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**International
Criminal
Court**

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

Date: **20 August 2019**

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 request to present evidence in rebuttal

Source: The Office of the Prosecutor

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Introduction

1. The Prosecution seeks leave to call Prof. Christopher Blattman (P-0453), the Ramalee E. Pearson Professor of Global Conflict Studies at the University of Chicago (USA) with expertise in international development, economics and politics, as an expert witness in rebuttal. The book-chapter co-authored by P-0453 titled 'On the nature and causes of LRA abduction: what the abductees say',¹ discussing the results of the Survey of War Affected Youth, Phase I ("Survey") conducted in Uganda in 2005-2006, is already formally submitted into evidence.² P-0453 was one of the principal researchers of the Survey. When Defence expert witness D-0133 was confronted with the Survey's results on the manner in which LRA members left the armed group, he claimed that they are unreliable because of linguistic and/or cultural miscommunication between the interviewees and the researchers.³ P-0453's rebuttal evidence – his expert report⁴ - addresses that claim and explains what measures the researchers took to avoid the possibility of cultural misunderstanding, linguistic mistakes, unrepresentative samples, and misworded questions.⁵ P-0453's evidence is therefore limited to the one discrete and narrow issue, which arises directly from D-0133's testimony.

2. The Prosecution requests that P-0453's evidence and related materials (the expert witness's curriculum vitae and the Prosecution's Letter of Instruction)⁶ be introduced into evidence pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules") or, alternatively, pursuant to Rule 68(3) of the Rules.

¹ UGA-OTP-0272-0002 at 0146-0169.

² P-0453 is the co-author of the book-chapter with Dr. Jeannie Annan. The evidence was recognized as formally submitted by the Trial Chamber on 27 January 2017.

³ ICC-02/04-01/15-T-204-ENG ET, p. 38 ln. 16 – p. 39 ln. 5.

⁴ UGA-OTP-0286-1323.

⁵ *Ibid.*

⁶ UGA-OTP-0286-1319 and UGA-OTP-0286-1331.

3. The Prosecution may make further requests to present rebuttal evidence as the Defence's presentation of evidence continues.

Submissions

A. The Chamber should allow the presentation of P-0453's evidence in rebuttal.

4. The Trial Chamber's 'Decision on the conduct of proceedings' provides that leave must be sought in order to present rebuttal evidence.⁷ The Rome Statute ("Statute") and the Rules are silent on the issue, but other trial chambers of this Court have held that, for such applications to succeed, the Prosecution must demonstrate:

-) that an issue of significance has arisen *ex improviso*;
-) that the proposed evidence in rebuttal satisfies the admissibility criteria; and
-) that this step will not undermine the Accused's rights, in particular under Article 67 of the Rome Statute ("Statute").⁸

I. The allegation about linguistic and/or cultural misunderstanding in the Survey arose *ex improviso* during D-0133's testimony.

5. The evidence that the Prosecution seeks to rebut is D-0133's claim that the results of the Survey described in P-0453's book-chapter are tainted by linguistic

⁷ ICC-02/04-01/15-497, para. 9.

⁸ *Prosecutor v. Ntaganda*, Decision on Prosecution request for presentation of evidence in rebuttal (ICC-01/04-02/06-2197-Conf) and related filings, ICC-01/04-02/06-2246, 26 February 2018, para. 20; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWW-0005, 21 April 2011, ICC-01/04-01/06-2727-Conf, paras 42-43 and the case law referred to in relevant footnotes; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029, paras 24-25.

and/or cultural miscommunication.⁹ This claim arose *ex improviso* during D-0133's testimony and could not have been anticipated by the Prosecution through the exercise of reasonable due diligence.

6. D-0133, when questioned by the Defence, stated that no children escaped from the LRA voluntarily, all were 'recovered' by the military.¹⁰ The Prosecution confronted D-0133 with the results of the Survey described in P-0453's book-chapter, which concluded the opposite.¹¹ It reported that out of 462 abducted males aged 14 to 30 at the time of the interviews, 80% had escaped the LRA, 15% were released and only 5% were rescued.¹² D-0133 responded that he did not agree with the results and that the researchers' concept of escape must have been inadequate, implying cultural and/or linguistic failings in the methodology of their information gathering.¹³ The Prosecution notes that the possibility of discussion about the manner in which young people in the LRA left the armed group was not included in D-0133's expert report or the summary of his anticipated testimony beforehand.¹⁴

7. The book-chapter discussing the Survey was formally recognized as submitted into evidence on 27 January 2017. The Defence did not challenge its formal submission and/or admissibility, nor has it challenged the conduct and results of the Survey on which it is based. The book-chapter has in fact been favourably cited in a number of academic and other publications disclosed by the Defence during trial and included in its List of Evidence.¹⁵ The Prosecution therefore

⁹ The Prosecution emphasizes that the issue it seeks to rebut is the very narrow issue of alleged cultural and/or linguistic failings in P-0453's research and **not** the wider issue of the ability of LRA personnel to escape and the nature of such escapes.

¹⁰ ICC-02/04-01/15-T-203-ENG ET, p. 80 lns. 5-9 and p. 81 lns. 4-15.

¹¹ ICC-02/04-01/15-T-203-ENG ET, p. 36 ln. 1 to p. 37 ln. 6.

¹² Ibid. See also UGA-OTP-0272-002 at 0150-0151.

¹³ ICC-02/04-01/15-T-204-ENG ET, p. 38 ln. 16 – p. 39 ln. 5.

¹⁴ See also email communication of 27 February 2019 at 13:23 hrs from the Prosecution to the Chamber and parties and participants, titled 'Prosecution's Updated List of materials for examination of D-0133'.

¹⁵ See for example: UGA-D26-0015-0642 at 0652 (no. 153 in Defence's LOE), UGA-D26-0018-0506 at 0545 (no. 196 in Defence's LOE), UGA-D26-0018-2582 at 2589 (no. 252 in Defence's LOE). See also UGA-D26-0018-2179 at 2213.

could not have reasonably anticipated D-0133's claims about the alleged cultural and/or linguistic failings in the conduct of the Survey prior to his testimony.

8. The Parties appear to disagree about the possibility of and prevalence of escape in the LRA. The issue is related to duress as pleaded by the Defence. Data about the number of people that managed to escape from the LRA is significant in this regard. P-0453's expert report, explaining how the Survey described in the book-chapter was conducted, thereby addressing the claims of D-0133 about cultural and/or linguistic miscommunication, will enable the Chamber to properly evaluate that testimony and other evidence that is already formally submitted.

II. P-0453's evidence satisfies the admissibility criteria.

9. The proposed rebuttal evidence is relevant and has significant probative value.

10. P-0453's expert report is concise and clear. It includes a detailed, step-by-step description of how the Survey that led to the results publicized in the book-chapter was conducted. It sets out the methodology by which P-0453 collected the data and framed his conclusions, including the sampling strategy of the Survey, the design of the questionnaire, the process of translation and back-translation, the process of surveying former LRA abductees and the process for conducting additional qualitative interviews on a subset of the Survey's sample. The expert report contains examples and is signed by the expert witness. As put by P-0453 himself: "I illustrate the dramatic lengths my research team and I took to minimize and even eliminate the kinds of linguistic or cultural miscommunication D-0133 is concerned about".¹⁶ Related materials consist of P-0453's detailed curriculum vitae and the Prosecution's Letter of Instruction to the expert. All three documents were disclosed to the Defence on 2 July 2019.

¹⁶ UGA-OTP-0286-1323 at 1323.

11. P-0453 is qualified to testify as an expert. As set out in his curriculum vitae, he is the Ramalee E. Pearson Professor of Global Conflict Studies at the University of Chicago and holds a number of other academic positions.¹⁷ His fields of study include political economy, conflict and crime.¹⁸ He holds a Master of Public Administration in International Development from Harvard Kennedy School and has obtained his PhD from University of California – Berkeley in 2007.¹⁹ P-0453 has conducted extensive research in the field, including in Northern Uganda during the charged period.²⁰ He has published on the impact of conflict in Northern Uganda, and, specifically, on child soldiering and integration of LRA returnees.²¹ His works are cited in many other publications about the armed conflict and its impact in Northern Uganda, including documents disclosed by the Defence in this trial.²² Although P-0453 is not featured on the Registry's list of experts,²³ this should not preclude his engagement as an expert witness in this trial. Pursuant to regulation 44(1) of the Regulations of the Court, the Trial Chamber may allow introduction of expert evidence from persons who are not on the list of experts.

III. Granting the Prosecution's request would not be prejudicial to and would not undermine the rights of the Accused.

12. The proposed rebuttal evidence is limited in scope to one discrete and narrow issue – the conduct of the Survey, whose results regarding escape from the LRA are discussed in P-0453's book-chapter that is already formally submitted into evidence. The reason why the Prosecution seeks to introduce this evidence is to assist the Chamber in its evaluation of that evidence in light of D-0133's claims.

¹⁷ See UGA-OTP-0286-1331 at 1331.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ UGA-OTP-0286-1331 at 1333-1335.

²¹ UGA-OTP-0286-1331 at 1331-1333.

²² For example: UGA-D26-0015-0642 at 0652, UGA-D26-0018-0506 at 0545, UGA-D26-0018-2582 at 2589, UGA-D26-0018-2179 at 2213, UGA-D26-0015-0184 at 0184; UGA-PCV-0004-0247 at 0249, 0250, 0253.

²³ List of Experts before the ICC as of 12 December 2018.

13. It arises out of an unheralded claim made by a witness called on behalf of the Accused. There is no unfair prejudice to the Accused in permitting the opposing party to adduce evidence which enables the Trial Chamber to assess that claim in context.

14. P-0453's expert report is short, amounting to eight pages (seven pages of text). Together with his curriculum vitae and the Letter of Instruction, the total of pages for submission into evidence is 21.

15. The Defence has been in possession of the expert report, P-0453's curriculum vitae and the Letter of Instruction since 2 July 2019. Since the same date, the Defence has also been on notice that the Prosecution will seek to call P-0453 as a rebuttal witness.²⁴

16. The Prosecution proposes that P-0453's evidence be introduced pursuant to Rule 68(2)(b) of the Rules, which would mean that the proceedings would not be delayed in any way. Even if the witness were to testify under Rule 68(3) of the Rules, his testimony would not take more than a day.

B. The evidence of P-0453 should be introduced pursuant to Rule 68(2)(b) of the Rules.

17. The Prosecution requests that P-0453's rebuttal evidence, if allowed, be introduced pursuant to Rule 68(2)(b) of the Rules. The evidence includes his expert report (UGA-OTP-0286-1323), his detailed curriculum vitae (UGA-OTP-0286-1331) and the Letter of Instruction issued to P-0453 by the Prosecution (UGA-OTP-0286-1319).

18. The decision of whether to introduce prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, when the relevant requirements are met, is discretionary

²⁴ This is discussed in the Letter of Instruction, UGA-OTP-0286-1319 at 1322.

in nature.²⁵ Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber must bear in mind in the exercise of such discretion. The Trial Chamber has elaborated on those criteria in its previous decisions on the application of Rule 68(2)(b) in this case.²⁶ Significantly, the Trial Chamber has emphasized that the crucial question is whether the previously recorded testimony may, in light of its content and significance to the case, be introduced without the need for ‘testing’ the information through oral examination of the witness at trial.²⁷

19. Alternatively, if the Trial Chamber decides that P-0453 should appear for testimony, the Prosecution requests that his evidence be introduced pursuant to Rule 68(3) of the Rules, in accordance with the established practice in the case for expert witnesses.

a) The evidence does not address acts or conduct of the Accused.

20. The expert report of P-0453 goes to the proof of a matter other than the acts and conduct of the Accused. The scope of the expert report and therefore the witness’s testimony is very narrow – related solely to the conduct of the Survey carried out amongst young LRA returnees in 2005-2006, addressing the claims about the conduct of the Survey made by D-0133.

²⁵ Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Conf, para. 6.

²⁶ Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596; Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600; Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016, ICC-02/04-01/15-621; Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 2 July 2018, ICC-02/04-01/15-1294; Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 16 August 2018, ICC-02/04-01/15-1322.

²⁷ Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Conf, para. 7, referring to *Bemba et al.* Rule 68 Decision, ICC-01/05-01/13-1478-Red-Corr.

21. Whilst the possibility and prevalence of escape in the LRA is something the Parties disagree about, the Prosecution observes that P-0453's evidence is limited to how the Survey was conducted, nothing more.

b.) P-0453's evidence is of cumulative nature.

22. The book-chapter submitted into evidence already provides some information about the conduct of the Survey.²⁸ P-0453's expert report, providing further detail, is therefore of cumulative nature, answering specifically (and only) the assertions made by D-0133 during his testimony.

c.) The evidence has sufficient indicia of reliability.

23. The expert report and related material all have sufficient indicia of reliability to be introduced into evidence pursuant to Rule 68(2)(b) of the Rules. As discussed in paragraph 9 above, the expert report is written in a clear, unambiguous language. It is detailed and signed by the expert. P-0453's curriculum vitae is similarly detailed and provided by the expert himself. The Prosecution's Letter of Instruction is also concrete, clear and it lists all the materials supplied to the expert witness by the Prosecution.

d.) Given the limited scope of P-0453's evidence, the interests of justice will best be served by its introduction pursuant to Rule 68(2)(b) of the Rules.

24. Finally, the Prosecution submits that introducing P-0453's expert report and related materials pursuant to Rule 68(2)(b) of the Rules is in the interests of justice. Introducing the materials in this manner will save court time and resources. It will also be least disruptive for P-0453 himself, who is a busy university professor.

²⁸ UGA-OTP-0272-0002 at 0147.

C. The Prosecution may make further requests for presentation of rebuttal evidence in the future.

25. On 15 July 2019 the Trial Chamber invited the Prosecution to seek leave for presenting rebuttal evidence as early as possible.²⁹ The Prosecution accordingly files this request.

26. The Prosecution is considering additional requests to present rebuttal evidence, for example related to the anticipated Defence evidence on the applicability of Article 31(1)(a) of the Statute to Dominic Ongwen. The Prosecution will however only be able to make a final determination on these issues towards the very end of the case, when Defence expert witnesses D-0041 and D-0042 will have testified. Similarly, the Defence has not yet submitted any requests for introduction of documentary evidence from the bar table, which – depending on the content and the outcome – may also prompt requests for the presentation of rebuttal evidence. In other words, the Prosecution reserves the right to make further requests to present rebuttal evidence until the Defence’s presentation of evidence concludes. The Prosecution however undertakes to act speedily and present any such requests as soon as possible to enable the Trial Chamber to rule on them promptly and to avoid a delay in the proceedings.

Relief Sought

27. For the foregoing reasons, the Prosecution requests the Trial Chamber to:

FIRST, grant the request to call Christopher Blattman (P-0453) as a Prosecution expert witness in rebuttal;

²⁹ Email communication from Trial Chamber IX titled ‘hearing schedule for the remainder of 2019’, sent to the parties and participants of 15 July 2019 at 18:16 hrs.

SECOND, grant the request to introduce, subject to the receipt of the respective declarations under rule 68(2)(b)(ii) and (iii) of the Rules, the prior recorded testimony of P-0453 (UGA-OTP-0286-1323) and associated materials (UGA-OTP-0286-1319, UGA-OTP-0286-1331) into evidence pursuant to Rule 68(2)(b) of the Rules, or, alternatively, pursuant to Rule 68(3) of the Rules.



Fatou Bensouda, Prosecutor

Dated this 20th day of August 2019
At The Hague, the Netherlands