish an affirmative defense such as duress.¹⁴ The applicants consider that Professor Slobogin’s framework is an appropriate basis for an approach to the criminal responsibility of defendants who experience distress or unusual perceptions. In this approach, similarly to an insanity defense, the existence of distress or unusual perceptions does not automatically exclude criminal responsibility. Unlike the insanity defense, however, there is no 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

persons with disabilities, (2017) para H, p 19,

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

¹² Committee on the rights of persons with disabilities, Concluding observations on the initial report of Kenya, CRPD/C/KEN/CO/1 (2015) p 6 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/223/37/PDF/G1522337.pdf?OpenElement>.

¹³ United Nations Gen. Assembly, Annual Report of UN High Commissioner for Human Rights, A/HRC/10/48, para 47 p 15 (2009) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>.

¹⁴ Slobogin, Christopher, An End to Insanity: Recasting the Role of Mental Illness in Criminal Cases, (86 Virginia L. Rev. 1199 (2000) <https://ssrn.com/abstract=216188>.

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.

14. Applying this framework to this case resets the questions at stake—did the defendant’s intent at the time of committing the acts amount to *mens rea* required for a determination of criminal responsibility, taking into account the defendant’s subjective experience including elements of duress? The question is not, then, whether or not a “mental illness” could be deduced in one way or another. Likewise, assessing the application of the duress defense would be based on the defendant’s actual desires and beliefs rather than those of a reasonable person who has not had the defendant’s experiences.

V. Expertise of the Applicants

15. **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 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.

16. **Robert D. Fleischner** is a licensed attorney who has represented persons with psychosocial disabilities in civil and criminal case in United States courts for nearly 50 years. He has written a book on guardianship and scholarly journal articles and book chapters on mental health and disability law.

Conclusion

For the reasons mentioned above, the Applicants respectfully request the Chamber to grant them leave to submit observations pursuant to Rule 103(1).

Respectfully submitted,



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/s/ Tina Minkowitz

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