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**International
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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public Document

CLRV's Response to "Prosecution request to present evidence in rebuttal"

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims¹ (the “CLRV”) supports the “Prosecution’s Request to Present Evidence in Rebuttal” (the “Request”).²

2. In particular, the CLRV submits that the need to call P-0453 has arisen *ex improviso* during the testimony of D-0133 and allowing the evidence in rebuttal will help the Trial Chamber (the “Chamber”) to better understand a significant piece of evidence going to the matter of duress as pleaded by the Defence and thus will assist in the determination of the truth. Moreover, granting the Request will not prejudice the rights of the Accused and the fair and expeditious conduct of the proceedings. Additionally, granting the Request shall constitute an important step towards ensuring the respect of the Victims’ right to the truth.

II. PROCEDURAL BACKGROUND

3. On 13 July 2016, the Presiding Judge of the Chamber issued the “Initial Directions on the Conduct of the Proceedings” and held that leave must be sought in order to present rebuttal or rejoinder evidence.³

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Prosecution request to present evidence in rebuttal”, No. ICC-02/04-01/15-1569, 20 August 2019 (the “Request”).

³ See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX, Presiding Judge), No. ICC-02/04-01/15-497, 13 July 2016, para. 9.

4. On 15 July 2019, the Chamber invited the Prosecution to seek leave for presenting rebuttal evidence as early as possible.⁴ On 20 August 2019, the Prosecution filed its Request.⁵

III. SUBMISSIONS

A. Applicable Law

5. The CLRV agrees with the Prosecution that the jurisprudence of the other Chambers of the Court establishes the following criteria for calling rebuttal evidence: (a) an issue of significance has arisen *ex improviso*; (b) the proposed evidence in rebuttal satisfies the admissibility criteria; and (c) allowing it will not undermine the accused's fair trial rights under article 67 of the Rome Statute (the "Statute").⁶ Yet, in the context of this case, the Chamber already held in the Initial Directions that it will defer its assessment of the admissibility of the evidence (including the relevance and probative value) until deliberating its judgment pursuant to article 74(2) of the Statute.⁷ Therefore, the above mentioned criterion (b) is not applicable in the present proceedings. Moreover, whether the proposed evidence may be necessary for the determination of the truth is another important element in assessing a request to submit rebuttal evidence under article 69(3) of the Statute.⁸

⁴ See the email sent by the Chamber on 15 July 2019 at 18:16.

⁵ See the Request, *supra* note 2.

⁶ See the "Decision on Prosecution request for presentation of evidence in rebuttal (ICC-01/04-02/06-2197-Conf) and related filings" (Trial Chamber VI), No. ICC-01/04-02/06-2246, 26 February 2018, para. 20 and the "Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005" (Trial Chamber VI), No. ICC-01/04-01/06-2727-Red, 28 April 2011, paras. 42-43.

⁷ See the "Initial Directions on the Conduct of the Proceedings", *supra* note 3, paras. 24-26. See also the "Decision on Prosecution Request to Submit Interception Related Evidence (Trial Chamber IX), No. ICC-02/04-01/15-615, 1 December 2016, paras. 4-13.

⁸ See the "Decision on "Prosecution's Application to Submit Additional Evidence"" (Trial Chamber III), No. ICC-01/05-01/08-3029, 02 April 2014, para. 28.

B. Merits of the Request

6. The CLRV firstly agrees with the Prosecution that the claim made by D-0133 to the effect that the results of the Survey described in P-0453's book-chapter are tainted by linguistic and cultural errors and that no children escaped from the LRA voluntarily but were all recovered by the Ugandan military is an issue of significance that has arisen *ex improviso*.⁹ Indeed, the matter of abducted children escaping on their own initiative from the LRA was discussed throughout the trial. Yet, it was heard for the first time during the testimony of D-0133 that all those children allegedly left the bush only because of the UPDF interventions. Consequently, this matter could not have been anticipated prior to the in court testimony of D-0133.

7. Moreover, the CLRV submits that allowing the Prosecution's rebuttal evidence in order to shed light on this contested matter is necessary for the determination of the truth. While what constitutes evidence that is necessary for the determination of the truth is inevitably to be decided by the Chamber on a case-by-case basis,¹⁰ Trial Chamber III elaborated that:

"The power of the Chamber under Article 69(3) of the Statute is a discretionary power to be exercised where the Chamber considers that certain additional evidence may be necessary for the determination of the truth. In considering whether or not to exercise this power in any particular case, it is appropriate for the Chamber to have regard to a broad range of factors, including the evidence already before it, the potential impact on the fairness and expeditiousness of the trial and rights of the accused, and the centrality and relevance of the additional evidence to the core matters for determination by the Chamber".¹¹

⁹ See the Request, *supra* note 2, paras. 5-8.

¹⁰ See the "Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'" (Appeals Chamber), No. ICC-01/04-01/07-2288 OA11, 16 July 2010, para. 112.

¹¹ See the "Decision on 'Prosecution's Application to Submit Additional Evidence'" (Trial Chamber III), No. ICC-01/05-01/08-3029, 2 April 2014, para. 29.

8. Accordingly, the CLRV further agrees with the Prosecution that the matter of possibility of voluntary escape from the LRA is a significant issue that is related to duress as pleaded by the Defence pursuant to article 31(1)(d) of the Statute.¹² The proposed evidence in response to the claim made by D-0133 regarding duress is of course central to the core matters to be determined by the Chamber at the end of the trial. Moreover, the CLRV submits that determining whether abducted children had to escape on their own volition from the LRA in extremely harsh circumstances, including the fact that many of them risked their very lives for doing so, or whether they were simply recovered by the UPDF is also crucial for the Chamber's assessment of the whole extent and the nature of the personal harm they suffered from at the hands of the LRA commanders, including Mr. Ongwen.

9. Yet, if left unaddressed, this issue of significance might cast doubt over not only the veracity of the expert evidence and the credibility of P-0453 but also might indirectly affect (in the minds of the Judges) the weight of other relevant evidence provided by the experts who are not native Acholi or Luo speakers. It is because the crux of the issue revolves around the exact meaning of certain words or expressions of Acholi or Luo language over which the words of a native speaker and those of non-native speakers collide.¹³ Thus, during its deliberation, the Chamber might find itself confronted with an insoluble linguistic problem related to the testimonies of experts with different primary languages and cultural backgrounds. Therefore, while the Prosecution seeks to call the rebuttal evidence only on the narrow issue of the

¹² See the Request, *supra* note 2, para. 8.

¹³ See Transcript No. ICC-02/04-01/15-T-204-ENG ET WT, p. 38 line 17 – p. 39 line 5. [...] *You see, when you're in LRA speak and in the local language in Luo, if you talk to somebody, and with due respect to the professor, to escape in Luo or in Acholi would actually not mean to - - to escape I think in the English context. For example, laor, that is in Luo, but what if you ask this person, this child, 'You escaped. How did you escape?' The child will still go back to the story, "You see, when the army ambushed us, we were here. And after the ambush when they shot, we escaped." Now if I was to do a critique of that research after this professor had done it, I would point that out to the professor that, 'Actually your term, your concept of escape is inadequate because all this escape they're saying is not an initiated willful move by the children when LRA is sleeping and they escaped.' If you go to the root of whatever one clear story of escape, every child has a story of how he escaped and all of them are connected to a conflict, to an attack or they were attacked and that is how they escaped. So I don't agree with this data".*

reliability of the Survey conducted by P-0453, the Chamber should also take into account the impact of the claim made by D-0133 in potentially influencing, albeit coincidentally, the assessment of other expert evidence as part of its duty to determine the truth.¹⁴

10. Consequently, the CLRV further agrees with the Prosecution that admitting P-0453's expert report, which explains how the Survey in question was conducted, thus addressing the claim of D-0133 about cultural or linguistic misunderstanding, will enable the Chamber to properly evaluate that expert testimony and other evidence that is formally submitted.¹⁵ This will indeed be in line with the Chamber's duty to determine the truth pursuant to article 69(3) of the Statute which gives it broad powers to request the submission of necessary evidence.¹⁶ Indeed, the Appeals Chamber held in this regard that "[t]he determination of the truth is a central aspect of any criminal trial to which not only the Prosecutor, but also a Trial Chamber is under an obligation to actively contribute".¹⁷

11. Next, the CLRV further agrees with the Prosecution that allowing the proposed rebuttal evidence will not undermine the Accused's rights under article 67

¹⁴ See the "Decision on Defence Request to add Witnesses D-0251 and D-0257 to its List of Witnesses" (Trial Chamber VI), No. ICC-01/04-02/06-2079, 20 October 2017, para. 23.

¹⁵ See the Request, *supra* note 2, para. 8.

¹⁶ See the "Judgment on the Appeal of the Prosecutor against the 'Decision on Request of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre'" (Appeals Chamber), No. ICC-01/04-01/07-1718-Conf-Exp OA9, 09 December 2009, para. 48. (Pursuant to the Appeals Chamber Order ICC-01/04-02/12-252, dated 4th February 2015, this document is reclassified as "public") See also "Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", No. ICC-01/09-01/11-1938-Anx-Red, 19 August 2015, para. 28 "[...] [A]rticle 69(3) is a very important expression of the plenitude of a Trial Chamber's incidental jurisdiction to do justice in the case, by admitting necessary evidence in the interest of justice, beyond any limitations that may be inherent in the Rules of Evidence and Procedure, and particularly in the context of the tabulated categories indicated in [rule] 68."

¹⁷ See the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. ICC-01/04-02/12-271 A, 27 February 2015, para. 275.

of the Statute.¹⁸ Considering the limited scope of the rebuttal evidence in question and the relatively short length of the expert report which was disclosed previously, the Defence will not suffer any prejudice in the event that the Chamber grants the Request. In addition, the introduction of this single expert witness at the end of the trial which commenced three years ago cannot possibly affect the fair and expeditious conduct of the proceedings.

12. Lastly, allowing the rebuttal evidence proposed by the Prosecution will constitute an important step towards ensuring the respect of the Victims' right to the truth. Indeed, the proper understanding and assessment of expert evidence of P-0453 might impact the weight of the body of incriminating evidence against the Accused and thus influence the Chamber's ultimate verdict on the extent of his culpability. Thus, as held by the Single Judge of Pre-Trial Chamber I, the declaration of guilt of the ones responsible for the suffering of the Victims is at the root of their right to the truth.¹⁹ In pursuing this right, Victims have a central interest in: (i) bringing clarity about what indeed happened; and (ii) closing possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.²⁰ Thus, the CLRV submits that calling P-0453 will indeed elucidate what transpired when the abducted children left the LRA and close gaps between the opinions of the expert witnesses on related matters.

13. As for the Prosecution's proposal that P-0453's evidence be introduced either pursuant to rule 68(2)(b) or 68(3) of the Rules of Procedure and Evidence, the CLRV leaves it to the discretion of the Chamber.

¹⁸ See the Request, *supra* note 2, paras. 12-16.

¹⁹ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, para. 39.

²⁰ *Idem*, para. 34.

IV. CONCLUSION

14. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to grant the Prosecution's Request.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 30th day of August 2019

At The Hague, The Netherlands