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**International
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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

Defence Response to the Prosecution's Motion to Strike, ICC-02/04-01/15-1959

Source: Defence for Dominic Ongwen

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

Karim A.A. Khan, QC, Prosecutor
Helen Brady

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoda
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Orchlon Narantsetseg
Caroline Walter

Registrar

Peter Lewis

Amici Curiae

Dr Mohammad Hadi Zakerhossein

Felicity Gerry QC, Wayne Jordash QC, Ben Douglass-Jones QC, Anna McNeil, Philippa Southwell, Dr Beatrice Krebs, Jennifer Keene-McCann

Dr Erin Baines, Anne-Marie de Brouwer, Annie Bunting, Eefje de Volder, Kathleen M. Maloney, Melanie O'Brien, Osai Ojigho, Valerie Oosterveld, Indira Rosental

Louise Arimatsu, Adejoké Babington-Ashaye, Kirsten Campbell, Danya Chaikel, Christine Chinkin, Carolyn Edgerton, Priya Gopalan, Gorana Mlinarević, Angela Mudukiti, Cynthia T. Tai

Sareta Ashraph, Stephanie Barbour, Kirsten Campbell, Alexandra Lily Kather, Jocelyn Getegen Kestenbaum, Maxine Marcus, Gorana Mlinarević, Valeria Oosterveld, Kathleen Roberts, Susana SáCouto, Jelja Sané, Hyunah Yang

Professor Jean Allain

Professor Dr Mario H. Braakman

Arpit Batra

Professor Bonita Meyersfeld and the Southern African Litigation Centre Trust

Amici Curiae (con't)

Mariana Ardila, Teresa Fernández-Paredes, Mariá Cecilia Ibáñez, Daniela Kravetz, Susana SáCouto, Dalila Seonae

Dr Rosemary Grey, Global Justice Center, Amnesty International, Women's Initiatives for Gender Justice

National Institute of Military Justice

Tina Minkowitz and Robert D. Fleischer

Public International Law & Policy Group

Justice Francis M. Ssekandi

Dr Erin Baines, Professor Kamari M. Clarke, Professor Mark A. Drumbl

Dr Paul Behrens

Association of Defence Counsel Practicing before the International Courts and Tribunals

UN Special Rapporteur Siobhán Mullally

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby opposes the Prosecution's *Motion to Strike Paragraphs 51-52 of the 'Defence Response to the Amici Curiae Observations'* (ICC-02/04-01/15-1950) ('Motion to Strike')¹ in the Defence Response to the *Amici Curiae* Observations, and associated Annexes B, E, F.

II. OBSERVATIONS

A. The Defence Observations in paragraphs 51 and 52, and Annexes B, E and F are neither unauthorized nor inappropriate

2. At the beginning of its Motion to Strike, the Prosecution, in paragraph 1, relies on the *Bemba* Summary Dismissal Decision to assert that the Defence Observations at paragraphs 51 and 52, and Annexes B, E and F are "unauthorized" submissions and should be dismissed.²
3. In *Bemba*, the Appeals Chamber disregarded the Prosecutor's Reply to the Legal Representative of Victims' observation on Mr Bemba's application to present additional evidence. This holding was based on the fact that the Prosecutor was using the Victim's observations as a way to oppose Mr Bemba's application.
4. In the *Bemba* case, the Appeals Chamber characterized the Prosecution's indirect reply to Mr Bemba's application through the Prosecution's reply to the victims as "unauthorized" and "inappropriate." In effect, the Prosecution was replying to Mr Bemba through a third party, the victims.
5. The Defence submits that the Prosecution's reliance on the *Bemba* Summary Dismissal Decision is misplaced because the situation of the Defence Observations is distinguished on the facts. Paragraphs 51 and 52 are not "unauthorized" or "inappropriate."
6. First, the paragraphs are part of the Defence Observations, pursuant to Rule 103(2), as requested by the Appeals Chamber in its Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, Doc **1914**, paragraph 22.³

¹ Appeals Chamber, *Motion to Strike Paragraphs 51-52 of the 'Defence Response to Amici Curiae Observations'* (ICC-02/04-01/15-1950), [ICC-02/04-01/15-1959](#).

² [Motion to strike](#), para. 1.

³ Appeals Chamber, *Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence*, [ICC-02/04-01/15-1914](#), para. 22.

7. Second, as discussed below, the paragraphs are direct Defence responses to issues raised in *Amici* briefs, Docs 1942, 1936 and 1930.

B. The Defence Observations, paragraphs 51-52, respond to issues raised in the *Amici Curiae* and are not “new” issues

8. The Prosecution claims that the *Amici Curiae* never addressed *Al Hassan* specifically, nor did the Defence make such a claim.⁴ The Defence concurs with this point. However, the *Al Hassan* report explicitly addressed the issue of culture and its impact on mental health assessment and evaluation by medical experts.⁵ This point was also raised in the *Amici Curiae* briefs discussed below. The *Al Hassan* report also reflected the professional approach and opinions of two of the Prosecution Experts in *Ongwen*, Dr Mezey and Professor Weierstall-Pust, on whom the Trial Chamber relied to reject the evidence of the Defence Experts, particularly based on their methodology.⁶
9. Thus, the Prosecution’s argument that paragraphs 51-52 are non-responsive to the *Amici Curiae* is erroneous. The Prosecution either misreads the *Amici Curiae* or fails to fully comprehend their substance. Whether or not a particular brief refers to *Al Hassan* or its case number is irrelevant.⁷ The issue is whether the principles and subject matter in *Al Hassan* are relevant to the *Amici Curiae*. The Defence’s answer is “yes.” Below, we discuss each of the briefs we used in this section, as well as Annexes B, E, F.⁸

C. The Braakman Brief – Doc 1942

10. There is no doubt, on its face, that the Braakman Brief addresses cultural issues and their impact on evaluations and assessments by psychiatrists. This is exactly the issue in the *Al Hassan* report – how does culture interact with, or impact mental health evaluations.
11. Professor Braakman titles his brief as *Submission of observations pursuant to rule 103 of the Rules of Procedure and Evidence, as amici curiae on transcultural forensic psychiatric issues*.⁹ He addresses the issue of the cultural background of psychiatrists at paragraph 4, page 5. He

⁴ [Motion to Strike](#), para. 2.

⁵ See Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), paras 51 and 52(f).

⁶ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), paras 2528-2574.

⁷ See, [Motion to Strike](#), para. 2, fn. 5 (“None of these submissions contains any reference either to “Al Hassan” or the *Al Hassan* case number”).

⁸ The Defence notes that in fn. 5, the Prosecution’s Motion to Strike, mentions three other briefs – Minkowitz *et al.* Brief [Doc 1930](#), Gerry *et al.* Brief, [Doc 1929](#), and ADC-ICT Brief, [Doc 1937](#). It is not evident what point the Prosecution is trying to make with these references. The Defence did not discuss any of them in the section dealing with culture and mental health. Hence, we do not discuss them in this reply.

⁹ Appeals Chamber, *Submission of observations pursuant to rule 103 of the Rules of Procedure and Evidence, as amici curiae on transcultural forensic psychiatric issues*, [ICC-02/04-01/15-1942](#).

further (incorrectly) criticizes the lack of cultural expertise of the Defence Experts, including relying on a quote taken out of context and misrepresented by the Trial Chamber¹⁰ from Professor Akena (Braakman, Section 2.3, pages 7-8). He again raises the issue of cross-cultural evaluation at Section 3.4, page 10.

12. It is erroneous to conclude that Professor Braakman does not address issues of culture and mental health, including the issue of the cultural background and expertise of the psychiatrist. This issue was also addressed by the *Al Hassan* Court and Registry in its selection of the third expert for the *Al Hassan* panel.¹¹
13. In summation, the Prosecution's argument that issues of culture and mental health are not addressed in the Braakman brief is unfounded.

D. The Clarke *et al.* Brief – Doc 1936

14. The Clarke *et al.* brief focuses, in part, on spiritualism, and its impact on the determination of mental health. In paragraph 16, it states, “[w]e submit that the LRA's coercion, conscious manipulation, and creation of new realities and their spiritual consequences destroyed Ongwen's capacity to develop an understanding of morality and criminality with a standard of mature ‘reasonableness.’” The role of “spiritual cosmologies” is detailed in paragraphs 27-31.
15. The *amicus* brief advocates for justice and legal frameworks based on cultures of juvenile rights and human rights.¹² Therefore, it is reasonable to conclude that religious and spiritual beliefs are part of culture, i.e. there is no bright line demarcating a boundary between religious or spiritual beliefs and culture.
16. The Defence submits that sections of the brief discuss aspects of culture which are significant to the *Ongwen* case. Thus, culture is also an issue which is found in the Clarke *et al.* brief.
17. It is simply disingenuous to claim that “nothing in the Defence submissions concerning *Al Hassan* is related to any observation made by the *amici curiae* and cannot properly be construed as a response.”¹³ The Braakman and Clarke *et al.* briefs are evidence that this is a fallacy.

E. The Ssekandi Brief – Doc 1926

18. The third brief discussed in this section of the Defence Response is Justice Ssekandi's Brief.

¹⁰ Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), paras 48-49.

¹¹ See, Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), fn. 93.

¹² [Doc 1936](#), paras 4, 17 and 42.

¹³ [Motion to Strike](#), para 2.

19. As the Legal Representatives of Victims point out,¹⁴ Justice Ssekandi states in his *amicus* brief that the “Prosecution vigorously cross-examined Professor Ovuga and Dr Akena as hostile witnesses...” In addition, he described the Prosecutor’s characterization of Professor Ovuga’s expert opinions as “nonsense.”¹⁵ This example in the *amicus* brief speaks to the issue of how expert psychiatrists for the Defence in the *Ongwen* case are regarded by the Prosecution. The Defence Response, para 52(e) discusses this issue in terms of Dr Mezey and Prof Weierstall-Pust.
20. Obviously, Justice Ssekandi does not mention Dr Mezey or Prof Weierstall-Pust. However, the Defence’s view is that the Prosecution’s cross-examination of the Defence Experts as “hostile witnesses” served to “set the tone” for the critique of Prof Weierstall-Pust in his rebuttal evidence, and for the Trial Chamber’s rejection of the Defence Experts’ evidence.

F. Public International Law and Policy Group (PILPG) Brief - Doc 1940

21. The *Amicus Curiae* of the PILPG, Doc 1940, raises the issue of the Trial Chamber’s holding on the unreliability of the Defence Experts. At paragraph 29, it states that, “[i]n relation to mental disease or defect, the ICC Trial Chamber gave clear reasons indicating why the evidence put forward by the Defence was unreliable.”¹⁶ The Defence disagrees and addresses this point in its response to *Amici* observations at para 64.¹⁷
22. One of the fundamental factors in the Trial Chamber’s analysis was that the Defence Experts’ methodology relied on an outdated system, using the DSM-IV rather than the DSM-5.¹⁸ This was based on Prof Weierstall-Pust’s critique.¹⁹ As noted in the Defence Appeal, the Trial Judgment misrepresented the Defence Experts’ evidence.²⁰ In fact, the Defence Experts stated that they reported findings according the DSM-5 diagnostic criteria, but used a format of multi-axial diagnoses from DSM-IV-TR.²¹
23. Hence, the references in the Defence Response on *Amici* Observations at paragraphs 51 and 52, especially footnote 96 on methodology (particularly the use of DSM-IV versus DSM-5) and its

¹⁴ Appeals Chamber, *Victims’ Observations on amici curiae submissions*, [ICC-02/04-01/15-1953](#), para. 37.

¹⁵ [Doc 1926](#), para. 21.

¹⁶ Appeals Chamber, *Amicus Curiae Observations by Public International Law & Policy Group*, [ICC-02/04-01/15-1940](#), para. 29.

¹⁷ Appeals Chamber, *Defence Response to the Amici Curiae Observations*, [ICC-02/04-01/15-1950](#), para. 64.

¹⁸ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), para. 2535.

¹⁹ Rebuttal Report, UGA-OTP-0287-0078, Section 2.4, p. 0084.

²⁰ Appeals Chamber, *Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”* filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, [ICC-02/04-01/15-1866-Red](#), paras 345-350.

²¹ Appeals Chamber, *Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”* filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, [ICC-02/04-01/15-1866-Red](#), paras 346-347 (with fns 387-389 to Second Psychiatric Report, UGA-D26-0015-0948).

detailed explanation about Prof Weierstall-Pust's *et al.* Burundi study, are a response to an issue raised by the *amicus*.

24. As indicated in footnote 96, Prof Weierstall-Pust failed to disclose that he was one of the authors of the Burundi Study (**Annex B**), which chose to use DSM-IV rather than DSM-5 to analyse its data and reach conclusions. The Burundi Study article was under review at the time of Prof Weierstall-Pust's Rebuttal Report and oral testimony in late November 2019.
25. The significance of this is that during the same time period that the Burundi Study was being considered for publication (between 19 August 2019 and its publication in 20 April 2020), Prof Weierstall-Pust presented evidence in the Rebuttal case (late November 2019) which criticized the Defence Experts' outdated system (which was not true) for choosing to use both the DSM-IV and DSM-5 for different purposes.
26. In addition, the initial data in the Burundi Study was collected at the time that the American Psychiatric Association had approved the DSM-5 through its internal processes, and the study's second data batch (from slightly less than 50% of total participants) was collected in 2014, well after the publication of the DSM-5 in 2013. The article was under review at the time of Prof Weierstall-Pust's Rebuttal Report and oral testimony.
27. In the simplest terms, Prof Weierstall-Pust and his colleagues were making the same choice as the Defence Experts: which system to use, DSM-IV or DSM-5. But, in contrast, the Defence Experts, who used the most current DSM-5 for diagnostic criteria – Prof Weierstall *et al.* chose to use DSM-IV, even though DSM-5 had been approved and then published while their data was being collected.
28. It appears that there was a double standard at play here in choosing DSM-IV or DSM-5: one for Prof Weierstall-Pust and his colleagues for the Burundi study, and the other for the Defence Experts. There are no apparent negative consequences in respect to the Burundi study, but the choice (and its misrepresentation by the Trial Chamber) prejudiced Mr Ongwen because it was one of the factors upon which the Chamber relied to reject the Defence Experts' evidence.
29. In summation, the use of DSM IV and DSM- 5 are not new issues in this case and the issue is raised in the *amicus* which accepts the Trial Chamber's findings on the unreliability of the Defence Experts' evidence.

G. The Annexes

30. The Defence notes that **Annex B** is discussed above.

31. As to **Annex E**, Prof Ardila's article on culture and psychometric testing directly addresses the issue of the use of psychometric testing and the impact of culture. This standardized testing was another criterion relied on by the Trial Chamber, using Prof Weierstall-Pust's evidence, to assess the Defence Experts' evidence and find it unreliable.²²
32. As to **Annex F**, Dr Aggarwal's article focuses on using theories from the field of cultural psychiatry to analyse the field trials for the DSM-5. Noting the commitment of the DSM-5 Task Force to cultural issues throughout the revision process, the article suggests that the DSM-5 Task Force could analyse racial and ethnic factors in assessing clinician-patient relationships and results in field trials. The Defence submits that this perspective highlights the impact of culture of mental health issues, and the issue of cultural psychiatry, which is discussed in the Braakman brief, Doc **1942**.
33. In summation, each of the annexes which the Prosecution wants to strike, in fact, directly address an issue which is raised in the *amici* briefs.

H. The Defence is not depriving the Prosecution or any participant of its opportunity to respond

34. The Defence rejects the Prosecution argument that it is depriving the Prosecution and participating victims an opportunity to respond to paragraphs 51-52, by the inclusion of these paragraphs in its Defence Response to *Amici* Observations.²³
35. The Defence rejects the characterization of paras 51 and 52 as "last minute, decontextualized allegations." First, the Burundi article has been available in the public space since its publication in April 2020. The Defence would assume that Prof Weierstall-Pust would have provided the Prosecution with a copy in the months prior to his rebuttal evidence: the article was received 27 August 2019, and Prof Weierstall Pust's rebuttal evidence was at the end of November, 2019.
36. Second, the *Al Hassan* Report, which was made public in March 2021, was dated 8 December 2020 (when it was prepared as a confidential report for the Court and provided to the Prosecution and the Defence). Thus, the Prosecution has had knowledge of the *Al Hassan* Report for almost 14 months and it should have known about the Burundi article for at least 17 months since it was first received by the publisher. The Prosecution's claim of "last minute" material, suggesting they are surprised by the material, is not supported. The material is clearly

²² For example see, Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#), paras 2560 and 2566.

²³ [Motion to Strike](#), para. 4.

not “new.” Whether and how the Prosecution analyses and evaluates material available to it is a separate question, and is a choice of the Prosecution. The Defence has no role in this matter.

37. The Defence submits that the jurisprudence in the *Ongwen* case will affect millions of child soldiers worldwide. Both the Defence and the Prosecution have an obligation to carefully scrutinize and verify the sources of evidence which are relied upon by the Trial Judgment in its findings. In respect to Prof Weierstall-Pust, the Prosecution could have done this also, relying on the *Al Hassan* Report and also the Burundi article. However, it did not. The Defence should not be criticized by the Prosecution because the Prosecution failed to do this.
38. The CLRV Response to the Prosecution’s Motion to Strike, Doc **1960**, agrees with the Prosecution’s premise that the Defence is depriving the CLRV of an opportunity to be heard.²⁴ In response, the Defence reiterates its arguments that the issues raised in its Defence Response to the *Amici Curiae* Observations, paragraphs 51 and 52, are not new and are found in Docs **1942**, **1930** and **1936**. As with the Prosecution, the material concerning the *Al Hassan* report was publicly available to the CLRV, as was the Burundi article authored by Prof Weierstall-Pust *et al.*
39. The CLRV appears to be asserting that the Defence is trying to undermine the principles of litigation by including paragraphs 51 and 52 and Annexes B, E and F.²⁵ The CLRV’s allegations are unfocussed and unfounded. The CLRV, for example, cites no authority that a party is barred from raising issues which “go beyond” its initial position, and fails to explain how time-limits and page-limits under Rule 150 are linked, if at all, to abuse of the Court’s due process.²⁶
40. Paragraphs 6 and 7 of the CLRV Response to the Prosecution’s Motion to Strike are predicated on the Defence raising “new” issues or arguments. As discussed above, none of the issues in paragraphs 51-52 are “new” - they are based in the *Amici Curiae* as well as referenced in the Trial Chamber’s Judgment (which indicates that they were raised in evidence during trial and/or litigated below).

²⁴ Appeals Chamber CLRV Response to the Prosecution “Motion to Strike Paragraphs 51-52 of the ‘Defence Response to the *Amici Curiae* Observations’ ICC-02/04-01/15-1950” [sic], [ICC-02/04-01/15-1960](#), para. 3.

²⁵ *Ibid.*, para. 5.

²⁶ *Ibid.*

III. CONCLUSION

41. Implicit in the Prosecution's Motion is that the impact of culture on mental health, including as evidenced by the *Al Hassan* Report, is irrelevant to the *Amici Curiae*. The Defence disagrees with this. A review of the *Amici Curiae* discussed above refutes this proposition. For these reasons, the Prosecution's Motion to Strike should be denied.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 26th day of January, 2022

At Kampala, Uganda