

Mike Sullivan
4 Johnson Street
Onerahi
Whangarei 0110
New Zealand

22 February 2012

Sent by email otp.informationdesk@icc-cpi.int

OTP-CR-178/11

International Criminal Court

Office of the Prosecutor

Communications

Post Office Box 19519

2500 CM The Hague

The Netherlands

Dear Sirs,

ICC Reference OTP-CR-178/11: Crimes against humanity and genocide by the Government of New Zealand towards people with Down syndrome

We refer to our submission dated 29 June 2011 and our supplementary submission dated 25 October 2011. We would be grateful if you would please advise us of the status of your consideration of our submission, as we are very keen to have this matter resolved with increasing urgency.

We would also like to submit three additional items of evidence in support of our case for your consideration, as outlined below.

Status of the group of people with Down syndrome as a protected racial group

In our previous submissions we have outlined in detail our view as to why people with Down syndrome have protection as a racial group.

We wish to elaborate that it was in 1959 that Jérôme Lejeune's discovered that those people with Down syndrome possessed an extra 21st chromosome (Trisomy 21). Prior to this discovery, people with Down syndrome were considered to be a group of people identified by their racial characteristics, and were often referred to as "Mongols". As this discovery was some eleven years after the Genocide Convention was adopted in 1948, it is evident that people with Down syndrome were considered to be a racial group in the context of that convention.

This is eloquently summarised in [the review of Kieron Smith's book: "The Politics of Down Syndrome"](#):

"Consider the man from whom Down syndrome now takes its name: the British physician John Langdon Down. In the late 1850s, as a young superintendent at the Earlwood Asylum for Idiots, Down identified what we now know of as the physical manifestations of Down syndrome – the epicanthic folds on the eyes, the broad, flat face, and so on – with the racial characteristics of people from Mongolia. 'A very large number of congenital

idiots are typical Mongols', he wrote in his 1866 study, Observations on an Ethnic Classification of Idiots. 'So marked is this', he continued, 'that when placed side by side, it is difficult to believe that the specimens compared are not children of the same parents'.

That Down was willing to identify a congenital condition with race – to make, in effect, 'idiocy' a racial characteristic – was hardly a surprise. Down was writing in a period of imperial confidence abroad, and working-class agitation at home, in an era that was replete with spurious natural and biological justifications for social and political inequality. Yet his racial claims stuck. And for years, those with Down syndrome were known more often than not as 'mongols'.

Jérôme Lejeune's discovery in 1959 that those with Down syndrome were not in fact racially afflicted but rather possessed of an extra chromosome 21 (having three instead of two in each cell), did little to change matters. Throughout the 1960s and beyond, 'mongolian idiot', 'mongol' and 'mongolism' continued to be used as terms of classification, not to mention as terms of abuse. Incredibly, it took a complaint from the actual country of Mongolia in 1965 for the World Health Organisation to start officially phasing the terms out."

Kieron Smith goes on to state, in relation to the issue of Down syndrome as a “racial type”, on page 6 of his book:

“Generally this view continued well up until the Second World War when the Nazi's made such explicit generic racism unpalatable to intellectuals”.

The historic place of people with Down syndrome in relation to the Nazi atrocities has been comprehensively covered in our earlier submissions, and is not repeated here.

The above statements are provided to reinforce our view that people with Down syndrome were considered as a racial group at that point in history.

Lejeune's discovery of Trisomy 21 (Down syndrome) in 1959 was eleven years after the Genocide Convention was adopted in 1948. We consider that this provides historical proof that the group of people with Down syndrome were understood at the time of the Genocide Convention as being protected under the “racial group” category. From the 1860s to 1965 children with Down syndrome were subject to “racial” vilification in the very ignorant, but widely accepted, terms “mongoloid” and “mongols” that were so universally and cruelly misapplied to them.

New Zealand law provides for the prevention of births of people with Down syndrome

New Zealand law provides for the prevention of births of people with Down syndrome under [Section 187A of the Crimes Act 1961 \(no 43\)](#) through the use of disability selective abortion. Subsection (1)(aa) of Section 187A provides for abortion, in the case of a pregnancy of not more than 20 weeks' gestation, where “there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped”.

The above law was based on the view of the 1977 Royal Commission report on Contraception, Sterilisation and Abortion. Page 200 of the report deals with the issue of “handicapped” persons, stating:

(5) It is not immoral to terminate a pregnancy where the fetus is likely to be born with a severe physical or mental handicap, because the burden of the handicapped person to himself and to his parents may be greater than the sum total of their happiness.

(6) The termination of unborn life for reasons of social convenience is morally wrong.

Item (5) specifically included Down syndrome, which was discussed at length in the Commission’s report. We note the use of “fetus” in one case and “unborn life” in the other, which displays a clear discriminatory view towards the “handicapped”. We consider that the above statements are eugenic and are based in a view that people with handicaps have “life unworthy of life”.

It is clear that New Zealand law specifically provides for the prevention of births of people with Down syndrome, solely on the basis of their identification as having Down syndrome. As previously submitted, we consider that people with Down syndrome are protected as an identifiable group of people.

The [National Screening Unit process diagram](#) for genetic screening for Down syndrome shows that the screening programme is structured in a systematic way, such that a result is obtained before the 20 week legal cut off for foetal abnormality as a ground for an abortion. We consider that this clearly indicates that a purpose of screening is to prevent a birth of a child on the basis of their identification as having Down syndrome.

Admissibility

Additionally, Section 187A (1)(aa) of the Crimes Act 1961 (no 43) provides for a statutory defence under New Zealand law for the prevention of the births of people with Down syndrome. This reconfirms that we have exhausted domestic remedy, in relation to Article 17 of the Rome Statute.

We look forward to your consideration of these additional items and resolution of this crime against humanity.

Yours Sincerely,



Mike Sullivan
Group spokesman for submitters