

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15 November 2021

THE APPEALS CHAMBER

Before:

Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
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 Document

Request for leave to submit *Amicus Curiae* observations on the merits of the legal questions presented in the "Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)" of 25 October 2021 (ICC-02/04-01/15A)

Source:

Dr. Ayodele Akenroye
Professor Erin Baines
Professor Kamari M. Clarke
Professor Mark A. Drumbl

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

Ms. Beth Lyons

Legal Representatives of the Victims

Mr. Joseph Akwenyu Manoba

Mr. Francisco Cox

Ms Paolina Massidda

REGISTRY

Registrar

Mr. Peter Lewis

I. Introduction

1. This is a request on behalf of Dr. Ayodele Akenroye, Professor Erin Baines, Professor Kamari Clarke, and Professor Mark A. Drumbl ("the applicants") for leave to submit observations to The Appeals Chamber of the International Criminal Court pursuant to paragraph 19 of the "*Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)*" of 25 October 2021.

II. Relevant Expertise

2. The applicants are all leading legal scholars with extensive experience as international law and criminal law advisors, with a combined international criminal law experience of more than 100 years. They all teach, publish, lecture, and consult in the fields of international criminal law ("ICL"), transitional justice with additional specialization on the socio-politics of daily life. each are widely published in ICL and these various areas of expertise.
3. Dr. Ayodele Akenroye is a Post-Doctoral Research Fellow and an Instructor in International Criminal Law at the Centre for Criminology and Socio-Legal Studies, the University of Toronto, Canada. He was also a Visiting Professional at the Office of the Prosecutor of the International Criminal Court where he provided subject matter expertise to the prosecution team prosecuting Dominic Ongwen. He also practised as a criminal defence lawyer in Canada representing individuals with varying degree of mental health disease and defect. He earned his doctorate in International Criminal Law from McGill University, Montreal, Canada.
4. Professor Erin Baines is an Associate Professor at the University of British Columbia, Vancouver, Canada, and the Ivan Head South-North Chair at the International Development Research Centre. Professor Baines is leading expert on issues relating to transitional justice, and the ways former combatants, survivors of sexual and gender-based violence and children 'born of war' remake and reimagine their worlds in the wash of war violence. Her article on *Complex Political Perpetrators: Reflections on Dominic Ongwen* *Journal of Modern African Studies*, 47:2 (2009), 163-191 is one of the leading authorities on the complexity of Dominic Ongwen's identity.
5. Professor Kamari M. Clarke is a Distinguished Professor at the University of Toronto, Canada in Criminology and Sociolegal Studies. For more than twenty years, she has conducted research on issues related to legal institutions, human rights, international law, and religious nationalism. She has served as a technical advisor to the African Union (AU) legal counsel and produced policy reports related to International Law in Africa. Professor Clarke has published nine books with over 50 peer-refereed journal articles and book chapters. Among her publications, is

Fictions of Justice (Cambridge, 2010) and Affective Justice: The International Criminal Court and the Pan-Africanist Pushback (2019, Duke) which won the 2019 Royal Anthropological Institute's Amaury Talbot Book Prize.

6. Professor Mark A. Drumbl is the Class of 1975 Alumni Professor at Washington and Lee University, School of Law, Lexington, Virginia USA. His work has been relied upon by the Supreme Court of Canada, the United Kingdom High Court, United States Federal Court, and the Supreme Court of New York in recent decisions. In 2012, he published *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press). This ground-breaking book challenges much of conventional wisdom when it comes to preventing child soldiering, meaningfully reintegrating child soldiers, and engaging with former child soldiers as vibrant contributors to post-conflict reconciliation.

III. Summary of the Arguments

'Cluster a' questions

1. Culpability is the degree by which a person can be held legally or morally responsible for their conduct. However, proving culpability in the context of a mental disorder or defect is not easy to do. And it is even more difficult to determine in the context of child soldiers in international criminal law for it raises many unanswered questions both legally and morally. While notions of reasonableness have been the standard for assessing the baseline of human behaviours, new findings have suggested that courts have encountered difficulties in determining reasonableness in certain situations, especially in cases involving mental illness for child soldiers.
2. Yet mental illness, while critical, is an understudied area in international criminal justice domains and how international law properly defines it for the purposes of mitigation or exculpation remains unresolved. The important questions laid out by the Appeals Chamber touch upon the need for the proper delineation and interplay between mental illness and criminal responsibility. This is especially the case for former child soldiers, which Dominic Ongwen typifies. It is a watershed moment for the Appeals Chamber to set the proper framework for adjudicating mental illness in the context of collectivized child abuse and trauma.
3. The proper recognition of mental illness defence by the Appeal Chambers can cascade into the development of more robust cultures of human rights and needs to better align international criminal law with general principles of domestic criminal law, as recognized with the community of nations pursuant to article 21(1)(c) of the Rome Statute.
4. The reading of article 31(1)(a) of the Rome Statute clearly excludes criminal responsibility for individuals suffering from mental disease or defect. Dominic Ongwen's case at the International

Criminal Court is the first test case to determine the parameters of article 31(1)(a) of the Rome Statute. As framed, article 31(1)(a) excuses individuals from criminal responsibility only in exceptional circumstances and is concerned with the impact of mental disorders or defects at the time of the offence. Certain legal requirements must be fulfilled before Article 31(1)(a) can be triggered. First, the individual must have been suffering from a mental disease or defect at the time he or she committed the offence. Second, the mental disease or defect must have had one of the two effects delineated in article 31(1)(a). The mental disease or defect must either have made the individual incapable of appreciating the nature and quality of his or her acts or made the individual incapable of knowing right from wrong. Where the accused person meets these exceptional criteria a verdict of not criminally responsible on account of mental disease or defect must be entered. Article 31(1)(a) signals the importance of autonomy and reason in the system of criminal responsibility.

5. However, considered carefully, the text of article 31(1)(a) may suggest some ambiguity that could lead to a misinterpretation of the defence of mental defect or disorder. First, it ignores the fact that within the mental disease spectrum, there are a variety of human personalities - normal and abnormal, with some being closer to, and others being further away from, the line of "normality" that must be determined.
6. Second, it does not specifically state if the issue of mental disease or defect should be treated as an excuse for a specific act or whether as a status that automatically exempts the individual from criminal responsibility.
7. Third, it seems to require an application of a more stringent test as it demands the *destruction* of the person's capacity to appreciate or control, whereas the M'Naghten Rules¹, where the defense of insanity originated in common law jurisdictions, only requires that the person is suffering from a certain mental condition that causes in a lack of insight into the criminal nature of his behaviour.
8. Fourth, it does not clearly define the impact of trauma on the cognitive development of former child soldiers in various conflict zones who were 'forcibly' abducted, or who 'willingly' joined armed militias or insurgent groups to later assume command positions as adults, that would eventually lead to committing the same international crimes of which they were once victims. Ordinary people in extraordinary circumstances can suffer mental disease or defect when committing heinous crime and there is an urgent need for the ICC to be consistent, predictable, and principled in assessing and determining the long-term effects of trauma on child soldiers as

¹ R v M'Naghten (1843) 8 E.R. 718; (1843) 10 Cl. & F. 200

articulated by the Trial and Appeal Chambers in the *Lubanga* case.

9. Overall, the definition of mental disease is broad and the inclusion of “mental defect” to article 31(1)(a) broadens the scope of possible relevant states of mind even further.² Article 31(1)(a) refers to the person’s ability to control his or her behaviour in order to comply with the law. Article 31(1)(a) conceptions are based on the core principles of reasonableness influenced by notions of mental capacity. This has not been sufficiently espoused by International Criminal Tribunals but loosely refers to as the ability to choose,³ non-performance of what a reasonable person would have done,⁴ and as the “freedom of will, mental capacity or knowledge of law.”⁵
10. Assessing mental defect or disease under article 31(1)(a) is fraught with evidentiary challenges especially on the proper allocation of the burden of proof when an accused raises the plea of mental disease or defect as well as the proper weight to apply to conflicting psychiatric evidence. Drawing lessons from common law jurisdictions, it is the person pleading mental defect or disorder that carries the burden of proof. It is incumbent on him or her to prove that he or she was suffering from a mental defect at the time of the commission of the crime under the balance of probabilities standard of proof.⁶ Placing the burden of proof on the accused is reasonable because he is best placed to justify his or her mental disease or defect. This approach was rightly taken by the ICTY in the Čelebići case⁷ and should be adopted by the ICC.
11. In conclusion, the assessment of article 31(1)(a) by the Appeal Chambers should be carefully conducted to exclude the influence of implicit bias and unconscious stereotyping in evidentiary analysis and assignment of probative value.



Dr. Ayodele Akenroye

on behalf of **Professor Erin Baines, Professor Kamari M. Clarke, and
Professor Mark A. Drumbl**

Dated this 15th day of November 2021

At Toronto, Ontario, Canada

² O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos Verlagsgesellschaft, 1999 at 546.

³ Knoops, G.J., *Defences in Contemporary International Criminal Law*, Transnational Publishers Inc., Ardsley, 2001, p. 62.

⁴ *Ibid* at p. 97

⁵ Bassiouni, M.C., *Introduction to International Criminal Law*, Transnational Publishers Inc., Ardsley, 2003, p. 281.

⁶ Law Commission, *Criminal Liability: Insanity and Automatism, A Discussion Paper*, 23 July 2013, London, p.5.

⁷ Prosecutor v. Delalic, Mucic, Delic, Landzo. U.N. Doc. IT-96-21-T, March 21, 1996