

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **2 September 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

Public Redacted Version of “Defence Response to the Prosecution’s ‘request to present evidence in rebuttal’” filed on 30 August 2019

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

REGISTRY

Registrar

Peter Lewis

Victims and Witnesses Unit

Nigel Verrill

I. INTRODUCTION

1. The Defence requests Trial Chamber IX ('Trial Chamber' or 'Chamber') to deny leave for the Prosecution to call Professor Christopher Blattman ('Professor Blattman' or 'P-0453') as a Prosecution witness for rebuttal. It should be rejected because it does not meet the three-part legal test¹ required to introduce rebuttal evidence: the Prosecution through the exercise of due diligence should have anticipated a linguistic and/or cultural miscommunication arising, the proposed rebuttal evidence does not meet the admissibility criteria and it violates Mr. Ongwen's fair trial rights notably under Article 67 of the Rome Statute ('Statute').
2. Alternatively, in the event that the Chamber grants leave for the Prosecution to call Professor Blattman as a rebuttal witness, the Defence requests the Trial Chamber to deny the Prosecution's request to introduce Professor Blattman's evidence ('rebuttal report' or 'rebuttal evidence') and related materials (his curriculum vitae and Letter of Instruction) under Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules')² and to instead require that it be introduced pursuant to Rule 68(3) of the Rules.
3. In the event that Professor Blattman is accepted to be a Prosecution witness for rebuttal, the Defence will request leave to call rejoinder evidence. Moreover, the Defence may make further requests for leave to call rejoinder witnesses depending on any potential future rebuttal evidence requests from the Prosecution.

II. CONFIDENTIALITY

4. Pursuant to Regulations 23bis of the Regulations of the Court ('RoC'), this request is submitted as confidential as it refers to the contents of confidential evidence.³ A public redacted version will be filed shortly thereafter.

¹ Trial Chamber III in the *Bemba* case refers to it as the three-part test designed by Trial Chamber I in the *Lubanga* case in its Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029 ('*Bemba*, ICC-01/05-01/08-3029'), page 11, footnote 49.

² *Prosecutor v. Ongwen*, Prosecution request to present evidence in rebuttal, 20 August 2019, ICC-02/04-01/15-1569, para. 2 ('*Ongwen*, Prosecution Rebuttal Request').

³ Both D-0133's CV (UGA-D26-0015-1154) and the Letter of Instruction for Professor Blattman (UGA-OTP-0286-1319) are classified confidential in eCourt. The Defence refers to both in its request and thus submits it as confidential.

III. SUBMISSIONS

A. Professor Blattman's evidence should not be accepted as rebuttal evidence because it does not meet the three-part test

5. As articulated by the Prosecution in its request,⁴ while the Rome Statute ('Statute') does not mention rebuttal evidence, other Trial Chambers of the International Criminal Court ('ICC') hold that in order for the Prosecution to successfully introduce rebuttal evidence, it needs to demonstrate:

(1) An issue of significance has risen *ex improviso*;

(2) The rebuttal evidence satisfies the admissibility criteria; and

(3) It will not undermine the rights of the accused, in particular under Article 67 of the Statute⁵

6. Trial Chamber I in the *Lubanga* case is the first of the above cited Trial Chambers that formulated the three-part legal test the Prosecution needs to meet to successfully introduce rebuttal evidence.⁶ This three-part legal test was largely based on the oral decision of Trial Chamber II in the *Katanga* case and jurisprudence of the *ad hoc* Tribunals.⁷ Moreover, Trial Chamber I underlined that the jurisprudence of the *ad hoc* is of potential relevance notably "when addressing the circumstances in which evidence may be presented" for rebuttal.⁸ Thus, this motion will equally rely on the jurisprudence of the *ad hoc* Tribunals to demonstrate that the Prosecution failed to successfully

⁴ Ongwen, Prosecution Rebuttal Request, para. 4.

⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, 28 April 2011, ICC-01/04-01/06-2727-Red, para. 42-43 ('*Lubanga*, ICC-01/04-01/06-2727-Red'); *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution request for presentation of evidence in rebuttal (ICC-01/04-02/06-2197-Conf) and related filings, 26 February 2018, ICC-01/04-02/06-2246, para. 20 ('*Ntaganda*, ICC-01/04-02/06-2246'); *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029, para. 24-25 and see footnote number 49 ('*Bemba*, ICC-01/05-01/08-3029').

⁶ *Lubanga*, ICC-01/04-01/06-2727-Red (see paras. 39 to 43) which was rendered on 28 April 2011 and was based largely on the various decisions of the *ad hoc*s as well as Trial Chamber II's oral decision delivered on 24 November 2010 in the *Katanga* case ICC-01/04-01/07-T-222-Red-ENG WT, page 77 lines 9-14, and page 77 line 16 to page 78 line 2. *Bemba*, ICC-01/05-01/08-3029 was rendered on 2 February 2014 where Trial Chamber III referred to the "three-part legal test" created by Trial Chamber I that the Prosecution needs to satisfy to introduce rebuttal evidence see *Bemba*, ICC-01/05-01/08-3029, para. 24 and footnote 49. *Ntaganda*, ICC-01/04-02/06-2246 was rendered on 26 February 2018, para. 20 also referred to Trial Chamber I's findings based on Trial Chamber II and the *ad hoc* jurisprudence on the three criteria that the Prosecution needs to demonstrate to call rebuttal evidence.

⁷ *Lubanga*, ICC-01/04-01/06-2727-Red, see para. 40 to 43 and see ICC-01/04-01/07-T-222-Red-ENG WT page 77 lines 9-14 and page 77 lines 16 to page 78 line 2 for Trial Chamber II's oral Decision.

⁸ *Lubanga*, ICC-01/04-01/06-2727-Red, para. 41.

demonstrate the three-part legal test to introduce Professor Blattman as its expert rebuttal witness.

(1) Through the exercise of due diligence, the Prosecution should have anticipated a linguistic and/or cultural miscommunication arising.

7. The Prosecution argues that it could not have anticipated the claim of linguistic and/or cultural miscommunication of D-0133.⁹ The Prosecution refers to the testimony of D-0133 where the expert witness explained that ‘escape’ as an English term means a different thing in a Luo or Acholi context.¹⁰ D-0133 critiqued Professor Blattman’s research because it did not take this difference into account in his survey about abductees that escaped and also critiqued the concept of escape as a willful initiated move by children.¹¹
8. During the Prosecution’s case-in-chief issues regarding linguistic and/or cultural miscommunications have arisen.¹² Given that a large number of witnesses called by both parties speak Luo (Acholi and/or Lango),¹³ the Prosecution should have

⁹ *Ongwen*, Prosecution Rebuttal Request, para. 5-6.

¹⁰ See *Ongwen*, Prosecution Rebuttal Request, para. 6 where the Prosecution states as follows: “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.” The Prosecution then refers to ICC-02/04-01/15-T-204-ENG ET, p. 38 lines 16 to page 39 lines 5.

¹¹ *Ibid* and see ICC-02/04-01/15-T-204, page 38 lines 24 until page 39 lines 5.

¹² See for example ICC-02/04-01/15-T-123-CONF-ENG ET page 40 lines 22 to 25, page 41 lines 1 to 25 and page 42 lines 1 to 4. See also ICC-02/04-01/15-T-39-CONF-ENG ET page 30, lines 1 to 9; ICC-02/04-01/15-T-119-CONF-ENG ET, page 46 lines 17 to 25 and page 47 lines 1 to 6; ICC-02/04-01/15-T-128-ENG ET, page 25 lines 17 until page 28 line 3.

¹³ For example, the following witnesses testified in Acholi: P-0226 see ICC-02/04-01/15-T-8-CONF ENG ET, P-0101 see ICC-02/04-01/15-T-13-CONF-ENG ET, P-0099 see ICC-02/04-01/15-T-14-CONF ENG ET, P-0214 see ICC-02/04-01/15-T-15-CONF-ENG ET, P-0236 see ICC-02/04-01/15-T-16-CONF ENG ET, P-0235 see ICC-02/04-01/15-T-17-CONF-ENG ET, P-0016 see ICC-02/04-01/15-T-32-CONF-ENG-ET, P-0059 see ICC-02/04-01/15-T-37-CONF-ENG ET, P-0440 see ICC-02/04-01/15-T-39-CONF-ENG ET, P-0205 see ICC-02/04-01/15-T-47-CONF-ENG ET, P-0330 see ICC-02/04-01/15-T-51-CONF-ENG ET, P-0379 see ICC-02/04-01/15-T-56-CONF-ENG ET, P-0309 see ICC-02/04-01/15-T-60-CONF-ENG ET, P-0264 see ICC-02/04-01/15-T-64-CONF-ENG ET, P-0081 see ICC-02/04-01/15-T-118-CONF-ENG ET, P-0138 see ICC-02/04-01/15-T-120-CONF-ENG-ET, P-0231 see ICC-02/04-01/15-T-122-CONF-ENG ET, P-0275 see ICC-02/04-01/15-T-124-CONF-ENG ET, P-0067 see ICC-02/04-01/15-T-125-CONF-ENG ET, P-0351 see ICC-02/04-01/15-T-129-CONF-ENG ET, P-0006 see ICC-02/04-01/15-T-140-CONF-ENG ET, P-0250 see ICC-02/04-01/15-T-141-CONF-ENG ET, P-0145 see ICC-02/04-01/15-T-143-CONF-ENG ET, P-0366 see ICC-02/04-01/15-T-147-CONF-ENG ET, P-0372 see ICC-02/04-01/15-T-148-CONF-ENG ET, P-0406 see ICC-02/04-01/15-T-154-CONF-ENG ET, P-0209 see ICC-02/04-01/15-160-CONF-ENG ET, P-0187 see ICC-02/04-01/15-T-164-CONF-ENG ET, P-0352 see ICC-02/04-01/15-T-67-CONF-ENG ET, P-0018 see ICC-02/04-01/15-T-68-CONF-ENG ET, P-0142 see ICC-02/04-01/15-T-70-CONF-ENG ET, P-0314 see ICC-02/04-01/15-T-74-CONF-ENG ET, P-0024 see ICC-02/04-01/15-T-77-CONF-ENG ET, P-0249 see ICC-02/04-01/15-T-79-CONF-ENG ET, P-0009 see ICC-02/04-01/15-T-81-ENG ET, P-0280 see ICC-02/04-01/15-T-83-CONF-ENG ET, P-0269 see ICC-02/04-01/15-T-85-CONF-ENG ET, P-0252 see ICC-02/04-01/15-T-87-CONF-ENG ET, P-0218 see ICC-02/04-01/15-T-90-ENG ET, P-0144 see ICC-02/04-01/15-T-91-CONF-ENG ET, P-0054 see ICC-02/04-01/15-T-93-CONF-ENG ET, P-0245 see ICC-02/04-01/15-T-98-CONF-ENG ET, P-0340 see ICC-02/04-01/15-T-102-CONF-ENG ET, P-0045 see ICC-02/04-01/15-T-103-CONF-ENG ET, P-0070 see ICC-

reasonably anticipated issues relating to linguistic and/or cultural miscommunication arising again.

9. Additionally, D-0133's CV was disclosed to the Prosecution on 12 December 2018,¹⁴ which indicates that D-0133 speaks Luo (both Acholi and Lango), that he was a former child soldier and that he has done extensive work with former child soldiers, for example, by helping in the resettlement of rescued LRA children.¹⁵
10. The Prosecution appears to argue that it could not have reasonably anticipated the possibility of a discussion regarding the way in which young soldiers left the LRA since this did not appear in D-0133's expert report or summary to further support its argument that D-0133's opinion about "linguistic and/or cultural misunderstanding in the Survey arose *ex improviso*".¹⁶ However, [REDACTED].¹⁷ Thus, it could have reasonably anticipated such a discussion arising during D-0133's testimony.
11. Moreover, the possibility of escape and the manner in which abductees left the LRA was discussed on several occasions at the Pre-Trial level, during the Prosecution's case-in-chief and during the Defence case.¹⁸ Thus the Prosecution, with the exercise of due diligence, should have anticipated the possibility of a discussion regarding the way in which young people left the LRA.

02/04-01/15-T-105-CONF-ENG ET, P-0233 see ICC-02/04-01/15-T-111-CONF-ENG ET, P-0172 see ICC-02/04-01/15-T-113-CONF-ENG ET, D-0028 see ICC-02/04-01/15-T-180-CONF-ENG ET, D-0150 see ICC-02/04-01/15-T-182-CONF-ENG ET, D-0087 see ICC-02/04-01/15-T-184-CONF-ENG, D-0079 see ICC-02/04-01/15-T-189-CONF-ENG ET, D-0026 see ICC-02/04-01/15-T-191-ENG-ET, D-0024 see ICC-02/04-01/15-T-192-ENG ET, D-0007 see ICC-02/04-01/15-T-193-ENG ET, D-0006 see ICC-02/04-01/15-T-194-CONF-ENG ET, D-0119 see ICC-02/04-01/15-T-196-CONF-ENG ET, D-0032 see ICC-02/04-01/15-T-199-CONF-ENG ET, D-0027 see ICC-02/04-01/15-T-202-CONF-ENG ET, D-0092 see ICC-02/04-01/15-T-208-CONF-ENG ET, D-0121 see ICC-02/04-01/15-T-213-CONF-ENG ET, D-0066 see ICC-02/04-01/15-T-214-ENG ET, D-0117 see ICC-02/04-01/15-T-215-CONF-ENG ET, D-0118 see ICC-02/04-01/15-T-216-CONF-ENG ET, D-0076 see ICC-02/04-01/15-T-219-CONF-ENG ET, D-0081 see ICC-02/04-01/15-T-220-CONF-ENG ET, D-0068 see ICC-02/04-01/15-T-222-CONF-ENG ET, D-0075 see ICC-02/04-01/15-T-224-CONF-ENG ET, D-0025 see ICC-02/04-01/15-T-226-CONF-ENG ET, D-0056 see ICC-02/04-01/15-T-228-CONF-ENG ET. See also the following called by the Legal Representatives of the Victims that testified in Acholi: V-0002 see ICC-02/04-01/15-T-171-CONF-ENG ET, V-0003 see ICC-02/04-01/15-T-172-CONF-ENG ET, V-0004 see ICC-02/04-01/15-T-173-CONF-ENG-ET. For example, the following Prosecution and Defence witnesses testified in Lango: P-0097 see ICC-02/04-01/15-T-108-CONF-ENG ET, P-0396 see ICC-02/04-01/15-T-126-CONF-ENG ET, P-286 see ICC-02/04-01/15-T-131-CONF-ENG ET, P-0304 see ICC-02/04-01/15-T-133-ENG ET, P-0374 see ICC-02/04-01/15-T-150-CONF-ENG ET, P-0410 see ICC-02/04-01/15-T-151-CONF-ENG ET, P-0307 see ICC-02/04-01/15-T-152-CONF-ENG ET, P-0085 see ICC-02/04-01/15-T-158-CONF-ENG ET, D-0105 see ICC-02/04-01/15-T-190-CONF-ENG ET, D-0084 see ICC-02/04-01/15-T-235-ENG ET.

¹⁴ Rule 78 Pack 55, 12-12-2018.

¹⁵ UGA-D26-0015-1154 at page 1154 and 1156.

¹⁶ See *Ongwen*, Prosecution Rebuttal Request, page 4, heading I and page 5, para. 6.

¹⁷ UGA-D26-0015-1154, at page 1158 see also page 1157.

¹⁸ [REDACTED].

12. The Prosecution attempts to isolate “the issue it seeks to rebut”¹⁹ as “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.”²⁰ However, the Prosecution in its request states that “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”.²¹ The Prosecution then footnotes following passage from D-0133’s testimony:

“[...] 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.”²²

13. Based on the quoted portion of D-0133’s testimony, D-0133’s criticism is not restricted to the cultural and/or linguistic differences between the concept of escape in Luo and/or LRA speak²³ and the English language.²⁴ Yet the Prosecution is now reducing D-0133’s statement to only an “allegation about linguistic and/or cultural misunderstanding.”²⁵ In fact, D-0133 also critiques Professor Blattman’s concept of escape as being insufficient.²⁶ D-0133 critiques Professor Blattman for considering escape as being an “initiated willful move by the children when LRA is sleeping” and it does not go to the root of every child’s escape story.²⁷ In other words, the issue that the Prosecution refers to as cultural and/or linguistic differences also encompasses both the ability, the context and the nature in which former abductees left the LRA, and thus it cannot be isolated.

¹⁹ Ongwen, Prosecution Rebuttal Request, page 5, footnote 9.

²⁰ Ongwen, Prosecution Rebuttal Request, page 5, footnote 9.

²¹ Ongwen, Prosecution Request, page 5, para. 6.

²² ICC-02/04-01/15-T-204-ENG ET WT, page 38 lines 17 to page 39 lines 5 (emphasis removed).

²³ ICC-02/04-01/15-T-204-ENG ET, page 38 lines 17 to 19.

²⁴ ICC-02/04-01/15-T-204-ENG ET, page 38 lines 16 to 25 and page 39 lines 1 to 5.

²⁵ Ongwen, Prosecution Rebuttal Request, page 4 heading I and para. 5 with the corresponding footnote.

²⁶ ICC-02/04-01/15-T-204-ENG ET, page 38 lines 24 until page 39 line 5.

²⁷ ICC-02/04-01/15-T-204-ENG ET, page 38 line 24 until page 39 line 5.

14. In this case, there are no exceptional circumstances to warrant rebuttal evidence. The Prosecution was able to make objections and question D-0133 during the trial.²⁸ During the Defence's direct examination on 26 February D-0133 testified that LRA child soldiers did not voluntarily escape but rather they were "recovered" by the military.²⁹ The following day, which was a non-Court sitting day, the Prosecution added Professor Blattman's book-chapter on its List of materials.³⁰ On 28 of February the Prosecution cross-examined D-0133 with Professor Blattman's book-chapter.³¹
15. Moreover, [REDACTED].³² [REDACTED].³³ Professor Blattman's book-chapter was submitted into evidence since 27 January 2017³⁴ and the chain of custody indicates that the Prosecution was in possession of the book which includes Professor Blattman's book-chapter since 3 October 2016. Thus the Prosecution was aware of Blattman's evidence over two years before D-0133's testimony.
16. The Prosecution clearly knew the importance of the book-chapter in relation to its case theory; during the direct examination of its first witness during its case-in-chief, the Prosecution asked expert witness P-0422 about Professor Blattman's and Annan's study regarding the number of abductees that managed to escape.³⁵ Thus, with the exercise of due diligence the Prosecution should have included [REDACTED] on its List of Materials and cross-examine D-0133 with these findings.
17. Furthermore, Trial Chamber II in the *Katanga* case held that rebuttal evidence may be introduced in exceptional circumstances and stated that "the mere fact that a Prosecutor could not foresee a given Defence question does not, in itself, constitute an exceptional circumstance".³⁶ Similarly, while the question which led to what the Prosecution refers to as linguistic and/or cultural misunderstanding was asked by the Prosecution itself

²⁸ See Lubanga, ICC-01/04-01/06-2727-Red at para. 40 [referring to *Katanga*, ICC-01/04-01/07-T-222-Red-ENG WT, page 77, lines 9 to 11] "exceptional circumstances, which cannot be dealt with sufficiently during the evidence of the witness then before the Court by way of questioning or making an objection, rebuttal evidence may be permitted."

²⁹ ICC-02/04-01/15-T-203-ENG ET, page 80, lines 5 to 9.

³⁰ 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'.

³¹ ICC-02/04-01/15-T-204-ENG ET, page 36, lines 17 until page 39, line 5.

³² UGA-OTP-0286-1323, page 1327.

³³ [REDACTED].

³⁴ As indicated by the Prosecution at para. 7 in its Rebuttal Request. See UGA-OTP-0272-0002 from page 0146 until 0169 for the book-chapter.

³⁵ ICC-02/04-01/15-T-28-ENG ET WT, page 61 lines 1 to 8, page 62 lines 18 until page 63 line 10.

³⁶ *Katanga*, ICC-01/04-01/07-T-222-Red-ENG WT, page 77, lines 9 to 11.

rather than by the Defence,³⁷ the fact that it could not foresee an answer given by a witness does not lead to an exceptional circumstance. The question and answer exchange that occurred is simply what can happen during a cross-examination.

(2) The proposed rebuttal evidence does not meet the admissibility criteria in respect to evidence³⁸

(a) The proposed rebuttal evidence lacks relevance

18. The issue of escape has been a big part of both the Prosecution's case-in-chief as well as the Defence case.³⁹ The position of Professor Blattman will be redundant since there is a plethora of evidence on the record about the manner and the circumstances through which witnesses left the LRA.⁴⁰ Moreover, witnesses have testified before the Court about how they left the LRA within the charged period.⁴¹ Professor Blattman's proposed rebuttal report does not appear to be specific in relation to the charged period.⁴² Ultimately it is for the Trial Chamber to evaluate the evidence and decide whether or not escape was prevalent and possible within the charged period.
19. The Prosecution states two reasons for seeking to introduce Blattman's rebuttal evidence; firstly, to assist the Chamber to evaluate D-0133's testimony⁴³ and secondly, to help the Chamber evaluate other submitted evidence.⁴⁴ The Defence submits that this argument is specious: the Trial Chamber is perfectly capable of assessing or weighing the evidence of D-0133, especially given the extensive witness testimony already on the record in light of Professor Blattman's book-chapter. Therefore, Professor Blattman's rebuttal evidence is unnecessary.
20. It appears from this that the Prosecution is objectively underestimating the professionalism of the judges. If there were any questions about the portion of the testimony where D-133 commented on Professor Blattman's book-chapter, the Trial

³⁷ While it was clarified by Presiding Judge Schmitt, however the question originated from the Prosecution, see ICC-02/04-01/15-T-204-ENG ET WT, page 36, lines 17 to 25 until page 38 line 15.

³⁸ See Article 69(4) of the Statute.

³⁹ See para. 11 and corresponding footnote of this motion and see also UGA-OTP-0217-0218, page 0227 lines 307 until page 0228 lines 354 UGA-OTP-0217-0287, page 0302, lines 514 until lines 569, page 0303.

⁴⁰ See para. 11 and corresponding footnote of this motion.

⁴¹ [REDACTED].

⁴² UGA-OTP-0286-1323.

⁴³ Ongwen, Prosecution Rebuttal Request, para. 12 and see para. 8.

⁴⁴ Ongwen, Prosecution Rebuttal Request, para. 8.

Chamber could seek clarification. The Defence notes that following the statement made by D-0133, the Presiding Judge stated “[...] so there was an informed answer, so to speak, and we can -- I think it’s now answered. You can move to another point.”⁴⁵

(b) The proposed rebuttal evidence is prejudicial

21. The Letter of Instruction that the Prosecution addressed to Professor Blattman does not constitute notice to the Defence as claimed by the Prosecution.⁴⁶ First, the letter is addressed only to Professor Blattman; if it was intended as notice to the Defence, then the Prosecution should have copied the Defence rather than disclose it almost four months after the date on the Letter of Instruction to Professor Blattman.⁴⁷
22. The Prosecution cannot bury what it erroneously claims is a notice of rebuttal in a disclosure package. The Prosecution needs to clearly identify a request for rebuttal evidence as such, and cannot use its Letter of Instruction⁴⁸ as a surrogate for notice to the Defence. The Defence was not given notice, and this prejudices Mr. Ongwen’s fair trial rights under Article 67(1)(a) and (e) of the Statute.
23. By analogy, the ICTR Appeals Chamber held that the Prosecution cannot bury exculpatory evidence by merely disclosing it as part of a general disclosure system (EDS) without notifying the Defence of the evidence and giving the “means by which the Defence can be reasonably expected to find them.”⁴⁹ The Appeals Chamber also held that simply because the Prosecution put material on the EDS, it does not constitute reasonably access to the accused. The Appeals Chamber suggested that it could be helpful if such material is separated in a “special file” or that the Prosecution notifies the Defence about such material in writing.⁵⁰ Thus, requests for critical parts of the proceedings cannot be buried when it concerns rebuttal evidence; rather they need to be identified by the Prosecution and made known to the Defence.

⁴⁵ ICC-02/04-01/15-T-204-ENG ET WT, page 39, lines 6 to 7.

⁴⁶ *Ongwen*, Prosecution Request, para. 15, footnote 24.

⁴⁷ UGA-OTP-0286-1319.

⁴⁸ Prosecution Request for Rebuttal, para. 15 and footnote 24.

⁴⁹ *Prosecutor v. Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, ICTR-98-44-AR73.7, 30 June 2006, para. 13.

⁵⁰ *Ibid*, para. 15.

24. Additionally, the Defence notes that at the time that the Prosecution made the request to Professor Blattman to draft a report,⁵¹ the Prosecution had not yet made a formal request to the Trial Chamber for rebuttal evidence. Although the Trial Chamber indicated the possibility of introducing rebuttal evidence subject to its leave in its Initial Directions on the Conduct of Proceedings,⁵² there was no and still has been no decision on the part of the Trial Chamber whether to allow Professor Blattman as a rebuttal witness for the Prosecution. The date of the Letter of Instruction indicates that the Prosecution planned on calling Professor Blattman as a rebuttal witness soon after the testimony of D-0133 who testified at the end of February.⁵³
25. The Appeals Chamber in *Delalic et al* case held that the Prosecution “cannot call additional evidence merely because its case has been met by certain evidence to contradict it.”⁵⁴ D-0133’s expert opinion contradicts the Prosecution’s theory concerning the possibility and prevalence of escape, and in order to salvage its theory it is now seeking to call Professor Blattman as a rebuttal witness.

(3) The proposed rebuttal evidence violates Mr. Ongwen’s fair trial rights under Article 67 of the Statute because it allows the Prosecution to have two bites of the apple

26. The Prosecution had ample time to prepare and cross-examine D-0133 with Professor Blattman’s book-chapter and is now seeking to get a second bite of the apple. The Prosecution’s proposed rebuttal evidence is attempting to challenge the overall credibility of D-0133 by challenging the content of his testimony. The Prosecution had sufficient opportunity to challenge the credibility of D-0133’s testimony on cross-examination and cannot now fix this lacuna.⁵⁵
27. Granting the Prosecution’s proposed rebuttal evidence would violate Mr. Ongwen’s fair trial rights. It would permit the Prosecution to elicit material that could have been added with the exercise of due diligence and proper timing during its cross-examination. It

⁵¹ ICC-OTP-0286-1319.

⁵² ICC-02/04-01/15-497, para. 9.

⁵³ Testimony concluded on 28 February 2019, ICC-02/04-01/15-T-204-ENG ET WT, page 44.

⁵⁴ *Prosecutor v Delalic et al Case No. IT-96-21-A*, Appeal Chamber Judgment, 20 February 2001, para. 275.

⁵⁵ “[T]he Trial Chamber may legitimately exercise its discretion to preclude the Prosecutor from presenting evidence that merely fills in lacunae she left in her case-in-chief.” *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor’s Motion for Leave to call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence*, 21 May 2003, para. 33.

forces the Defence to request leave to present rejoinder evidence and/or witnesses and to conduct additional investigations which extends the length of the trial.

28. Moreover, the Trial Chamber in *Ntagerura et al* case held that if the rebuttal evidence “challenges the credibility of a witness [...] the Chamber should exclude it in rebuttal.”⁵⁶ The Prosecution is essentially trying to challenge the credibility of D-0133’s expert opinion, which it could have done during the cross-examination of D-0133. Rebuttal evidence is not a “fix” for the Prosecution’s cross-examination of D-0133. The Prosecution simply disagrees with D-0133’s opinion, labelling the expert’s opinion as “an unheralded claim made by a witness called on behalf of the Accused”.⁵⁷ It is unfairly prejudicial for the Prosecution to try to challenge the credibility of D-0133 through the backdoor by introducing Professor Blattman and the related evidence as rebuttal evidence.
29. Furthermore, as held by the Trial Chamber in the *Ndindiliyimana* case, “rebuttal evidence must not be used by the Prosecution to re-open or perfect its case.”⁵⁸ In this instance, the prosecution is trying to re-open or perfect its case. It appears that the Prosecution is trying to mask the fact that it is calling Professor Blattman as a rebuttal witness for the concept of escape rather than the narrow linguistic and/or cultural miscommunication issue. The Prosecution is trying to re-open and/or perfect its case to discuss the issue of escape since D-0133 contradicted its theory about escape. This is clear from the Prosecution request, as it notes that the issue of “the possibility and prevalence of escape in the LRA” and “the number of people that managed to escape” is important for the issue of duress.⁵⁹
30. Moreover, the Defence notified the Chamber, parties and participants of its intention to raise the defence of duress on 9 August 2016.⁶⁰ As noted by the Prosecution, given that the number of abductees that left the LRA is of crucial importance for the issue of duress,⁶¹ it should have called Professor Blattman as an expert witness during its case-

⁵⁶ *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor’s Motion for Leave to call Evidence in Rebuttal Pursuant to Rules 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence*, 21 May 2003, para. 33.

⁵⁷ *Ongwen*, Prosecution Request, para. 13.

⁵⁸ *Prosecutor v Ndindiliyimana et al*. No. ICTR-2000-56-T, *Decision on the Prosecution Motion to Call Rebuttal Evidence*, 20 February 2009, para. 4.

⁵⁹ *Ongwen*, Prosecution Rebuttal Request, para. 8.

⁶⁰ ICC-02/04-01/15-517.

⁶¹ *Ongwen*, Prosecution Rebuttal Request, para. 8.

in-chief. The Prosecution had ample notice that the Defence intended to raise the defence of duress. Allowing it to call Professor Blattman as a rebuttal expert witness would enable the Prosecution to re-open and perfect its case which is unfairly prejudicial to Mr. Ongwen.

B. Alternatively, P-0453's (Professor Blattman) evidence should not be introduced under Rule 68(2)(b) of the Rules but rather pursuant to Rule 68(3) of the Rules

31. Should the Chamber reject the Defence's request under Section A, the Defence argues in the alternative that P-0453's evidence should not be introduced under Rule 68(2)(b) of the Rules. Given that introducing rebuttal evidence is "likely to be an exceptional event",⁶² if the Chamber allows the Prosecution to introduce it as rebuttal evidence, logically it follows that the Chamber then considers it to be of high importance. Due to this, the Defence has a crucial need to 'test' the information provided by Blattman through oral examination at trial,⁶³ and it would be in the interest of justice to allow the Defence to test the evidence through cross-examination.
32. Footnote nine of the Prosecution's request indicates that the issue it wishes to rebut is the "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."⁶⁴ However, this issue directly impacts on a point that is materially in dispute between the Defence and the Prosecution being the "the possibility of and prevalence of escape in the LRA"⁶⁵ P-0453's rebuttal evidence directly concerns [REDACTED]⁶⁶ and addresses the claims of D-0133.⁶⁷ Thus, the Defence has a critical need to examine the witness, as the Rebuttal report concerns an issue that is materially in dispute.⁶⁸
33. The Defence has previously raised the importance of the principle of orality in an earlier motion⁶⁹ and reiterates its importance in the current motion. Briefly, Article

⁶² *Lubanga*, ICC-01/04-01/06-2727-Red, para. 43.

⁶³ *Ongwen*, ICC-02/04-01/15-596-Conf, para. 7.

⁶⁴ *Ongwen*, Prosecution Rebuttal Request, page 5, footnote 9.

⁶⁵ *Ongwen*, Prosecution Rebuttal Request, para. 8

⁶⁶ UGA-OTP-0286-1323, 1327.

⁶⁷ *Ongwen*, Prosecution Rebuttal Request, para. 8.

⁶⁸ *Prosecutor v Bemba et al.*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, 19 February 2016, ICC-01/05-01/13-1641, para. 7.

⁶⁹ *Ongwen*, ICC-02/04-01/15-1316-Conf, paras. 32-33 and paras. 12 to 16.

69(2) of the Statute preserves the principle of orality by indicating the preference for *viva voce* testimony.⁷⁰ Moreover, Judge Henderson has opined that oral testimony is of significant importance when it concerns incriminating evidence or due to the inconsistencies that may arise during the examination of the witness.⁷¹ In our case, the credibility of D-0133 and the content of his testimony are essential to the defence of duress.

C. The Defence request for leave to rejoinder

34. The Defence reserves the right to request leave for rejoinder evidence if the Trial Chamber accepts P-0435 and related materials as rebuttal evidence.⁷² Additionally, given that the Prosecution indicated it is considering more requests for rebuttal evidence,⁷³ the Defence reserves the right to present requests for rejoinder evidence.

IV. RELIEF

35. For the reasons stated above, the Defence respectfully requests Trial Chamber IX to:
- a. Reject the Prosecution's request to call Christopher Blattman as a Prosecution expert witness in rebuttal;
 - b. Alternatively, should the Chamber accept Christopher Blattman (P-0453) as a Prosecution rebuttal witness, to reject the introduction of 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 and submit them pursuant to Rule 68(3) of the Rules instead.

Respectfully submitted,



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⁷⁰ ICC-01/04-01/07-2954, para. 4.

⁷¹ ICC-02/11-01/15-722-Anx, para. 6.

⁷² *Ongwen*, ICC-02/04-01/15-497, para. 9.

⁷³ *Ongwen*, Prosecution Rebuttal Request, para. 26.

Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 2nd day of September, 2019

At Kampala, Uganda