

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **12 February 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 Defence Request for Trial Chamber IX to Accept
Submissions on Sentencing Pursuant to Rule 103**

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 Participation and Reparations
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Other

1. The Office of the Prosecutor (“Prosecution”) opposes the Defence’s request that the Trial Chamber (“the Chamber”) allow *amicus curiae* submissions on the broad issue of “sentencing a former child soldier”.¹

2. Rule 103 of the Rules of Procedure and Evidence (“the Rules”) authorises the Chamber to invite or accept *amicus curiae* or other submissions on any issue that the Chamber deems appropriate, when considered desirable for the proper determination of the case.

3. The Chamber enjoys broad discretion regarding whether or not to accept *amicus* submissions under rule 103.² Such submissions are most commonly sought or accepted where novel issues of law are involved, such as in the two cases cited by the Defence.³ Chambers appear most likely to accept *amicus* submissions from States, organisations, or individuals that can demonstrate particular legal or specialised factual knowledge relevant to an issue before the Chamber.⁴ Leave to file *amicus* submissions is ordinarily granted on an individualised basis,⁵ not as an open invitation with pre-approval, as apparently sought here by the Defence.

4. Unlike the other cases referenced in its request, the Defence has identified no specific issue of international law or interpretation of the Rules or the Rome Statute regarding which the Chamber might benefit from the assistance of *amicus* submissions. Instead, the Defence asks this Chamber to allow submissions on the broad, and essentially factual, issue of “sentencing a former child soldier”.⁶

¹ ICC-02/04-01/15-1765, para. 17, 20, 22.

² See, e.g., ICC-01/18-63, para. 49.

³ See ICC-01/04-02/06-2554 (regarding the definition of “attack” under international humanitarian law and in article 8(2)(e)(iv) of the Rome Statute); ICC-01/18-63 (regarding the scope of the Court’s territorial jurisdiction in the situation in Palestine).

⁴ See ICC-01/04-02/06-2554, para. 12.

⁵ See ICC-01/04-02/06-2554, para. 12-14; ICC-01/18-63, para. 3.

⁶ ICC-02/04-01/15-1765, para. 17, 20, 22.

5. Determination of a proper sentence is not primarily a legal question. It requires careful consideration of facts and of evidence submitted by the parties and participants at trial and for purposes of sentencing. The Defence request does not explain how *amici*, who do not have access to all the relevant facts and evidence, might meaningfully assist the Chamber, which has spent the last several years conducting the trial and recently issued a lengthy judgment setting out in detail its assessment of the evidence and its findings of fact, many of which are directly relevant to sentencing.

6. The Defence suggests that *amicus* submissions might address the “long-term consequences” suffered by former child soldiers.⁷ However, the Chamber has already heard substantial evidence about such consequences, both directly from former child soldiers themselves and also from expert witnesses.⁸ The Defence has not indicated why or how additional information on the issue would assist the Chamber,⁹ and indeed if the Defence believes that additional evidence is needed, it may propose such evidence for the sentencing hearing scheduled in April.¹⁰

7. The Prosecution notes that the Defence also makes passing reference to “factors to be taken into account in determining an appropriate sentence”.¹¹ While this might constitute a legal issue, it is not novel, and it is unclear why it would justify *amicus* submissions. The relevant factors for sentencing are clearly articulated in article 78 of the Rome Statute and rule 145 of the Rules, and already include “the individual circumstances of the convicted person”, including his “age, education, social and economic condition”.

⁷ ICC-02/04-01/15-1765, para. 20.

⁸ For example, Professor Wessels, who worked with former LRA members in Uganda for many years, testified about the consequences for children exposed to war, including child soldiers. *See* T-176. Professor Weierstall-Pust also worked with former child soldiers during his research in Uganda and other countries. *See* T-169, p. 6-8.

⁹ The Prosecution notes that the Single Judge rejected a request by Child Soldiers International to submit an *amicus* brief on related issues in November 2016. *See* ICC-02/04-01/15-611.

¹⁰ ICC-02/04-01/15-1763, para. 3, 5-6.

¹¹ ICC-02/04-01/15-1765, para. 22.

8. Part of the difficulty in identifying any benefit from the proposed *amicus* submissions flows from the fact that no potential *amici* have been identified nor offered to present their views. Instead, the Defence appears to ask the Court to grant prospective leave to unidentified “States, organizations, professionals, and intellectuals”.¹² The Prosecution contends that leave to make submissions under rule 103 ordinarily should be granted only to identified States, organisations, or individuals after a *prima facie* showing of some particular expertise, knowledge, or experience that might assist the Chamber. Consequently, if the Chamber were inclined to invite *amicus* submissions for sentencing in this case, it should put in place a process by which discrete applications by potential *amici* could be made, considered, and ruled upon.

9. For the reasons set out above, the Prosecution asks the Chamber to deny the Defence request.



James Stewart, Deputy Prosecutor

Dated this 12th day of February 2021
At The Hague, The Netherlands

¹² ICC-02/04-01/15-1765, para. 20.