

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 10 March 2021

**TRIAL CHAMBER IX**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Raul C. Pangalangan

**SITUATION IN UGANDA**

**IN THE CASE OF**

***THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

**Prosecution's response to the Defence request to  
submit additional evidence at sentencing**

**Source:** The Office of the Prosecutor

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

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**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The Office of the Prosecutor (“Prosecution”) hereby responds to the Defence’s request to submit additional evidence for the purpose of determining Mr Ongwen’s sentence (“Defence Request”).<sup>1</sup>

### **Evidence proposed for submission through the bar table**

2. The Prosecution does not object to submission through the bar table of items UGA-D26-0015-1722 and UGA-D26-0015-1723 and the related translations.

3. The Prosecution does not object to submission through the bar table of the statements of the Acholi Religious Leaders Peace Initiative, the Wang-oo Heritage of Acholi Elders, and Ker Kwaro Acholi. The Prosecution notes that information about Mr Ongwen’s alleged personal experiences in the LRA, included on the second page of the submission of the Wang-oo Heritage of Acholi Elders, appears to be hearsay or speculation, and its source is unclear. The Chamber should give little or no weight to those portions of that submission.

### **Evidence proposed for submission under rule 68(2)(b)**

4. The Prosecution does not object to submission under rule 68(2)(b) of the Rules of Procedure and Evidence (“the Rules”) of the statements of D-0008, D-0009, D-0161, D-0162, and D-0163.

5. The Defence proposes to submit further expert reports by D-0042 and D-0060 under rule 68(2)(b) of the Rules. The Prosecution recognises that the procedural requirements of rule 68 are not strictly applied at the sentencing phase, and the Chamber may consider any relevant information in determining the sentence.<sup>2</sup> However, both of these witnesses testified and submitted reports during trial, and good cause is therefore required to recall them at sentencing; namely, the proposed

<sup>1</sup> [ICC-02/04-01/15-1783-Red](#) (“Defence Request”); *see also* [ICC-02/04-01/15-1785](#).

<sup>2</sup> *See, e.g., Prosecutor v. Bemba et al.*, Decision on sentencing witness and setting an article 76(2) hearing, [ICC-01/05-01/13-2025](#), para. 6-7.

evidence must be of significant probative value and not of a cumulative nature.<sup>3</sup> The proposed evidence does not meet that standard.

#### D-0042

6. The proposed report of D-0042 is largely repetitive of the explanations and conclusions detailed at length in his four previous reports (prepared together with D-0041) and two days of trial testimony.<sup>4</sup> There is no indication that the new report is based on any new interactions with Mr Ongwen. Furthermore, the report reflects the same reliability issues articulated by the Chamber in the Trial Judgment,<sup>5</sup> particularly D-0042's lack of objectivity due to blurring the roles of treating physician and forensic expert,<sup>6</sup> and his failure to properly assess the possibility of malingering.<sup>7</sup> The Chamber declined to rely on D-0042's evidence when assessing Mr Ongwen's mental capacity for purposes of article 31(1)(a),<sup>8</sup> and there is no apparent reason why a report that largely covers the same ground using the same approach should be considered reliable for sentencing purposes. D-0042's suggestion that Mr Ongwen should undergo *mato oput*,<sup>9</sup> meanwhile, could have been made earlier and is a subject matter discussed more fully and authoritatively by D-0160. For all of these reasons, the Prosecution asks the Chamber to reject the new report and proposed testimony of D-0042, or alternatively to accept it under rule 68(2)(b) but give it little or no weight.

<sup>3</sup> *Prosecutor v. Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, [ICC-01/05-01/08-3384](#), para. 18.

<sup>4</sup> Compare [UGA-D26-0015-1878](#) with [UGA-D26-0015-0154](#) (9 Feb. 2016), [UGA-D26-0015-0004](#) (undated); [UGA-D26-0015-0948](#) (28 June 2018), and [UGA-D26-0015-1219-R01](#) (25 January 2019); D-0042, [T-0250](#); D-0042, [T-0251](#).

<sup>5</sup> These issues included: (1) a loss of objectivity due to their blurring of the roles of treating physician and forensic expert ([Trial Judgment](#), para. 2528-2531); (2) "major doubts" about the validity of the methods employed by the Defence experts ([Trial Judgment](#), para. 2535); (3) the "unexplained contradictions" in the "various statements and observations made, or between such statements and observations and the conclusions finally drawn" ([Trial Judgment](#), para. 2536); (4) "failure to take into account other sources of information about Dominic Ongwen which were readily available to them" ([Trial Judgment](#), para. 2545); and (5) failure to properly assess the possibility of malingering ([Trial Judgment](#), para. 2567).

<sup>6</sup> See, e.g., [UGA-D26-0015-1878](#), at 1881.

<sup>7</sup> See, e.g., [UGA-D26-0015-1878](#), at 1883-1884.

<sup>8</sup> [Trial Judgment](#), para. 2457, 2527, 2574, and 2580.

<sup>9</sup> [UGA-D26-0015-1878](#), at 1886.

*D-0060*

7. The proposed report of D-0060 is also largely repetitive of his prior report and trial testimony, which the Trial Chamber found to be of “very limited value”.<sup>10</sup> With the exception of one online meeting between the witness and Mr Ongwen in February 2021, the report appears to be based entirely on information available to D-0060 before his trial testimony.<sup>11</sup> Even where it is not strictly repetitive, the report suffers from many of the same shortcomings as the witness’s prior evidence, including a failure to consider the veracity of statements made to him about LRA spiritual practices.<sup>12</sup> The report offers conclusions about what Mr Ongwen “believes” (or “believed” while in the LRA),<sup>13</sup> a matter which is not a proper subject of expert evidence, at least not from D-0060. In many instances, the report simply quotes Mr Ongwen directly, without any apparent probing as to the truth of the alleged statements.<sup>14</sup> For all of these reasons, the Prosecution asks the Chamber to reject the new report and proposed testimony of D-0060, or alternatively to accept it under rule 68(2)(b) but give it little or no weight.

### **Evidence proposed for submission under rule 68(3)**

*D-0160*

8. The Prosecution does not object to submission of the report of D-0160 under rule 68(3) or his proposed testimony *via* video link, subject to an opportunity for questioning by the Prosecution at the sentencing hearing.

*D-0133*

9. The Prosecution objects to the proposed report and testimony of D-0133, which is cumulative and lacks significant probative value. D-0133 already testified about

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<sup>10</sup> [Trial Judgment](#), para. 597.

<sup>11</sup> [UGA-D26-0015-1835](#), at 1835.

<sup>12</sup> Compare [Trial Judgment](#), para. 597, with [UGA-D26-0015-1825](#), at 1836.

<sup>13</sup> See, e.g., [UGA-D26-0015-1835](#), at 1840, 1843.

<sup>14</sup> [UGA-D26-0015-1835](#), at 1837, 1840.

alleged indoctrination and experiences of child soldiers in the LRA.<sup>15</sup> Whole paragraphs of D-0133's new report – making up about one third of it – are word-for-word replications of his first report, which is already in evidence.<sup>16</sup> D-0133's general observations about abductions and the experiences of children in the LRA do not add anything new to the already extensive evidence in this case, in which dozens of former LRA fighters, including former child soldiers, provided first-hand accounts of their experiences in the LRA and after their returns. Moreover, D-0133's direct experience with child soldiers returning from the LRA is very limited, as evident from his trial testimony.<sup>17</sup>

10. Insofar as D-0133 comments on the proper legal interpretation of mitigating circumstances and calls upon the Chamber to consider the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), these submissions should be disregarded as legal opinion which is the prerogative of the Chamber.

11. The only new aspect of D-0133's evidence is a portion of his report on Acholi traditional justice.<sup>18</sup> The witness gives a general overview and does not suggest that he possesses any direct knowledge of or involvement in Acholi traditional justice. His evidence resembles general evidence about *mato oput*, already in the case record.<sup>19</sup> Moreover, the Defence proposes to call D-0160 to testify about *mato oput*. As the Prime Minister of Ker Kwaro Acholi, D-0160 has first-hand and in-depth knowledge of Acholi traditional justice, including *mato oput*; the Defence itself calls his evidence "authoritative on the subject".<sup>20</sup> By comparison, D-0133's evidence on this topic is of marginal utility and is unnecessary.

<sup>15</sup> See, e.g., D-0133, [T-203](#), p. 62-63 (on indoctrination), 63-64 (on spiritualism).

<sup>16</sup> Compare [UGA-D26-0015-1889](#), at 1889, 1890, 1893, 1894, with [UGA-D26-0015-1022](#), at 1025, 1026, and 1029.

<sup>17</sup> D-0133, [T-204](#), p. 30.

<sup>18</sup> [UGA-D26-0015-1889](#), at 1896-1898.

<sup>19</sup> See, e.g., [UGA-OTP-0192-0216](#) (submitted by the Defence).

<sup>20</sup> [Defence Request](#), para. 26.

12. For all these reasons, the Prosecution submits that the Defence has not shown good cause to recall D-0133, and asks the Chamber to reject his proposed report and testimony, or in the alternative to accept the report under rule 68(2)(b) but give it little or no weight.

*D-0114*

13. At the time of filing this response, the Prosecution still has not received the proposed report of D-0114, which was due on 26 February 2021. The Prosecution asks that the proposed report and evidence be rejected *in limine* as filed well after the deadline without good cause, or in the alternative requests ten days in which to respond after the proposed report has been received.



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**James Stewart, Deputy Prosecutor**

Dated this 10<sup>th</sup> day of March 2021

At The Hague, the Netherlands