Cour
Pénale
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International
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Court

Original: ***English***

No.: ***ICC--02/04-01/15 A***
Date: **November 15th 2021**

THE APPEALS CHAMBER

Before: **JudgeLuz del Carmen Ibáñez Carranza, President**
Judge Piotr HofmańskiTitle
Judge Solomy Balungi BossaTitle
Judge Reine Alapini-GansouTitle
Judge Gocha LordkipanidzeTitle

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v.DOMINIC ONGWEN

Public Document

Request for leave to submit an amicus curiae pursuant to Role 103(1) on transcultural forensic psychiatric issues

Source: **Prof. dr. Mario H. Braakman, psychiatrist/ethnologist**

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

The Office of the Prosecutor
Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims
Mr Joseph Akwenyu Manoba

Legal Representatives of the Applicants
[1 name per team maximum]

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
[2 names maximum]

The Office of Public Counsel for the Defence
[2 names maximum]

States' Representatives

Amicus Curiae

REGISTRY

Registrar
M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

The Applicant, who is an expert in transcultural forensic psychiatry, requests leave to submit an amici curiae observation, Case number: No. ICC-02/04-01/15 A.

But first my particular expertise in the legal issues presented

My expertise is first of all that I am an experienced transcultural psychiatrist working since 25 years almost exclusively with refugees and migrants (diagnostic assessments and treatment). I have been the medical director of a highly specialized psychiatric clinic for (often traumatized) refugees (among them child soldiers) with severe mental disorders and for the last 12 years I conduct second opinions for colleagues who refer to me complex patients with a migratory background. I am the Editor-in-Chief of an international journal about mental health and ethnicity called World Cultural Psychiatry Research Review. I am respected by my international colleagues given the fact that I am the president-elect of the World Association of Cultural Psychiatry. I write psychiatric expert reports for Dutch courts and I was appointed professor of (transcultural) forensic psychiatry, Tilburg Law School at the University of Tilburg, the second best international law school of the world (Social Science Research Network Ranking, 2021) and #20worldwide in law (#1 in the Netherlands; Times Higher Education Ranking, 2022). I teach at master level and conduct research at the intersection of psychiatry and law.

The Applicant, who is an expert in transcultural forensic psychiatry, requests 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 ("the Rules") on:

1) the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility;
2) evidentiary issues relating to mental disease or defect;

Ad. 1) grounds for excluding criminal responsibility

Given the present formulation of article 31(1)(a) the court has two possibilities of innovative, and more present-day, legal interpretations:

1. It is up to the court to interpret the word 'destroy' not as complete annihilation but as 'severely damaged (and usually beyond repair)' thus the capacity to appreciate the unlawfulness or the capacity to control one's conduct is not totally eradicated but the destruction results only in partial dysfunction of this capacity thus opening the possibility of diminished responsibility. This opens the possibility of treatment or rehabilitation to prevent reoccurrence in combination with imprisonment or not.
2. Allowing diminished responsibility to be used in mitigation of a sentence. Thus criminal responsibility is not excluded but based on mental disorder leads to adjustment of the sentence[1]. The Appeal Chamber of the ICTY concluded this in the Celebici Case and the ICC could consider this as well[2].

Ad. 2) evidentiary issues relating to mental disease or defect

The conclusion of the Trial Chamber that at the time of the conduct relevant under the charges Mr Ongwen did not suffer from a mental disease or defect is not based on objective and scientific facts but possibly on biased opinions.

1. lay persons would be able to see symptoms of mental disorders

It is obvious for most psychiatrists that very few mental disorders are able to be recognized by lay persons (severe psychosis, mania). That observations made by lay persons is preferred by the Trial Chamber over the diagnosis

[1] Explaining its sentence, the Trial Chamber states the following: "While we have dismissed his defense of diminished responsibility, we have noted his young age at the relevant time and his impressionability and immaturity, as well as his particular personality traits and the effect that the armed conflict in his home town had upon him. It is these factors which have led us to impose a less severe sentence than the seriousness and cruelty of his crimes would ordinarily require (Tobin, 2007). https://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years

[2] 1994. International Criminal Tribunal for the Former Yugoslavia. Celebici Appeal Judgement, New York: United Nations. Para 590. Doc IT/32

made by professional psychiatrists is astonishing. Most disorders have signs and symptoms that need professional training to recognize them. Based purely on statistics it is very unlikely that the accused did **not** suffer from any mental disorder: Nine out of ten former child soldiers in Uganda suffer from depressed mood in adulthood. And that is just one of several possible mental health consequences. Research shows that child soldiers in adulthood suffer from a large array of symptoms and disorders not only depressed mood but also increased levels of aggression, learning difficulties, posttraumatic stress disorder and anti-social behaviour. The PTSD rate among those that had spent more than 1 month in captivity was measured at 48% and rose to 80% for those abducted for 6 months or more (Schauer & Elbert, 2010; Vinck, Pham, Stover, & Weinstein, 2007). Purely on statistical grounds it is highly unlikely that Mr. Ongwen did **not** suffer from mental disorders.

2. Impaired functioning

The Trial Chamber noted that many of Mr Ongwen's actions "involved careful planning of complex operations, which is incompatible with a mental disorder". It is quite offensive and stigmatizing to state that people with mental disorders are incapable of working or incapable of planning complex operations: most people with mental disorders are still working. Even severe mental disorders like schizophrenia or bipolar disorder are compatible with university professors earning Nobel prizes, and active members of parliament doing their jobs satisfactorily. Among people with PTSD the U.S. National Comorbidity Survey showed that PTSD leads to an average of 0.8 work loss days per month indicating that most people with PTSD can function normally. In a Dutch study among help seeking psychiatric outpatients with all kinds of mental disorders 68,1% were still working while 31,9% were unable to work at the time of the assessment. So indeed mental illness and functionality can co-exist in the majority of patients.

3. Lacking transcultural expertise

The cross-cultural assessment of mental disorder is complex and requires special tools and skills. The assertion made by Dr Akena that 'the core

symptoms of mental illnesses are similar across cultures'[3] is highly disputed in transcultural psychiatry: *Yet, there is little consensus on the extent to which psychiatric disorders or syndromes are universal or the extent to which they differ on their core definitions and constellation of symptoms, as influenced by cultural factors* (Canino & Alegría, 2008, p. 238). Psychiatric expertise should be based on scientific facts and not on personal opinions. Assessing mental disorder in persons with different cultural backgrounds requires specific expertise which seems to be lacking.

4. Personality disorder assessment

I did not come across an assessment of Mr Ongwen's personality. Being abducted at a very young age, traumatized, separated from his parents and grown up in an extremely violent and atypical environment of a religious group led by a messiah-like figure, and raised in a cultural environment that normalized war is highly likely leading to a developmental defect or personality derailment. Assessing personality in transcultural psychiatry is very complex and difficult and requires specific expertise since it is crucial to differentiate between aberrant thinking and conduct that is based on personality disorder or cultural aspects. The accused might not have been given the notions of right and wrong that prevail in most societies but internalized psychologically the aberrant values, norms, and, conscience of the prevailing culture around him. This could have destroyed the capacity to appreciate the unlawfulness or nature of his conduct.

Finally: In order to come to a more objective professional assessment of the accused state of mind during the alleged crimes it would be desirable to develop a professional mental health assessment team appointed by the ICC to avoid professional bias in case psychiatrists are selected by the defence or the prosecution. A team of psychiatrists/psychologist who to the best of their knowledge, selected on the basis of specific requirements and skills, issue a joint report and inform the court in a way that is as objective and scientific as possible, including uncertainties. In this way the court is much better served.

[3] Trial judgment feb 2021 IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN, ICC-02/04-01/15-1762-Red 04-02-2021 1/1077 NM T p. 871

References

(due to the limitation of 4 pages the references are minimal)

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Prof. Dr. Mario H. Braakman

Dated this November 15th 2021

At Tilburg, the Netherlands

At [place, country]