

# Ongwen and Mental Health Defenses at the International Criminal Court

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The International Criminal Court (ICC) case against Lord's Resistance Army commander and former child soldier Dominic Ongwen of Uganda resulted in a guilty verdict and 25-year prison sentence. Mr. Ongwen unsuccessfully raised defenses based on mental health. These included fitness to stand trial, insanity under Article 31(1)(a) of the Rome Statute (a first at the ICC), mitigation in sentencing based on diminished mental capacity, duress (also a first), and the cumulative effects of mental health and duress. These defenses were hampered by limited and ambiguous textual support, which occurs in a politico-legal context that is cautious regarding such defenses. Another group of challenges comes from the inherent difficulty of international forensic practice. In regard to how mental health affects the duress defense, the text of the Rome Statute and the *Ongwen* decision create a burdensome legal framework for defendants, particularly where mental illness limits but does not "destroy" decision-making, as Article 31(1)(a) requires for an insanity acquittal. Going forward, defense teams may attempt to address the court's all-or-nothing conception of mental illness, perhaps arguing a diminished mental capacity theory that accounts for psychiatric function that is reduced but not destroyed.

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The International Criminal Court (ICC) is an international tribunal in The Hague, Netherlands. The ICC has jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, and war crimes. The ICC is intended to complement existing national judicial systems. It has jurisdiction only under certain conditions, such as when national courts are unwilling or unable to prosecute criminals or when the United Nations Security Council or individual states refer situations to the court. The Rome Statute<sup>1</sup> is a multilateral treaty that serves as the ICC's foundational and governing document. The ICC began functioning on July 1, 2002, when the Rome Statute

went into effect. There are currently 123 states that are party to the Rome Statute and therefore members of the ICC.<sup>2</sup>

In February 2021, the ICC issued a guilty verdict in the case of Ugandan Dominic Ongwen, a former child soldier and later a commander in the Lord's Resistance Army (LRA).<sup>3</sup> The Lord's Resistance Army (LRA), where Mr. Ongwen served, has historical roots in a Ugandan rebellion that began in 1986. After five years of civil war, unrest remained. One rebel group, the Holy Spirit Movement led by Alice Lakwena started with 150 men and later became the LRA under Joseph Kony. As the group terrorized central Africa, it kidnapped thousands of children. These children would become "soldiers, slaves, and concubines."<sup>4</sup> Human Rights Watch estimates that the LRA has captured over 30,000 children and has "killed thousands of civilians and mutilated many others by cutting off their lips, ears, noses, hands, and feet."<sup>5</sup>

Though the LRA initially operated in Uganda, military efforts against it have pushed it into South Sudan, the Democratic Republic of Congo, and the

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**Table 1** Ongwen Pre-Trial Timeline

1986	Soon after seizing power in a coup, Uganda’s president Yoweri Museveni faced rebellion from several armed groups in Northern Uganda, including the Holy Spirit Movement.
1987	The Holy Spirit Movement dwindled when its leader Alice Lakwena fled Uganda to seek refuge in neighboring Kenya. Joseph Kony, a member of the movement formed what would become known as the Lord’s Resistance Army (LRA) from the group’s remnants.
1988	Dominic Ongwen was abducted on his way to school by the LRA.
March 1999	Uganda signed the Rome Statute of the International Criminal Court.
2002	Ugandan government launched a major military offensive against the LRA.
September 2003	According to the Office of the Prosecutor, Mr. Ongwen became part of the “Control Altar,” the central command of the LRA, and was appointed second in command of the Sinia Brigade.
December 2003	Uganda referred the situation to the ICC: the first situation referred to the Court.
July 2004	The ICC began investigating the Uganda situation.
July 2005	The ICC issued a warrant of arrest for five leaders of the LRA, including Mr. Ongwen.
October 2005	The warrant of arrest was unsealed.
January 2015	Mr. Ongwen surrendered himself to United States forces in the Central African Republic who were working alongside the Ugandan army.
July 2016	The ICC rejected requests to hold opening statements in northern Uganda, citing security concerns and the workload of the judges hearing the case.

Central African Republic. The U.S. military assisted the efforts from 2010-2017. As of 2021, Joseph Kony and his fighters are thought to be in disputed areas between Sudan and South Sudan, though his forces have since splintered.<sup>5</sup>

The trial of Mr. Ongwen marked a series of firsts. Uganda was the first country to refer a situation to the ICC in 2002 and the investigation was opened early in the court’s history in 2004. Mr. Ongwen was one of five top LRA leaders wanted by the court since 2005 and the first to go to trial. This was also the first case in which the accused invoked the insanity defense under Article 31(1)(a) of the Rome Statute and a duress defense under Article 31(1)(d) of the statute.<sup>6</sup> (See Table 1 for the timing of events preceding the trial.) Mr. Ongwen was sentenced to 25 years imprisonment for his 61-count conviction that included murder, enslavement, torture, forced marriage, rape, and sexual slavery.<sup>7</sup>

During his trial, Mr. Ongwen’s team used several strategies based on his mental health, including historic arguments for insanity and duress. This article begins by outlining those defense theories and their application at the international level. Next, the arguments and rulings regarding mental health related defenses at Mr. Ongwen’s trial are reviewed. Finally, the legal, political, and international challenges of mental health defenses at the ICC are discussed.

## Mental Health Defenses at ICC

### *Fitness to Stand Trial*

At the outset, the accused must be mentally fit to stand trial. By ICC precedent, an accused who is competent “can meaningfully participate in the trial - to such a degree that he has an understanding of the essentials of the proceedings, and in such way that it allows him to effectively exercise his fair trial rights” (Ref. 8, para 36). This includes the “capacities to understand the charges and the conduct, purpose and possible consequences of the proceedings, instruct counsel in the preparation and conduct of his or her defense, and make a statement” (Ref. 9, para 8).

Per ICC procedural rules, a court may order a medical, psychiatric, or psychological examination of the accused. The court itself then decides fitness. Thus, an accused with current symptoms of mental illness might invoke Rule 135 to halt proceedings. Following Rule 135, the tribunal would then re-evaluate every 120 days or as it sees fit.<sup>10</sup>

### *Insanity*

The insanity defense under Rome Statute Article 31(1)(a) and diminished capacity defense under procedural Rule 145(2)(a)(i) are based on the accused’s state of mind at the time of the offense. A successful insanity defense excuses an accused’s actions, removing criminal liability.

The American Law Institute, through the Model Penal Code (MPC), has articulated a standard for

the insanity defense. Section 4.01 reads: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.” (Ref. 11, S6). The guidelines on the insanity defense of the American Academy of Psychiatry and Law (AAPL) discuss insanity tests such as the MPC standard and the M’Naughten rule.<sup>11</sup>

At the ICC, the Rome Statute Article 31(1)(a) incorporates an insanity defense similar to the Model Penal Code: “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” (Ref. 1, Art. 31(1)(a)).

As will be discussed below, while the framework is similar to the Model Penal Code, the standard is made stricter by requiring destruction of capacity rather than substantial impairment.

### **Diminished Capacity**

A second defense theory based on mental health at the time of the act is that of diminished capacity. A diminished capacity defense does not fully abrogate criminal liability. Instead, a successful diminished capacity defense could reduce the seriousness of a charge.

Sparr discussed several modalities of diminished capacity defense, as well as their application in international criminal law.<sup>12</sup> Among these are an English diminished responsibility model that provides relief from mandatory sentencing in homicide cases, the *mens rea* model that has been followed in the United States, and a partial responsibility variant followed in some European countries. On the transnational level, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has determined diminished capacity to be a sentence mitigation, writing that a “defendant’s diminished mental responsibility is relevant to the sentence to be imposed and is not a defense leading to an acquittal in the true sense” (Ref. 13, para 590).

Likewise, ICC Rule of Procedure and Evidence 145(2)(a)(i) provides that, during sentencing, the tribunal shall consider mitigating evidence of “substantially diminished mental capacity.” In prior case law,

the ICC has required that the accused prove mitigating circumstance on “balance of probabilities” (also known as preponderance of the evidence).<sup>14</sup>

### **Sentence Mitigation**

Finally, an accused who is convicted may request that present-day mental health be considered as a mitigating factor in sentencing. The ICTY has found that poor health is mitigating only in “exceptional cases.”<sup>15</sup> There is no specific rule of the Rome Statute or ICC Rules of Procedure and Evidence providing for mitigation based on current mental health of the convicted person. Nonetheless, it may be possible to argue that poor mental health warrants mitigation under the general provision of Rule of Procedure and Evidence 145(2)(a) that requires the court to consider mitigating circumstances in determining a sentence.

### **Duress**

While not necessarily tied to mental health, the defense of duress can be influenced by psychiatric morbidity. In international law, duress was recognized in post-World War II tribunals. One case stated “[n]o court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever” (Ref. 16, p 91). Later, however, the ICTY held in the *Erdemovic* case that duress could not serve as a complete defense to certain war crimes.<sup>17</sup>

The Rome Statute incorporates a duress defense where the accused’s conduct was: “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” (Ref. 1, Art. 31(1)(d)).

The basic elements of the duress defense at the ICC are, therefore, acting under imminent threat, taking necessary and reasonable steps to avoid that threat, and not intending to cause a greater harm than the one sought to be avoided.

Though not necessarily an element of duress, mental health evidence might inform a court’s application of the law. Feelings of duress, the accused’s understanding of imminence and capacity to pursue reasonable alternatives, and intent to cause harm could all be influenced by mental illness. Additionally, as discussed below, an accused might argue for a

cumulative effect of mental health and duress conditions.

## Ongwen Trial Summary

### ICC Proceedings against Dominic Ongwen

Uganda ratified the Rome Statute in 2002 and referred the situation to the ICC in 2003. In July 2004 the Office of Prosecutor began investigating the Uganda situation and in 2005 issued a warrant of arrest for five individuals associated with the LRA: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen.<sup>18</sup>

Mr. Ongwen was taken into custody in 2015 and transferred to the ICC's location in the Hague, Netherlands. In March 2016, the court confirmed 70 charges against him. These charges included attacks on civilians (including murder and torture), enslavement, and sexual and gender crimes (such as forced marriage and sex). The charged period ranged from July 1, 2002 to December 31, 2005.<sup>19</sup>

### Overview and Competency Arguments

Mr. Ongwen's trial commenced in The Hague on December 6, 2016. A number of experts and witnesses were called: 109 by the prosecution, 63 by the defense, and 7 for the victims. Closing arguments took place in March 2020, and the verdict (discussed below) was delivered on February 4, 2021.<sup>18</sup>

On December 5, 2016 (the day before the start of the trial), the defense requested a psychiatric examination per ICC Rule of Procedure and Evidence 135 to determine if Mr. Ongwen was mentally fit to stand trial. After oral argument, the court denied this motion but, in a later written ruling, appointed Dutch psychiatrist, Dr. Joop de Jong, to perform a mental health assessment limited to current mental state and treatment to address then-existing psychiatric illness.<sup>20</sup> In its ruling from the bench, the court noted that Mr. Ongwen's earlier statements in the pretrial phase indicated his understanding of the charges.<sup>21</sup>

In his January 2017 assessment, Dr. de Jong diagnosed Mr. Ongwen with posttraumatic stress disorder (PTSD), depression, and unspecified dissociative disorder. Given that this examination was limited to current mental state, the ICC tribunal did not consider this evidence as part of the insanity case discussed below (Ref. 22, paras 2576-2578).

The defense attempted twice more to compel a Rule 135 examination of competency. Both these

requests, in January 2019<sup>23</sup> and September 2019,<sup>24</sup> were rejected for lack of new evidence. The court remained satisfied with its initial appraisal of Mr. Ongwen's mental capacity.

### Raising Defenses of Insanity and Duress

In August 2016, the defense team gave notice that it would be pursuing an insanity defense under Art. 31(a) of the Rome Statute and a duress defense under Art. 31(1)(d).<sup>25</sup> Each is discussed separately below. In January 2019, the defense asked the ICC to clarify who bears the burden of proof, and to what level, when an insanity defense is raised.<sup>26</sup> The ICC's response to that motion did not explicitly delineate the burden of proof in Art. 31(1)(a) insanity defenses. Rather, the court reiterated the rule that "the facts which are indispensable for entering a conviction must be established beyond reasonable doubt by the Prosecution" (Ref. 27, para 13; internal quotes omitted).

### Defense's Insanity Case

The defense team based their case on several mental health reports prepared by Ugandan mental health experts, Drs. Dickens Akena and Emilio Ovuga. Dr. Akena graduated from medical school in 2003 and also has a doctorate in psychometrics (Ref. 28, p 16). Dr. Ovuga graduated from medical school in 1976 and testified that he had been doing forensic work since 1981 (Ref. 29, pp 9, 14).

They jointly prepared two formal reports (as to Mr. Ongwen's mental state during the period in question) as well as two ancillary reports. They both offered live testimony in November 2019. The first formal report, undated but produced after November 2016, offered diagnoses of "depressive illness, posttraumatic stress disorder (PTSD), and dissociative disorder." The first report also opined that Mr. Ongwen was not criminally responsible for his actions and offered treatment recommendations (Ref. 22, para 2524).

The second report was based on interviews. This report presented diagnoses of "Dissociative Identity Disorder (Multiple episodes)," "Dissociative Amnesia," "Posttraumatic Stress Disorder;" "Depressive Disorder," and "Symptoms of Obsessive Compulsive Disorder." The second report also offered treatment recommendations (Ref. 22, para 2526).

During closing arguments, defense counsel emphasized dissociation, arguing that in such a state it is difficult to distinguish right from wrong (Ref. 30, pp 72-

73). This assertion was supported by Dr. Ovuga's testimony that there were two personalities, "Dominic A" and "Dominic B." (Ref. 29, p 42). Dr. Ovuga testified that these dissociative states affected Mr. Ongwen's ability to tell right from wrong (Ref. 29, p 39).

There were two other reports that were not prepared for the purpose of a mental health defense. The first of these was done in February 2016, for the ostensible purpose of getting Mr. Ongwen treatment. The second ancillary report was done in January 2019, with the purpose of understanding his mental state and ability to stand trial (Ref. 22, para 2526).

### **Prosecution Response to Insanity Defense**

The prosecution addressed the Article 31(1)(a) defense with three witnesses of its own. Their contributions, particularly as they were found persuasive by the tribunal, are summarized below.

Professor Gillian Mezey, who teaches forensic psychiatry in the United Kingdom, prepared a report and testified for the prosecution. She was not allowed to interview Mr. Ongwen herself because he refused to see any prosecution mental health expert. She had the defense experts' reports and the report of Dr. de Joop. Of note, Professor Mezey's report opined that "severe and incapacitating mental disorders would have been incompatible with Mr. Ongwen not only functioning adequately, but actively thriving within the LRA for over twenty years" (Ref. 22, para 2473). Moreover, she wrote that he did not meet diagnostic criteria for PTSD, depressive disorder, or dissociative disorder; though he did have mild depressive symptoms while incarcerated (Ref. 22, paras 2470-2478).

A Ugandan psychiatrist, Dr. Catherine Abbo concluded in her written report that Mr. Ongwen attained a high level of moral development. She did not interview him. During her in-court testimony, Dr. Abbo noted that severe dissociative disorder would be apparent to a layperson. She also testified that dissociative PTSD would be incongruent with premeditated action, implying that Mr. Ongwen did not have this condition (Ref. 22, paras 2479-2485). She noted that Mr. Ongwen's promotions within the LRA buffered his early life trauma, and that he was motivated by his "existential situation rather than terms of mental illness" (Ref. 31, p 21). Professor Roland Weiserstall-Pust, a clinical psychologist based in Germany, prepared a written report, testified before

the court, prepared a rebuttal report, and testified in rebuttal following the defense experts. He too did not interview Mr. Ongwen. Professor Weiserstall-Pust wrote that there was no convincing evidence that Mr. Ongwen had mental illness from 2002 to 2005, noting that his functional level was not severely impaired.

Furthermore, he testified that PTSD would likely impair the ability to fight: "he will make mistakes, he will suffer from hyperarousal, which means that he is not able to follow orders . . . he is not even able to control a weapon when you have a shaking hand." This characterization was contrasted with Mr. Ongwen's good performance as a fighter and his ascension in the LRA's ranks (Ref. 22, paras 2486-2496).

### **Prosecution Closing Statement**

According to the prosecution, Mr. Ongwen was rationally motivated by the benefits he received as he rose in rank. This included admiration of his superiors, respect from subordinates, a relatively better life, including greater physical and food security, and women and girls to have sex with and to perform household chores (Ref. 32, para 477). Mr. Ongwen sought to hide his crimes with "excuses of mental illness and duress which have been exposed as false" (Ref. 32, para 524). While acknowledging that Mr. Ongwen was a victim, the prosecution stated that he is not "relieved of responsibility" (Ref. 33, p 13).

### **Verdict and Rejection of Insanity Defense**

On February 4, 2021, the ICC trial chamber found Mr. Ongwen guilty of most charges, with acquittals for eight of the 70 counts. In its 1077-page decision,<sup>22</sup> the ICC also rejected the insanity defense raised under Article 31(1)(a) of the Rome Statute. The court did not reach the question of whether his capacity was destroyed by mental illness, because "Dominic Ongwen did not suffer from a mental disease or defect at the time of the conduct relevant under the charges" (Ref. 22, para 2580).

The ICC rejected the defense's claim that Mr. Ongwen was experiencing mental illness when he committed his offenses. In particular, the court found the prosecution's three mental health witnesses persuasive in their finding that Mr. Ongwen did not show signs of severe mental illness during the charged period 2002 to 2005. The court acknowledged that prosecution experts did not interview the accused but

pivoted to discussing the importance of collateral material (Ref. 22, paras 2546-47).

The court gave great weight to collateral evidence presented at trial, none of which pointed to illness during the charged period. Witnesses testified to Mr. Ongwen's apparently congenial disposition, and the court noted that "the large number of witnesses" did not provide testimony supporting a claim of mental illness (Ref. 22, paras 2519-2520). Addressing the likely premeditation necessary to enact large scale crimes, the court cited Professor Mezey, who called planned military action "highly unlikely to represent the sort of automatic motiveless actions that are typically associated with a dissociative state or other severe mental health conditions" (Ref. 22, para 2521).

Conversely, the defense experts' testimony and reports did not outweigh the collateral material and prosecution witnesses' testimony. The court identified aspects of the defense's insanity case that it found problematic, including conflict between defense experts' role both as assessor and providing treatment recommendations (Ref. 22, para 2531) and the validity of defense experts' methodology (Ref. 22, para 2532).

### **Defense's Duress Case**

In parallel to the Art. 31(1)(a) insanity defense, Mr. Ongwen's team presented a duress defense based on Mr. Kony's control over him, arguing that disobeying him or leaving the LRA would be punished by death (Ref. 34, p 182). The defense also argued that spiritual beliefs that Mr. Kony could read minds and predict the future fueled a sense of imminency regarding Mr. Kony's threat to Mr. Ongwen and LRA members (Ref. 34, p 186).

Additionally, the defense argued that a "cumulative effect" of both insanity and the "extensive threats and coercion" Mr. Ongwen faced while in the LRA (Ref. 34, p 196) also warranted consideration. Without specifying the legal basis for this combined defense, Mr. Ongwen's team argued for acquittal based on any one or more of insanity, duress, or "combined mental illness and duress" (Ref. 34, p 197).

### **Rejection of Duress and Cumulative Defense**

As it did with the insanity defense, the ICC's Trial Chamber rejected Mr. Ongwen's duress defense. The chamber found that he had not satisfied the first element of such a defense, proving that his conduct was caused by duress resulting from threat of imminent

death or of continuing or imminent serious bodily harm (Ref. 22, p 910).

The court cited testimony that other brigade commanders defied orders without punishment (Ref. 22, p 914). There were also examples of commanders who were executed, but without proof that it was due to disobedience (Ref. 22, p 920). The ICC also pointed out an example where Mr. Ongwen defied Mr. Kony by taking for himself a woman whom Mr. Kony wanted as his own. He was not beaten for this (Ref. 22, p 915).

Moreover, the ICC also noted that Mr. Ongwen could have escaped, which argues against the claim of imminent threat. The court cited examples of others who escaped, and that Mr. Ongwen himself had once been arrested for attempted escape yet was promoted later the same year (Ref. 22, p 922). The court also cited testimony showing that some members of LRA did not believe that Mr. Kony had spiritual powers that made him more fearsome (Ref. 22, p 933).

Finally, the court also rejected the cumulative effect of insanity and duress proposed by the defense. The ICC noted that these two defenses are in fact contradictory: insanity requires a lack of capacity, whereas duress presupposes having capacity to make decisions (Ref. 22, p 937).

### **Sentencing**

The ICC issued its sentencing decision on May 6, 2021, with a total period of imprisonment of 25 years.<sup>35</sup> Addressing a defense request for sentencing mitigation based on diminished capacity under Rule 145(2)(a)(i), the tribunal reiterated its opinion that "Dominic Ongwen did not suffer from a mental disease or defect. The evidence indicates that he was in full possession of his mental faculties and exercised his role as commander effectively" (Ref. 35, para 100).

Furthermore, the court rejected the idea of mitigating Mr. Ongwen's sentence based on current mental illness. Mitigation due to current health concerns, should be reserved for "exceptional cases" in the court's view (Ref. 35, para 103). The ICC noted that Mr. Ongwen was able to testify lucidly for an hour and 45 minutes, and that he preferred his confinement to the bush and the LRA (Ref. 35, para 104).

Finally, the Chamber reiterated the factual finding that there was no basis in the evidence to hold that Mr. Ongwen was subjected to the threat of

imminent death or imminent serious bodily harm. Thus, sentence mitigation for duress was not warranted (Ref. 35, p 42).

## Discussion of Defense Challenges

There are a number of obstacles to successfully implementing a mental health defense. These can be classified as legal or political, and are inherent to the evolving field of international forensic practice.

### Legal Challenges

#### *A High Bar to Prove Insanity*

The text of the Rome Statute's Article 31(1)(a) sets a high bar for the insanity defense by requiring that mental illness "destroys" the capacity of defendants to either appreciate unlawfulness or conform their actions to the law. This contrasts with the American Model Penal Code's insanity defense, which uses the more flexible term "lacks substantial capacity."

In terms of a continuum of psychiatric dysfunction, destruction would indicate a high level of dysfunction. Psychotic, manic, and dissociative states might suffice, as they can grossly distort perceived experience. It would be harder to argue that depression, anxiety, OCD, or PTSD could destroy one's capacity. While they can affect judgment they generally leave overall reality appreciation intact.

Substantial capacity, on the other hand, could be interpreted more liberally. Since the level of impairment is not specifically stated, this could be any mental illness that affects judgment. The level of departure from a norm is not defined, so one might argue that any mood or thought disorder that affects judgment might form the basis for a defense under the Model Penal Code.

Tobin notes this textual hurdle to proving insanity under the Rome Statute. "According to the defense lawyer, Erskine, using the total loss of mental faculties to have an insanity defense considered would make it almost impossible for anyone to be found insane" (Ref. 36, p 17). Though *Ongwen* is the first case to invoke an insanity defense, the ICC did not rule on the capacity question. Instead, the court found that Mr. Ongwen did not have a mental illness,<sup>22</sup> and so it did not need to decide whether his capacity was destroyed by his alleged dissociations into two personalities. Should this question be decided, however, the bar will likely be high for the accused.

#### *Proving Duress is Also Difficult*

The text of the Rome Statute's duress defense also sets a high bar for the accused. First, Art. 31(1)(d) requires that the threat be imminent. This alone was the grounds on which the ICC rejected Mr. Ongwen's duress claim, without considering other elements. Other requirements include showing both reasonable attempts to avoid the threat as well as proportionality between the threatened harm to the accused and the intended results of the accused's actions.

With regard to the proportionality rule, Risacher points out that the Rome Statute's definition of duress appears to mix the subjective element of duress (the accused's feelings) with the balance-of-harms tests traditionally required by the separate defense of necessity, where the accused's emotional state is less material.<sup>37</sup> In the Model Penal Code, the duress condition is more lenient and requires that "the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist" (Ref. 37, p 1410).

Unlike the Rome Statute, the MPC duress defense does not require the threat to be imminent, does not impose a proportionality requirement, and does not mandate reasonable steps to avoid the threat.

#### *Lack of a Mixed Insanity-Duress Defense*

There is also potential unfairness in disallowing a psychiatrically-informed duress defense. Although the *Ongwen* trial decision rejected a cumulative defense integrating mental health and duress, the two can be intertwined, especially regarding subjective elements of the duress defense.

For example, PTSD might create a state of hypervigilance that amplifies the imminency of a threat that others might find less imminent. For example, Derluyn *et al.* found clinically elevated scores for intrusion, avoidance, and hyperarousal in former child soldiers from Uganda.<sup>38</sup> Hecker *et al.* found a correlation between appetitive aggression and joining a militant group as a child soldier.<sup>39</sup>

Therefore, autonomic hyperactivation could disrupt the higher-level reasoning required by Article 31(1)(d). An accused in a fight-or-flight state, caused or exacerbated by mental illness, would presumably have a hard time performing cold calculations of

proportionality and exploring alternative courses of conduct. Mr. Ongwen may have been in such a situation, with a history of trauma (as a former child soldier) but without symptoms rising to the level of insanity. He may have been unable to rationally consider elements like imminency and alternatives but maintained enough lucidity to not qualify for the insanity defense. For such defendants, it may be perceived as unfair to leave them without a defense that acknowledges trauma and subsequent psychiatric dysfunction that falls into this gray zone. Mr. Ongwen's proposed cumulative defense might have addressed this apparent gap but was not given serious consideration by the ICC.

One possibility in addressing this apparent deficit would be what Sparr refers to as the "partial responsibility variant" of the diminished capacity defense (Ref. 12, p 66). By reducing but not eliminating liability, this recognized defense would allow for a middle ground between exoneration and ignoring trauma. Another approach would involve recognition that early life trauma (e.g., Mr. Ongwen's forced service as a child soldier) can cause persistent biological and psychological abnormalities.<sup>47</sup> The ICC, with its binary view of mental illness, did not consider these sequelae, which might support the mental health defenses described above.

#### *Burdens of Proof Remain Unclear*

Additionally, the ICC did not decide the burden of proof in insanity and duress defenses, leaving defendants "in the dark."<sup>40</sup> While the *Ongwen* judgment states the prosecution must prove guilt beyond a reasonable doubt,<sup>22</sup> this does not specify whether this includes rebutting an affirmative defense of insanity or duress. This contrasts to the ICTY, where the appeal chamber has stated (albeit in *dicta*), that the "defendant bears the onus" of establishing insanity by a preponderance of the evidence ("more probably than not") (Ref. 13, para 582). In cases of diminished capacity, where the accused seeks a reduced charge (but may still be found guilty), the burden of proof at the ICTY remains on the accused (Ref. 13, para 590).

In U.S. jurisdictions, on the other hand, the burden of proof may fall on the prosecution after the accused has raised insanity or duress. For example, in the state of Massachusetts, the prosecution must prove, beyond a reasonable doubt, that an accused is not insane.<sup>41</sup> Massachusetts likewise puts the burden of proof in duress cases on the government, requiring

proof beyond a reasonable doubt that the offense was not committed under duress.<sup>42</sup>

Because *Ongwen* did not clarify the legal mechanics of an insanity or duress defense at the ICC, defendants find themselves at strategic disadvantage. For example, when the burden of disproving insanity or duress is on the state, a defense team may allocate more of their resources to that defense, which is more likely to succeed. But if the burden of proof is with the accused, then the defense may reallocate their resources to alternate theories. And if the defense seriously pursues an insanity or duress defense, they do so while understanding the obstacles.

#### **The Political Challenge of Skepticism**

Underlying the legal barriers to raising an insanity defense at the ICC is the political context disfavoring mental health defenses. As described by Xavier, the insanity defense in Art. 31(1)(a) did not receive great attention during the drafting of the Rome Statute; the insanity text went substantively unchanged during drafting.<sup>43</sup> The relatively little attention paid to the insanity defense during drafting is reflected in the text's sparse treatment of the topic. Tobin commented: "[t]he parsimonious approach of Article 31(1)(a) of the ICC Statute is as close as can be got to a total rejection of an insanity defense" (Ref. 36, p 121). He further theorizes that this rejection of the legitimacy of the insanity defense is meant to avoid a situation where it is "perceived that the defendant has in some way duped the court" (Ref. 36, p 112). This circumstance, the product of international legal diplomacy, thus represents a policy choice that prioritizes punishment over potentially extenuating circumstances.

A similar political current disfavoring the insanity defense can be seen in American law. In 1982, John Hinckley, Jr. was found not guilty by reason of insanity after attempting to assassinate President Ronald Reagan.<sup>44</sup> Two years later, the Insanity Defense Reform Act of 1984 added a requirement that mental illness be severe, shifted the burden of proof to the accused, and eliminated the second Model Penal Code test (capacity to conform conduct to the law).<sup>45</sup>

#### **Challenges in International Forensic Work**

Finally, preparing forensic mental health evaluations for international tribunals raises a set of challenges unique to the war crimes context. For one, gathering collateral may be complicated and involve hundreds of witnesses. Moreover, these witnesses

may speak different languages or be located remotely in rural areas underserved by infrastructure and telecommunication resources. These factors can complicate the expert's efforts to collect collateral information.

Also, experts trained in different jurisdictions may adhere to different professional guidelines. An example would be whether treatment recommendations should be part of such an evaluation. The American Academy of Psychiatry and the Law's Guidelines allow such recommendations, which may assist in prognosis.<sup>46</sup> But in this case, the ICC disagreed, stating that these recommendations were an indicator of bias to the court.

Additionally, one must consider ICC's relatively recent inception in 2002, with *Ongwen* in 2021 as the first insanity case to be decided. Thus, there does not yet exist a pool of forensic evaluators familiar with the court and its procedures. This is apparent regarding the subject of treatment recommendations: it is now clear that they are disfavored by the ICC. As long as mental health defenses remain relatively untested at the ICC, forensic experts may find themselves in uncharted territory.

## Conclusion

At this point, the ICC's approach to mental health defenses appears cautious if not skeptical. Defendants raising mental health defenses like insanity at the ICC face manifold challenges. These include the high bar set in the Rome Statute to prove insanity and duress, rejection of a trauma-informed combined mental health and duress defense, uncertain legal mechanics, a generally pervasive distaste for the insanity defense, and the particular challenges of international forensic evaluation.

International challenges may resolve to some extent with time as best practices and standards coalesce through practice and exposure to these challenging cases. There may be utility in promulgating guidelines for ICC forensic evaluations. This could be done by drafting anew or drawing from a preexisting set of guidelines for forensic evaluations, such as those created by the American Academy of Psychiatry and the Law.<sup>46</sup>

While legal and political challenges are largely outside the scope of the forensic practitioner's influence, awareness of this context may guide the evaluation process. For example, an evaluator might address to what extent, if any, mental illness affects the

accused's ability to judge right from wrong, with an estimated level of confidence. This would be important given that destruction of capacity, not merely impairment, is required to prove insanity at the ICC. Because the burden of proof is not clear, a confidence level can aid the court as legal standards evolve. Judges and legal teams can benefit from fine-tuned data, however the burden of proof is later defined.

Finally, forensic experts at the ICC may work with legal teams to advocate for a combined mental health and duress defense that reflects the complex interplay between psychiatric conditions and behavioral regulation. Psychiatric illness exists on a spectrum, and *Ongwen's* binary approach to mental illness (sick or not sick) is not well equipped to capture that nuance. The doctrine of diminished capacity may allow for better consideration of the uncertainties in victim perpetrator cases. It is hoped that the modest observations and suggestions offered here will provide some guidance for future work.

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