International Criminal Court

Trial Chamber IX

Situation: Republic of Uganda

In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15

Presiding Judge Bertram Schmitt, Judge Péter Kovács and

Judge Raul Cano Pangalangan

Trial Hearing - Courtroom 3

Monday, 27 November 2017

(The hearing starts in open session at 9.33 a.m.)

THE COURT USHER: [9:33:41] All rise.

The International Criminal Court is now in session.

PRESIDING JUDGE SCHMITT: [9:34:08] Good morning, everyone. Especially good morning to Mr Kloosterman.

Could the court officer please call the case.

THE COURT OFFICER: [9:34:15] Good morning, Mr President, your Honours.

The situation in the Republic of Uganda, in the case of The Prosecutor versus Dominic Ongwen, case reference ICC-02/04-01/15.

And for the record, we are in open session.

PRESIDING JUDGE SCHMITT: [9:34:30] Thank you very much.

I ask for the appearances of the parties. Mr Bradfield.

MR BRADFIELD: [9:34:35] Good morning, Mr President, your Honours.

Appearing today for the Prosecution are Colleen Gilg, Benjamin Gumpert, Julian Elderfield, Beti Hohler, Pubudu Sachithanandan, Ramu Fatima Bittaye, Ayodele Akenroye and myself, Paul Bradfield.

PRESIDING JUDGE SCHMITT: [9:34:53] Thank you very much.

And for the Legal Representatives of the Victims.

MS SEHMI: Good morning, your Honour. Anushka Sehmi and Mr James Mawira.

PRESIDING JUDGE SCHMITT: [9:35:04] Mr Narantsetseg.

MR NARANTSETSEG: [9:35:05] Good morning, Mr President, your Honours. My name is Orchlon Narantsetseg. I am with Ms Caroline Walter. Thank you.

PRESIDING JUDGE SCHMITT: [9:35:11] I am absolutely unable, Mr Narantsetseg, to pronounce your name in such a velocity like you do.

MR NARANTSETSEG: [9:35:20] You are doing very well, sir.

PRESIDING JUDGE SCHMITT: [9:35:21] Mr Obhof for the Defence.

MR OBHOF: [9:35:23] Thank you very much, your Honour. Today we have Chief Charles Achaleke Taku, Ms Abigail Bridgman, our client, Mr Dominic Ongwen, and myself, Thomas Obhof.

PRESIDING JUDGE SCHMITT: [9:35:32] Thank you very much. And we have of course the next witness, with the pseudonym P-414, in the courtroom. This is Mr Kloosterman. Mr Kloosterman, a very warm welcome. On behalf of the Chamber, I welcome you in the courtroom. And there should be a card in front of you with the solemn undertaking to tell the truth. Would you please be so kind to read this card aloud.

WITNESS: UGA-OTP-P-0414

(The witness speaks English)

THE WITNESS: [9:35:58] I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.

PRESIDING JUDGE SCHMITT: [9:36:05] Thank you, Mr Kloosterman. Now you are sworn in.

Before we start with your testimony, a few practical matters. You know that

everything here in the courtroom is written down and interpreted. And to allow for the interpretation, we have to speak relatively slow, at a relatively slow pace, and to wait for the answer until the person that asks you has finished the question. If you have any questions yourself, you can raise your hand. Then we will give you the word.

We can start the testimony then, Mr Bradfield.

MR BRADFIELD: [9:36:39] Thank you, your Honour.

QUESTIONED BY MR BRADFIELD:

Q. [9:36:43] Good morning, Professor.

A. [9:36:45] Good morning.

Q. [9:36:45] We have not met before, but my name is Paul Bradfield and today I will be the counsel asking questions for the Prosecution.

So for the record, can you please state your full name?

A. [9:36:57] My full name is Ate Douwe Kloosterman.

Q. [9:37:03] And what is your current occupation, Professor?

A. [9:37:06] My current occupation is a forensic expert, forensic reporting expert at the Netherlands Forensic Institute in The Hague, and I'm a professor by special appointment at the University of Amsterdam.

Q. [9:37:25] And the Netherlands Forensic Institute, which I will refer to as NFI --

A. [9:37:30] Yes.

Q. [9:37:31] -- how long have you worked there?

A. [9:37:32] I work there since 1980.

Q. [9:37:39] Professor, beside you there is a black folder. Can I ask you to open up tab 22, please. And this is ERN UGA-OTP-0276-4134.

A. [9:38:06] I got it in front of me, yes.

Q. [9:38:19] And this is your curriculum vitae; is that correct, Professor?

A. [9:38:24] Yes.

Q. [9:38:24] Now, I won't go through every aspect of your extensive experience, but just to note two particular aspects of your CV. You hold a PhD in the area of DNA and forensic typing; is that correct?

A. [9:38:46] Yes, forensic DNA typing, that's correct, yes.

Q. [9:38:50] And your CV also states that you are a qualified expert court witness on DNA analysis; is that correct?

A. [9:38:59] Yes. Yes, I'm registered through the NFI at the -- what we call NRGD, Netherlands Register for Forensic Experts. I am a registered expert there on the field of forensic DNA typing.

Q. [9:39:20] And have you testified in legal proceedings before as an expert witness?

A. [9:39:26] Yes, sir. Yes, many times in The Netherlands.

Q. [9:39:30] And have you been before this Court before?

A. I have been one time before in this Court, yes.

Q. [9:39:38] And do you remember the name of that other case?

A. [9:39:47] I don't know what the name of that other case was now, no.

Q. [9:39:51] That's okay.

PRESIDING JUDGE SCHMITT: [9:39:52] Can you tell me what the other case was?

MR BRADFIELD: [9:39:55] It was the Gbagbo and Blé Goudé case, your Honour.

PRESIDING JUDGE SCHMITT: [9:40:01] Okay. Thank you.

MR BRADFIELD: [9:40:02]

Q. [9:40:02] So, Mr Witness, can I ask you now to turn to tab 4 in that black binder.

A. [9:40:21] Yes.

Q. [9:40:21] And for the record, this is UGA-OTP-0278-0529, and this is a report dated 17 March 2016.

Professor, do you recognise that document?

A. [9:40:41] Yes, yes.

Q. [9:40:42] Can you please turn to page 11, which is ERN ending in 0539.

Do you see your signature on that page, Professor?

A. [9:41:01] Yes.

Q. [9:41:02] Thank you. Can I ask you now to turn to tab 6. And this is ERN UGA-OTP-0265-0106, and this is dated 6 June 2016.

And do you recognise that document, Professor?

A. [9:41:33] Yes.

Q. [9:41:34] And if I could ask you to go to the -- page 12 of 13. That is ERN ending in 0117.

Do you see your signature there?

A. [9:41:49] Yeah. That is my signature, yes.

Q. [9:41:52] Very well. And to your last report, which is at tab 7, if you could turn there. And this is UGA-OTP-0267-0160. This is dated 6 July 2016.

Do you recognise that report, Professor?

A. [9:42:25] I recognise that report, yes. Thank you.

Q. [9:42:29] And if you could go to page 11 of that same report. That's an ERN ending in 0170.

And do you see your signature there?

A. Yes, that's my signature, yes.

Q. [9:42:48] And finally, if you could go to tab 8, UGA-OTP-0267-0413, and this is a letter dated 18 July 2016.

Do you recognise that document, Professor?

A. [9:43:17] Yes.

Q. [9:43:19] And I understand this is a letter concerning the transfer of DNA profiles from the NFI to the Office of the Prosecutor; is that correct?

A. [9:43:35] That's correct, yes.

Q. [9:43:37] If you could just turn to the second page of that same document, ERN ending in 0414, is that your signature again?

A. [9:43:50] That's my signature again, yes.

Q. [9:43:52] Thank you very much. So, Professor, when you wrote all of these reports, did you compile them truthfully?

A. [9:44:01] Yes.

Q. [9:44:02] And were they made to the best of your knowledge and recollection?

A. [9:44:05] Yes.

Q. [9:44:08] So, Professor, the Judges may accept these reports as your evidence in this case, unless you have any objection to that. So do you have any objection, Professor?

A. [9:44:22] No, I have no objection against that, no.

MR BRADFIELD: [09:44:25] Thank you.

PRESIDING JUDGE SCHMITT: [9:44:26] That of course fulfils the requirements of Rule 68(3). Thank you very much.

MR BRADFIELD: [9:44:33]

Q. So, Professor, your reports are now in the case record. What I propose to do now is to ask a few clarifying and additional questions of just a few aspects of these reports.

You will also see before you a coloured document, which is a list of names of persons

outside of the binder. Yes. And for everybody in the courtroom, I assume you have seen on email, this is a list of names of women and children who are the focus of Professor's various reports.

So, Professor, as we go through your testimony and my questions and questions from the Defence, we may need to refer to these persons listed on that document.

A. [9:45:30] Yeah.

Q. [9:45:31] And when we do so, we will use the pseudonym alongside the various names. So, for example, mother A and child A1. Do you understand that?

A. [9:45:43] Yeah.

Q. [9:45:46] So, Mr Witness, if you could turn open tab 4 once again for me and please turn to the second page. That is ERN ending in 0530. Are you there?

A. [9:46:23] Yeah.

Q. [9:46:24] Great. So, Professor, here it states that four buccal swabs were taken from Mr Ongwen and four buccal swaps per person were taken from nine other persons.

A. [9:46:45] Were received by the NFI.

Q. [9:46:47] Were received, yes.

A. [09:46:48] Yes.

Q. [9:46:50] So what I want to ask you is, in layman's terms, what is a buccal swab and what role does it play in the DNA testing process?

A. [9:47:01] A buccal swab is a swab from the inside of the cheek, can be the left or the right cheek, which is meant as a reference sample from the person that is sampled. In the early days we took blood from that person, but through the sensitivity of the present DNA test we can do it with a sample from the swab, from the cheek, from the inside of the cheek. So that is used as a reference sample from that particular person.

We don't take one, we take four samples of that person. Also to be able to reanalyse the sample, if necessary. And to do additional testing. That happened to us in this case where we did Y chromosomal analysis and there we can use a new swab again.

Q. [9:47:55] and in what physical form did you receive these swabs at the NFI, how were they transported?

A. [9:48:07] They were transported in so-called carton boxes and received by the NFI. They were also sealed, with the seal unbroken, that was checked by the NFI and then they went further for analysis.

Q. [9:48:36] Could I ask you now to turn to page 5 of that same document?

A. Yes.

Q. [9:48:41] That is ERN ending in 0533. And if I could direct your attention to the second last paragraph and there is a sentence that begins "Likelihood ratios". Do you see that?

A. [9:49:05] Yes.

Q. [9:49:05] I am just going to read this back to you, and I quote: "Likelihood ratios (LR) were calculated to demonstrate biological paternity between Mr D Ongwen and the five children." End quote.

So, Professor, in layman's terms could you explain to the Chamber what is meant by a likelihood ratio?

A. [9:49:41] When we looked at the profiles from the presumed father and the children we saw that this man could be the father of those children. So he could be it.

The next question is: But how strong is the evidence? And in cases like this we calculate a so-called likelihood ratio which is also known as a paternity index and paternity testing and that's what I mean with the likelihood ratio. To get an objective

measure on the probability of the evidence under two different scenarios.

Q. [9:50:32] So, Professor, could I ask you then to turn the page of that same document now to page 0534, where you outline the results of the first child in that report, whom we will refer as child D1, according to the list. And if I could direct your attention to the last paragraph, and I'm going to read it back to you again, quote: "The DNA typing results show that Mr D Ongwen can be the biological father of D1. Using a prior probability of 50%, the probability of paternity is greater than 99.99%." Now, Professor, the percentages give us an indication there, but can you explain for us in simple terms what does this sentence mean?

A. [9:51:47] That was the last sentence of that report on page number 6, yeah?

Q. [9:51:55] Yes.

A. [9:51:56] Yes. So we calculated the likelihood ratio, and from that is the next question: Okay, what is the posterior probability, what's the actual probability that Mr Ongwen who was called in the report is the father of that particular child? And now it becomes a little bit complex to be able to do -- to say something about the posterior probability, the actual probability, we must know an estimate of the prior probability. The prior probability is combined with the likelihood ratio to get to this posterior probability. And in this case we assumed the prior probability of 50 per cent. So without any DNA evidence the probability that he is the true father is estimated as 50 per cent. And from that we go to our posterior probability of 99.9 per cent. And also what is down at the bottom of that page, that figure of 99.99 per cent is required for DNA-based identifications under Dutch jurisdiction. Other jurisdiction requires similar or less stringent probabilities of identity.

Q. [9:53:33] A follow-up question, Professor, based on what you have said, what is the likelihood then that a person other than Mr Dominic Ongwen would be the father

of child D1?

A. [9:53:50] Most men we would use likelihood ratio of only zero because you see exclusions then, that a child have completely different typing than the man that was tested and when he is a true biological father you see similarities between the two profiles. If you don't see them, you can exclude such a man.

Q. [9:54:16] So across the three various reports, Professor, you testified the DNA profiles of 12 children; is that correct? They are the ones listed in the coloured document.

A. [9:54:40] Twelve children, yes.

PRESIDING JUDGE SCHMITT: [9:54:42] We have a question, here, please, just a moment.

JUDGE PANGALANGAN: [9:54:46] Thank you, Mr President.

Mr Witness, can we go back to the text that you were looking at earlier, biological father of (Redacted), I notice there are three categories in those -- three paragraphs there, and I was just wondering whether the language, I mean what's the significance of the language, the different language that you used in the three paragraphs? In the first you say that he -- there is -- the results are approximately 22 million times more likely that Mr Ongwen is the biological father?

THE WITNESS: [9:55:27] Yes.

JUDGE PANGALANGAN: [9:55:28] So that's the first. The second it says that the profile obtained matches with the Y chromosomal DNA profile of the child. And the third is can be the biological father with a probability of 99.9 per cent. What's the difference? I mean why use different languages in the -- different terms in the three different categories?

THE WITNESS: [9:55:55] The most important number is the 99.99 per cent, the

posterior probability. And the other three paragraphs bring us to that number. It's different technologies are used here.

In the first paragraph the 22 million times more likely, it's straightforward autosomal DNA typing which is used by all forensic DNA laboratories who are working in the same field.

The second one, the Y chromosomal typing data is where we looked at the Y chromosomal evidence when Mr Ongwen and the child that was tested is the father of the child that was tested, we expect to see the same Y chromosomal DNA profile. That was true in this case.

And those both results, the Y chromosomal result and the autosomal result bring us to the posterior probability of greater than 99.99 per cent.

JUDGE PANGALANGAN: [9:57:12] Thank you.

PRESIDING JUDGE SCHMITT: [9:57:13] Would it change the probability if you also would take into account that the two persons, of course the mother is truer, but the presumed father knew each other? Do you understand what I mean? So --

THE WITNESS: [9:57:27] Yes.

PRESIDING JUDGE SCHMITT: [9:57:27] -- I understand it that you did a purely, purely scientific research.

THE WITNESS: [9:57:32] Yes.

PRESIDING JUDGE SCHMITT: [9:57:33] Would that, what I tell you, would this change anything?

THE WITNESS: [9:57:37] Yes, it could change it dramatically, yes.

PRESIDING JUDGE SCHMITT: [9:57:41] In which sense?

THE WITNESS: [9:57:42] That's hard to predict, but I assume that the evidence gets weaker in those cases. But I don't expect it to be weaker than a 99.99 per cent,

because we have an overwhelming amount of evidence here with the likelihood ratio of 22 million.

PRESIDING JUDGE SCHMITT: [9:58:03] And when you say "can", is this the precaution that a natural scientist takes in the wording?

THE WITNESS: [9:58:13] No, then I would like to see the true scenario. The relevant question is: Is if Mr Ongwen is not the father, who is the alternative father then? And we assumed here with the calculation that we made that the alternative father is not related to Ongwen. But when you would ask me, okay, but the alternative father could be his brother, then the situation would change dramatically.

PRESIDING JUDGE SCHMITT: [9:58:43] Thank you very much.

THE WITNESS: [9:58:45] But that was not the case. We did not receive any information that this could be the case.

PRESIDING JUDGE SCHMITT: [9:58:50] Okay. Thank you. It was just for our understanding that we have here any problems.

MR BRADFIELD: [9:58:58]

Q. [9:59:00] So, Professor, just to reiterate, across your three reports you tested the DNA profiles of 12 children in total. And for 11 of these children, all except child G1 on the list, for the 11 others you concluded that the probability that Mr Ongwen was the biological father was the same percentage, 99.99 per cent; is that correct?

A. [9:59:36] Yeah, yeah.

Q. [9:59:47] So, Professor, I am going to leave those reports aside for the moment and talk about something a little bit different.

Back in 2006 you also did some DNA testing for the Office of the Prosecutor; isn't that correct?

A. [10:00:04] Yes, the NFI performed DNA testing in this case already, yes.

Q. [10:00:10] Could I ask you to open tab 3 of your binder.

And this is UGA-OTP-0170-0027.

Do you recognise that document, Professor?

A. [10:00:43] Yes, I signed it.

Q. [10:00:46] And that is your signature on page 505; is that correct?

A. [10:00:54] That's correct, yes.

Q. [10:00:54] Can you explain what exact DNA analysis took place as part of this request?

A. [10:01:10] In this case we received reference samples from mothers and the children. And we also received remains from a human corpse.

Q. [10:01:28] And for the guidance of everyone in the courtroom, these children refer to children A1, A2, A3, and B1 in the circulated list. And it's correct, Professor, that the DNA of the children was tested against the remains; isn't that correct?

A. [10:01:52] The children that we received, yes. Six children were tested against the remains, medical remains from a male individual and if that individual could be the father of those children. And we --

Q. [10:02:19] It should be four children, I think, Professor, when you count them?

A. [10:02:23] Oh, yes, four children, yes, and mothers, yes.

Q. [10:02:26] The results of this analysis was that these children were not the biological children of the deceased remains; is that correct?

A. [10:02:34] Exactly. That was the main conclusion.

Q. [10:02:42] Could I ask you to turn now to tab 7.

A. [10:02:50] Yes.

Q. [10:02:55] Sorry, tab 6.

A. [10:02:58] Tab 6.

Q. [10:02:59] UGA-OTP-0265-0106 at page 0114.

A. [10:03:19] I got it in front of me.

Q. [10:03:23] Now this part 4 of this report, Professor, details a mix-up of the samples that were taken in 2006?

A. [10:03:39] Yes.

Q. [10:03:39] Isn't that correct?

A. [10:03:40] Yes.

Q. [10:03:41] And what followed after that is that those, I shall call them original samples were relabelled correctly and retested; is that correct?

A. Were retested, yes. The original labelling was correct.

Q. [10:04:00] And following that, fresh samples were taken again from the same individuals?

A. [10:04:08] Yes.

Q. [10:04:08] Is that correct?

A. [10:04:09] Yes.

Q. [10:04:12] And what was the result of the two DNA profile tests that were carried out?

A. [10:04:20] That we observed a match between the original samples that were taken in 2006, the retested samples, and a new reference samples, those DNA profiles matched. So we had no doubt anymore about the integrity of those reference samples.

Q. [10:04:46] And just to confirm that final results, if I could ask you to turn to tab 7. That's UGA-OTP-0267-0160 at 0166.

A. [10:05:12] Yes.

Q. [10:05:15] Sorry, 0169.

A. [10:05:21] 69, yes.

Q. [10:05:24] There the subheading is "Verification of earlier reported results".

A. [10:05:31] Yes.

Q. [10:05:32] And again like with the others, Professor, you state that the probability of paternity of these children is greater than 99.99 per cent?

A. [10:05:42] Yeah, yeah.

Q. [10:05:45] Throughout the DNA processes that you conducted, Professor, it's true that your methods and your procedures met the international standards of the society of forensic genetics; is that correct?

A. [10:06:02] Yes, yeah.

MR BRADFIELD: [10:06:05] Your Honours, at this time we have no further questions.

PRESIDING JUDGE SCHMITT: [10:06:08] Thank you very much. I don't assume that the Legal Representatives of the victims will have any questions, so we go directly to the Defence and Mr Obhof has the floor. Can you already foreshadow or -- I would not assume that you need the whole day, let me put it this way?

MR OBHOF: [10:06:26] No, your Honour. I have seven pages. We might be able to finish this session if we elongate or take a coffee and finish within 30 minutes.

PRESIDING JUDGE SCHMITT: [10:06:38] Please continue.

QUESTIONED BY MR OBHOF:

Q. [10:06:44] Mr Witness, when you are determining the probability ratios in your reports you used statistical data compiled in the United States of America; it is that correct?

A. [10:06:55] That's correct.

Q. [10:06:56] Okay. And I'm going to list off three tab numbers with footnotes.

The court ushers don't have to turn to it. Tab 4, it's page 0533 footnote 6; tab 6, it's at page 0113, footnote 5; and at tab 7, it's at page 0167 at footnote 3. And I will hold on a minute while everything is being interpreted.

Okay. Now, with the statistical data, did you use the probabilities from all the persons tested from the African Americans, from the Caucasians, from the Hispanics or from the Asians, Mr Witness?

A. [10:07:51] No, we tested against the data from the African Americans, because we thought that represented the population in question the best.

Q. [10:08:08] Now, did the Office of the Prosecutor inform you that Mr Ongwen was from the United States of America or any of the women that they are alleging he conceived these children with?

A. [10:08:23] No. The problem here is that we don't have a DNA database available from Uganda to get an estimate on the frequency of the genetic profiles so we have to use something else and we thought this would be the best estimate because there are not so many black populations genetic databases available.

Q. [10:08:50] Thank you. You actually answered my next two questions. Now, Mr Witness, do you know where the heritage is of most African Americans, not black people, but African Americans?

A. [10:09:07] Yes, that started during the slave trade. And I think that is Ghana where most slaves came from, so you can also expect that most black Americans have their roots in those areas in Africa, which is not necessarily the same as the area we are concerned with.

Q. [10:09:37] And just for the record, I'm sorry, you're speaking of western Africa?

A. [10:09:44] Yeah.

Q. [10:09:44] Thank you. Now for African Americans do you know where the

second highest genetic history generally comes from?

A. [10:09:55] No, sir.

Q. [10:09:57] Does it surprise you if I say European and not eastern Africa?

A. [10:10:05] But those are the Caucasian Americans.

Q. [10:10:11] Yes.

A. [10:10:12] The American FBI tested many, many different people, volunteers who gave a DNA sample to create a genetic population database to make calculations as least possible. So there is no samples of suspects or victims. Volunteers. And they have divided, they made rough divisions in a Caucasian population genetic database, a black American database and a Hispanic one. So those three databases are available in the United States. And we don't have a black database available in our country. We have a big Caucasian database, but not a black database. So we have to use something else.

MR OBHOF: [10:10:59] If I could have the court usher turn everything over to evidence 2 for me so people can watch it.

PRESIDING JUDGE SCHMITT: [10:11:08] And in the meantime, perhaps, I have a question: It's -- we can perfectly follow that you can only use databases that are available.

THE WITNESS: [10:11:20] Yeah.

PRESIDING JUDGE SCHMITT: [10:11:20] From your scientific point of view do you have any idea how much that possibly could change the outcome or influence the outcome that you use a database that is not specifically from the region concerned? I assume there is a scientific discussion about these matters. I assume this is not a forensic problem that only arises today in this courtroom.

THE WITNESS: [10:11:54] Yeah. We looked at Y chromosomal DNA profiles and

autosomal DNA profiles. With Y chromosomal profiles you have to be extremely careful. Y chromosomal profiles if they are extremely in our country, can be abundant in other countries. But that's not true for the autosomal DNA profiles. Autosomal DNA profiles are rare in every population. There is not a population in this earth where there is a DNA profile, an autosomal profile which is extremely abundant. All these profiles are extremely rare. So if I would use the wrong population to make my calculations or a different population to make my calculations I still will see that the evidence is extremely high.

PRESIDING JUDGE SCHMITT: [10:12:49] Could you quantify that?

THE WITNESS: [10:12:51] I could quantity that if it was asked to me, but not at this time very moment.

PRESIDING JUDGE SCHMITT: [10:12:57] Okay, I understand.

Mr Bradfield is standing, but of course we will let the witness answer first.

MR BRADFIELD: [10:13:03] Yes, I hesitate to rise and interrupt my learned friend, but we would just like to clarify the provenance of the document that my friend is referring to, and if it has an ERN number, we would like to have that.

PRESIDING JUDGE SCHMITT: [10:13:17] Indeed.

MR OBHOF: Yes.

PRESIDING JUDGE SCHMITT: That's correct.

MR OBHOF: [10:13:19] It does not have an ERN number. It's used as an example. It comes from the tabs and the footnotes I mentioned which are incorporated into the gentleman's report. These are the allele frequencies in which he uses in order to get the probability ratio which the Judges have discussed.

PRESIDING JUDGE SCHMITT: [10:13:39] But we will give this an ERN number, I would assume?

MR OBHOF: [10:13:44] I can send one later if you would like. I would send one later. I didn't --

PRESIDING JUDGE SCHMITT: [10:13:49] So this is part of the report, so to speak?

MR OBHOF: [10:13:52] Yes. It's the footnotes that I read out a few minutes ago.

PRESIDING JUDGE SCHMITT: [10:13:54] Okay. Then I think nobody would have an objection to use it in principle, or at least to ask the witness what he can tell us about it. Please continue, Mr Obhof.

MR OBHOF: [10:14:03]

Q. [10:14:03] Mr Witness, right now I have of course the allele frequency highlighted, you see it at .3085, that's for D3S1358 and that is the allele 15.0.

A. [10:14:19] Yes.

Q. [10:14:19] Yes. And now I'm going to switch over right now to the Caucasian and right there it's .2729.

A. [10:14:28] So the first one is 30 per cent, the other one is 27 per cent.

Q. [10:14:31] Correct. Now would you expect, considering the African American is rather higher, I mean would you expect the same to come from, if such a database was made from, whether it be the Acholi people or even eastern Africa, would you expect those numbers to be also different as it is with the black African Americans and the Caucasians?

A. [10:14:56] When you look at one particular allele there can be differences, but when you look at a whole profile the difference gets smaller. When you look at a profile of ten different loci, you still will get an extremely high likelihood ratio, independent of the population that you test. But I am very prepared to make every calculations which is asked me to do.

Q. [10:15:26] I understand. Now if we could turn to tab 19, please, prosecution

binder.

PRESIDING JUDGE SCHMITT: [10:15:34] And perhaps shortly it might also not be necessary to give this document an extra ERN number because it's already in the report, so it's already incorporated. I'm not sure.

Mr Gumpert, any other opinion?

MR GUMPERT: [10:15:47] I think we need some clarity here. This document isn't in the report. It's referred to in a footnote in the report. There are many footnotes and many references. I don't complain about what my learned friend has done. I think it would have been courteous to put the Prosecution and the Court on notice that this particular document of all those referred to was actually going to be used. But as I say, I don't complain, but I would ask that if it is to be something which is to, said to influence the end decision which your Honours are going to come to, it ought to have an ERN number so that it is distinguished from all of the other possible references in the footnotes to quite long reports.

PRESIDING JUDGE SCHMITT: [10:16:32] I think that's convincing. So we leave it as it is. It becomes a separate ERN number, yeah.

MR OBHOF: [10:16:43]

Q. [10:16:56] Now for the record this is a DNA profile of child C2. And, Mr Witness, you will see at the very bottom the profile for -- or the printout dealing with D3S1358. That's at the very bottom, second to the left.

A. [10:17:17] Yeah.

Q. [10:17:18] And you see the number 16 and 17?

A. [10:17:20] Yes.

Q. [10:17:20] Now, you would expect that -- the mother to donate one and the father to contribute one?

A. [10:17:26] I don't know who donated the 16 or the 17, but one of the two must have donated the 16 and the other one the 17.

Q. [10:17:33] Okay.

A. [10:17:34] But if the mother donated the 16, the father must have donated the 17.

Q. [10:17:38] Okay.

A. [10:17:39] And vice versa.

Q. [10:17:44] Now, I don't know if there is a - how would I say - a redacted version of tab 20.

PRESIDING JUDGE SCHMITT: [10:18:04] There is handwriting on the top --

MR OBHOF: [10:18:07] Yes, there is handwriting on the top which contains a name.

PRESIDING JUDGE SCHMITT: [10:18:11] If not, we don't display it, simply, and continue.

MR OBHOF: [10:18:15]

Q. [10:18:15] Now, Mr Witness, on the very next tab, tab 20, you will see down there, for the same loci, D3S1358, the mother, the presumed mother, has two 16s. So would that not mean that -- and that is mother C. So would that not mean that C2 as one of her progeny, the 16 would have to come from that mother?

A. [10:18:52] Which one is the mother, sir?

Q. [10:18:54] The mother is tab 20. It has the number 11 up top on the right-hand side.

A. [10:19:08] And we are looking at these three, yes, the very bottom, the mother is the 16, 16?

Q. [10:19:16] Correct.

A. [10:19:16] Yes.

Q. [10:19:17] And then on page 10 -- sorry, on tab 19, with the 10 written on top of

it, you will see the allele combination is 16 and 17.

A. [10:19:27] Yes.

Q. [10:19:28] Which that would mean that the mother would have to have contributed the 16?

A. [10:19:32] Yes.

Q. [10:19:32] Yes. Now, if we could turn to tab 16, which is the DNA profile for Mr Ongwen, and you will notice for the same allele that we are looking at that Mr Ongwen is a 15, 16 and there is no 17.

A. [10:19:58] Yeah.

Q. [10:20:00] Now, can you explain why the child would not have either a double 16 or a 15, 16?

A. [10:20:08] In case like this, we can deal with so-called mutation, which happens in a frequency of around one in a thousand per locus. So when you look at the 15 locus profile, it can happen in every hundred cases that you see a mutation. And I expect this to be a mutation if all the other typings are correct.

Q. [10:20:44] Now, this part cannot be shown to the public, but if we could go to tab 7, which is 0267-0160, page 0169. And it goes from 0169 to 0170. Now, I won't say the name again, but it is the bottom child which we are discussing, child C2.

A. [10:21:17] Yeah.

Q. [10:21:17] It makes no mention of a Y chromosomal testing on this child, as it did with some of the earlier children in tab 4.

A. [10:21:28] I am looking at page 11 from 12.

Q. [10:21:31] Page 10 from 12 -- or 10 and 11, sorry, 10 of 12 and page 11 of 12.

A. [10:21:37] Yes.

Q. [10:21:38] Yes.
A. [10:21:41] And the bottom child?
Q. [10:21:43] Correct. There was no Y chromosomal testing, was there as was the case (Overlapping speakers)
A. [10:21:47] No, because I expect this child to be a girl.
Q. [10:21:52] No, this child is a male.
A. [10:21:57] Okay. Yes?
Q. [10:22:10] So there was no -- that's correct, there was no Y chromosomal testing?
A. No, there was no Y chromosomal testing, no.
Q. [10:22:20] Now, in terms of your probability, Mr Witness, would your probabilities change if it was told to you that proximate to the time of the conception of this child that it is alleged that someone else, either from or from very near Mr Ongwen's home village, had sexual relations with this woman?
A. [10:22:45] If there is a brother or nephew or uncle relationship between the two person, between the alleged and the alternative scenario, yes, that could change the calculation.
PRESIDING JUDGE SCHMITT: [10:23:02] Just for my understanding, are we speaking about child C2 or C1 here?
MR OBHOF: [10:23:07] C2.
PRESIDING JUDGE SCHMITT: [10:23:08] C2.
MR OBHOF: [10:23:09] Yes. Yes, C2.
Q. [10:23:25] Now, Mr Witness, why was the PCR STR used instead of RFLP considering the abundance of DNA which one could get?
A. [10:23:39] RFLP became outdated when the STRs were introduced in the middle of the '90s and also -- and the most important reason is that the DNA database - and

I am not talking about the population genetic database, but the criminal databases containing DNA profiles of unsolved cases and DNA profiles of suspects and convicted ones - are based on STR typing data and not on RFLP. So that was the main reason to continue only STRs.

Q. [10:24:14] Now did the Prosecution request you to run Mr Ongwen's STR genetic profile with any of the known criminal databases?

A. [10:24:25] Now, the actual question is if --

Q. [10:24:30] If the Prosecution, if the Office of the Prosecutor requested you to run Mr Ongwen's DNA profile against any of the databases?

A. [10:24:40] It would be an unusual request, to receive that from the ICC. So that would not be immediately performed, but first some question and answer sessions.

Q. [10:24:55] Now, Mr Witness, isn't it also an idea that -- sorry, also a reason that STR started to be used because of the difficulties performing RFLP at crime scenes because of lack of sufficient genetic material?

A. [10:25:11] Yeah, one of the -- the other reason was that for RFLP, which is outdated now for many, many years already, you need more DNA, much more DNA than for the STRs, because it was not based on amplification. But for normal paternity testing, you will have enough DNA for an RFLP test. Except for the bone in one of the case from 2006 that would not produce enough DNA for a paternity test. But for small bloodstains, saliva stains, hairs, yeah, STRs were an extremely important development of that because the whole test became a hundred times more sensitive, if not even a thousand times more sensitive.

Q. [10:26:03] And, Professor, isn't STRs -- STR more prone to contamination than RFLP?

A. [10:26:13] It is not the STR, it is the sensitivity of the test which makes it more

prone to contamination, yes. So only way you contaminate with a few cells, you can pick up those few cells. So it is sensitive to contamination, yes.

Q. [10:26:42] Sorry, I just wait until the light comes off, yes.

So, Mr Witness, if any type of cells, whether they be homo sapien, microbial or whatever, they will be amplified during the PCR process?

A. [10:27:08] No, only DNA from primates will be amplified. So that's humans and monkeys. So microbial DNA will not be amplified and will not be picked up. The problem with microbial, however, is that they consume the human DNA so it disappears slowly.

Q. [10:27:52] Okay. It is turned off, sorry.

Mr Witness, I know this might seem rather obvious, but it has to be asked. Does the genetic profiling show anything about whether the intercourse was consensual or not?

A. [10:28:19] No, sir.

Q. [10:28:19] No.

A. [10:28:27] Even if it would be from artificial insemination, I wouldn't see any difference.

Q. [10:28:36] Now, can any of the procedures that you did determine the rough age of a person?

A. [10:28:45] Not these procedures. We are looking at new procedures at the moment to estimate someone's DNA who left -- to estimate someone's age who left his DNA or her DNA, but still a lot of work has to be done. But I make -- I had a publication on this a couple of months ago, on estimating the age from DNA samples.

Q. [10:29:14] Now, Mr Witness, is it from DNA or is it from telomeres?

A. [10:29:17] No, it's not from telomeres. It's from what we call DNA methylation.

PRESIDING JUDGE SCHMITT: [10:29:22] And should this at one point --

THE WITNESS: [10:29:26] No.

PRESIDING JUDGE SCHMITT: [10:29:27] I'm just interested, should this at one point in time become really a valid science, so to speak --

THE WITNESS: [10:29:33] Yes.

PRESIDING JUDGE SCHMITT: [10:29:33] -- how specific would it be? Could you tell if a person or the DNA of a person was the DNA of a person 15-year-old or a 30-year-old or -- the exactness, I would be interested, if it comes to fruition.

THE WITNESS: [10:29:49] Well, it would be from the Caucasian population because that's the population we tested again here, it will be plus or minus four to five years.

PRESIDING JUDGE SCHMITT: [10:29:57] Very interesting.

THE WITNESS: [10:29:59] Yes. But I don't know -- I don't have data from other populations yet. They will follow.

PRESIDING JUDGE SCHMITT: [10:30:03] Thank you.

Mr Obhof.

MR OBHOF: [10:30:06]

Q. [10:30:08] Mr Witness, is there also research being done on determining people's age and longevity by the length of their telomeres?

A. [10:30:18] Yes, but forensically that's not so interesting, because it's not sensitive enough, yet. And we don't want to estimate the age from healthy persons who gave their blood for their reference sample, but also from stains.

MR OBHOF: [10:30:54] Quick witness today, your Honour.

PRESIDING JUDGE SCHMITT: [10:30:57] Finished?

MR OBHOF: [10:30:59] Yes, unless the Judges have any more questions.

PRESIDING JUDGE SCHMITT: [10:31:02] No. No, I don't think so.

Then, Mr Kloosterman, this was really very quick. You are obviously also surprised.

THE WITNESS: [10:31:10] Yes.

PRESIDING JUDGE SCHMITT: [10:31:11] So this concludes your testimony. We thank you very much that you have been coming. By the way, where did you come from exactly today? I am just interested. Not so far away, I would assume?

THE WITNESS: [10:31:20] Not so far away, no, from -- 20 kilometres away from here.

PRESIDING JUDGE SCHMITT: [10:31:24] Okay. So, nevertheless I thank you for coming to this courtroom.

THE WITNESS: [10:31:27] So I go back to the NFI now.

PRESIDING JUDGE SCHMITT: [10:31:29] And we wish you a nice rest of the day. But I think you are going to work.

THE WITNESS: [10:31:34] Yes.

PRESIDING JUDGE SCHMITT: [10:31:35] But thank you very much again. We adjourn the hearing and tomorrow, I think, P-293.

THE COURT USHER: [10:31:42] All rise.

(The hearing ends in open session at 10.31 a.m.)