

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15 A
Date: December 23th 2021

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, President
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

Submission of observations pursuant to rule 103 of the Rules of Procedure and Evidence, as amici curiae 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:

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
Section**

Other

**The Applicant, who is an expert in transcultural forensic psychiatry,
submits an amici curiae observation
in the case of THE PROSECUTOR v. DOMINIC ONGWEN,**

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

on the following:

- 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;

Introduction

It is NOT my intention to take a stance in favor of the defendant or the prosecutor. That is not my responsibility nor is it of any importance. What I want to do is to stress the importance of an independent psychiatric assessment in order to enable the court to make better and more informed decisions. Psychiatry should and can serve the judges who have to make decisions. To achieve this impartiality and integrity are essential requirements for psychiatrists. My goal is to further enhance the quality and high standards of international criminal law by making a modest contribution to the improvement of the evaluation of mental aspects that can sometimes play a role in court cases like the one we are dealing with now. It will also contribute to the fairness of the trial. I thank the present chamber of appeal for their interest in the mental aspects of the accused and I hope that I can make a small contribution to this.

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. It opens the possibility of a third possibility next to accountable or unaccountable, and that is: partial accountability. This opens the possibility of treatment or rehabilitation to prevent reoccurrence in combination with (reduced) 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 sentence¹. The Appeal Chamber of the ICTY concluded this in the Celebici Case and the ICC could consider this as well².

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

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. Establishing a psychiatric diagnosis is a highly complex endeavour:

1. It requires specific and professional knowledge regarding the question whether the patient experiences specific symptoms or exhibits specific signs.
2. Contrary to all other medical specialties the diagnosis is not a discovery of a given disorder that is present below the surface and waiting to be uncovered with the suitable diagnostic procedures. Psychiatric diagnosis is not a discovery but a construction, based on facts, but always lends itself for multiple interpretations and there is room for (small) differences of opinion on what is the heart of the matter.
3. Psychiatric assessment does not only include signs and symptoms of the person but also takes into account the extensive and complex social context of a patient with ample of room for potential focusses and biases.

What makes it even more complex in the case of mr Ongwen are two additional points:

4. The psychiatric assessment is a transcultural assessment since the cultural context of western based psychiatry and the cultural background of the psychiatrists involved in the assessment of mr Ongwen are different from the cultural background of mr Ongwen. Culture has a very strong influence on signs, symptoms and diagnoses. So special cross-cultural techniques and skills are required to take into account and evaluate the specific ethnic peculiarities in mr Ongwen's life and exploring the differences between pathological features of the individual versus normal or very unusual cultural

aspects of mr Ongwen's specific cultural context in which he was raised and in which he operates.

5. Due to the specific requirements in forensic psychiatry the assessment is not about the present condition of the accused but is a retrospective undertaking, since what matters is the state of mind during the time in which the accused events took place.

These five points put strong requirements upon the psychiatrists who have the responsibility to assess mw Ongwen and write a report for the court concerning all necessary facts and conclusions.

Please allow me to sum up the observations I want to make concerning the case of the Prosecutor versus mr Ongwen:

2.1. 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 made by professional psychiatrists is astonishing. Most disorders have signs and symptoms that need professional training to recognize them.

As a layperson, at most in a very small minority of disorders (such as bipolar disorders or schizophrenia), people could notice some signs (abnormal speed of speech) or symptoms (bizarre thoughts) however the vast majority of psychiatric disorders cannot be noticed by laymen. Allowing arguments of this kind to make sense damages the credibility of the court since it is obvious to almost all psychiatrists that laymen cannot make such observations at all. A chamber of appeal that goes along with this and accepts this as true will give rise to having doubts about other parts of reasoning by the court and puts into question other decisions that are made. And that is highly undesirable.

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.

2.2. 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.

2.3. 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 & Alegria, 2008, p. 238). Psychiatric

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

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.

2.4. 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.

2.5. Additional diagnostic issues

Smaller diagnostic issues and differences between two or more psychiatrists could easily arise as we have seen. Reaching medical consensus is then what is required. In the present case we see that a group of psychiatrists reach several different diagnoses while another group does not see any diagnosis at all. This extreme difference of opinion is damaging to the psychiatric profession itself and lacks any kind of logic. It is not very helpful for lawyers who have to deal with these kind of extreme differences. A solution is presented below. In a lot of countries making diagnostic remarks, let alone conclusions, is forbidden in professional guidelines if a psychiatrist has not examined the patient. So it should not be allowed as evidence in court. The reason why I myself refrain from any diagnostic conclusion of the accused is precisely that I did not examine him.

3. Suggestions for a high(er) quality of psychiatric information

Allowing reports to be drawn up by psychiatrists for the benefit of the defense or the public Prosecutor results in various forms of bias and leads to at least two problems (3.1 and 3.2):

3.1. Half full or half empty?

The psychiatric picture of people is so complex that, depending on your position, you could claim as a psychiatrist of the defending party that a glass of water is half full and as psychiatrist engaged by the public Prosecutor that the glass is half empty. If you opt for this, very complex psychiatric considerations will not be solved medically but will be taken over by lawyers in court to look for solutions, while it should be a discussion between doctors and should be solved first. Of course, after that all parties in court will evaluate and criticize if necessary the obtained results but then the discussion will take place in a different legal discourse. As doctors, we must make the work of legal specialists easier and ensure the best possible translation of our psychiatric findings to them.

3.2. Policy of consulting psychiatrists should be changed

There will be a detrimental effect in new cases in which mental aspects could be relevant if the chamber of appeal allows psychiatrists to be engaged by the Prosecutor or by the Defence. Allowing the accused to refuse to cooperate with a psychiatric investigation initiated by the Prosecutor and to cooperate with an investigation initiated by the Defence will in the future lead to the situation that cooperation is always provided to the party that the Defence believes it can benefit from. If an impartial assessment of a team of psychiatrists is chosen, the situation is completely different: the defendant then has the choice to cooperate in a psychiatric investigation, independently of the Prosecutor or Defence, but the conclusion is as neutral as possible.

3.3. Team of several independent psychiatrists

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.

3.4. Cross-cultural re-evaluation of mental disorder and personality disorder

I could not establish a clear and state-of-the art use of transcultural psychiatric methods to obtain a psychiatric diagnosis of the defendant. In addition to that: It is evident that while his own situation as a former abductee was recognized, there was not a culture-sensitive detailed examination of his personality development and the impact it could have had on his subsequent way of thinking and behaving. I therefore would recommend a new expert assessment of the accused, preferably of course by using the method mentioned in 3.3.

3.5. Reducing danger

As a medical doctor it is not up to me to have an opinion as to what the reasons and effects of criminal law are like retaliation, doing justice, compensating victims or deterrence. However it is my duty to point the judges to an additional responsibility we all have and that is to reduce danger for the public. In Dutch law, like in several other countries, avoiding or reducing danger is an important aspect of criminal law. To be more precise: convicting someone to e.g. 25 years of imprisonment serves several goals but it is only a temporary measure to avert danger. After that period of 25 years someone who could still be very dangerous for the public is released, possibly without receiving treatment that could considerably

reduce the risk of recurrence and is aimed at successful reintegration into a healthy environment. I know that in this case the chamber of appeal is not in charge of amending legislation such as the Treaty of Rome but I would nevertheless like to point out to draw attention to this issue somewhere. Setting up a small specialized forensic psychiatric clinic for this target group could also be considered.

Disclaimer or limitations of this submission

I do not have access to all detailed information necessary in order to have a definite opinion on the mental aspects and the work of my colleagues. However the Appeals Chamber does have access to all the necessary (psychiatric) reports. So I leave it up to the judges to come to a more informed opinion themselves. I wish to thank the Appeals Chamber for granting me the opportunity to submit my observations.

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Dated this 23-12-2021

At Tilburg, the Netherlands

At [place, country]