

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **19 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

Decision on Prosecution request to present evidence in rebuttal

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and 69(3) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on the Prosecution request to present evidence in rebuttal’.

I. Procedural history and submissions

1. On 20 August 2019, the Office of the Prosecutor (the ‘Prosecution’) filed a request to present the evidence of one expert witness in rebuttal.¹ The Prosecution submits that the evidence of expert witness P-0453 in rebuttal is warranted. P-0453 is a professor who has written about the conflict in Northern Uganda and particularly on child soldiering and integration of returnees.²
2. Specifically, the Prosecution seeks to rebut the claim made by another witness (D-0133) that a book chapter written by P-0453 is tainted by linguistic and cultural miscommunication. The Prosecution argues that such a claim arose unexpectedly during D-0133’s testimony.³ The Prosecution also submits that the testimony of P-0453 ‘will enable the Chamber to properly evaluate that testimony and other evidence that is already formally submitted’.⁴ The Prosecution further avers that the proposed evidence of P-0453,⁵ meets the admissibility criteria.⁶ Moreover, the Prosecution submits that its Request would not be prejudicial to or undermine the rights of the accused, as the evidence ‘is limited in scope to one discrete and narrow issue’ useful for the Chamber’s assessment of D-0133’s testimony.⁷ The Prosecution proposes that the evidence is introduced pursuant to either Rule 68(2)(b) or Rule 68(3) of the Rules of Procedure and Evidence (the ‘Rules’), in order not to delay the proceedings.⁸

¹ Prosecution request to present evidence in rebuttal, ICC-02/04-01/15-1569 (the ‘Request’).

² Request, ICC-02/04-01/15-1569, para. 11.

³ Request, ICC-02/04-01/15-1569, para. 5.

⁴ Request, ICC-02/04-01/15-1569, para. 8.

⁵ The Prosecution requests the submission of the expert report, his curriculum vitae and the Prosecution’s letter of instruction to the expert. These are items UGA-OTP-0286-1323, UGA-OTP-0286-1319 and UGA-OTP-0286-1331. The said book chapter was already formally recognised as submitted into evidence on 27 January 2017. This is item UGA-OTP-0272-0002.

⁶ Request, ICC-02/04-01/15-1569, para. 10.

⁷ Request, ICC-02/04-01/15-1569, para. 12.

⁸ Request, ICC-02/04-01/15-1569, paras 2 and 16-24.

3. On 30 August 2019, the Common Legal Representative for Victims (the ‘CLRv’) filed its response in support of the Request.⁹ The CLRv considers that an admissibility assessment is not necessary at this stage. It additionally submits that the proposed evidence ‘may be necessary for the determination of the truth’.¹⁰ The CLRv agrees with the Prosecution that the evidence relates to a significant and central issue concerning duress and also to the ‘whole extent and the nature of the personal harm’ allegedly suffered by abducted children.¹¹ The CLRv submits that the issue also indirectly affects other evidence on the record.¹² In the view of the CLRv, the proposed rebuttal evidence is in the interest of victims and their right to the truth.¹³
4. On that same date, the Defence opposed the Request.¹⁴ In its view, the Request fails to meet the criteria required to introduce rebuttal evidence. The Defence submits that (a) the Prosecution should have diligently anticipated a linguistic and cultural miscommunication arising; (b) the admissibility criteria is not met; (c) and the proposed rebuttal evidence would violate Mr Ongwen’s fair trial rights.¹⁵
5. The Defence submits that there is abundant evidence on the record about the issue of how witnesses left the LRA, and particularly within the charged period. Accordingly, in its view the Trial Chamber is perfectly capable of assessing or weighing the evidence of on the record.¹⁶ The Defence claims that given the late notice of the Request, such evidence would be prejudicial to the accused and affect his right to a fair trial.¹⁷ It also argues that rebuttal evidence should not be used to challenge the credibility of a witness,¹⁸ or to ‘re-open or perfect’ a case.¹⁹ The Defence further submits that since the Prosecution had ample notice that the Defence intended to raise the wider issue of duress, allowing it to re-open and perfect its case would be unfairly prejudicial to Mr

⁹ CLRv’s Response to “Prosecution request to present evidence in rebuttal”, ICC-02/04-01/15-1578 (the ‘CLRv Response’).

¹⁰ CLRv Response, ICC-02/04-01/15-1578, para. 5.

¹¹ CLRv Response, ICC-02/04-01/15-1578, para. 8.

¹² CLRv Response, ICC-02/04-01/15-1578, paras 9-10.

¹³ CLRv Response, ICC-02/04-01/15-1578, para. 12.

¹⁴ Defence Response to the Prosecution’s ‘request to present evidence in rebuttal’, ICC-02/04-01/15-1579-Conf. A public redacted version was filed on 3 September 2019 (the ‘Defence Response’).

¹⁵ Defence Response, ICC-02/04-01/15-1579-Red, para. 1.

¹⁶ Defence Response, ICC-02/04-01/15-1579-Red, paras 18-20.

¹⁷ Defence Response, ICC-02/04-01/15-1579-Red, paras 21-27.

¹⁸ Defence Response, ICC-02/04-01/15-1579-Red, para. 28.

¹⁹ Defence Response, ICC-02/04-01/15-1579-Red, para. 29.

Ongwen.²⁰ Alternatively, the Defence submits that should the rebuttal evidence be authorised, it should not be introduced pursuant to Rule 68(2)(b) or Rule 68(3) of the Rules.²¹ In case the Request is granted, the Defence also reserves the right to present requests to rejoiner evidence.²²

II. Analysis

6. Pursuant to the ‘Initial Directions on the Conduct of Proceedings’, the Chamber’s leave must be sought in order to present rebuttal evidence.²³ In order to evaluate whether the suggested rebuttal evidence is necessary or appropriate, the Chamber will consider whether the factual allegations related to the proposed evidence are of significance vis-à-vis the legal issues to be determined in this case, particularly in light of all the other evidence submitted on the record.
7. In order to understand the significance of the proposed testimony, it is important to examine the context. In February 2019, the Defence called D-0133, a former LRA child soldier, who stated in his testimony that escape from the LRA was impossible for child recruits.²⁴ During cross-examination, the Prosecution confronted D-0133 with the findings of a book chapter authored by P-0453 which concluded that 80% of former recruits interviewed had said they had escaped the LRA.²⁵ In his answer to the Prosecution, D-0133 disagreed with the results of said book chapter as in his views they are tainted by linguistic and cultural errors. He reiterated that no children escaped from the LRA voluntarily, but were instead all recovered by the Ugandan military.²⁶ The Prosecution now seeks leave to present as rebuttal evidence an eight-page letter in which P-0453 explains the methodology used in compiling the book chapter, seeking to rebut the assertion made by D-0133.²⁷ The book chapter authored by P-0453 was formally submitted into evidence since the Prosecution requested the submission of the book

²⁰ Defence Response, ICC-02/04-01/15-1579-Red, para. 30.

²¹ Defence Response, ICC-02/04-01/15-1579-Red, paras 31-33.

²² Defence Response, ICC-02/04-01/15-1579-Red, para. 34.

²³ 13 July 2016, ICC-02/04-01/15-497, para. 9. *See also* Articles 64(2) and 69(3) of the Statute.

²⁴ Transcript of hearing, 26 February 2019, ICC-02/04-01/15-T-203-ENG, p. 80, line 7: “there are not known cases where children escaped on voluntarily.” At p. 81, line 10: “the known process of them getting them out is by a recovery from the military”.

²⁵ UGA-OTP-0272-0002, at page 0151.

²⁶ Transcript of hearing, 28 February 2019, ICC-02/04-01/15-T-204 ENG, p. 3, lines 3-5.

²⁷ UGA-OTP-0283-1323. The Prosecution also requests the submission of the letter with instructions (UGA-OTP-0283-1319) and the witness’s curriculum vitae (UGA-OTP-0283-133).

containing said book chapter after its use during the questioning of Prosecution witness P-0422.

8. Thus, the Request relates to a very limited and specific factual issue (D-0133's allegations against P-0453's book chapter) that might be related to – but must be distinguished from – the more general legal issue of duress.
9. The more general issue is not new to this case. Throughout the trial multiple witnesses have referred to the question of whether escape was or not possible within the LRA.²⁸ Moreover, the Defence gave early notice that it would raise the issue of duress,²⁹ which might be linked to escape in the context of considering whether the accused acted necessarily and reasonably to avoid the threat in question. In fact, all parties seem to agree that the possibility and prevalence of escape in the LRA is an issue related to the general challenge of duress raised by the Defence. All parties also agree that this issue has been addressed in abundant evidence already formally submitted on the case record.³⁰
10. The more specific issue identified by the Prosecution, that of linguistic and/or cultural miscommunication claimed by D-0133,³¹ is also not new to these trial proceedings. In fact, as noted by the CLRV, the linguistic issue goes beyond D-0133 and relates to testimonies of other expert witnesses.³² As further noted by the Defence, issues relating to linguistic and/or cultural miscommunication have arisen in the course of the trial as a large number of witnesses have testified in Acholi and Lango.³³ Also, as acknowledged by the Prosecution in its Request, some of the issues dealt with by the suggested rebuttal evidence, namely the methodology followed by P-0453, are already addressed in the book chapter which has been submitted on the record.³⁴
11. In the case at hand, the Chamber does not consider that the suggested evidence is necessary or appropriate. The book chapter of P-0453 is only one of many items of

²⁸ For example, Prosecution witnesses P-0309 and P-0264.

²⁹ Defence Response, ICC-02/04-01/15-1579-Red, footnote 60, referring to ICC-02/04-01/15-517.

³⁰ Request, ICC-02/04-01/15-1569, para. 8; CLRV Response, ICC-02/04-01/15-1578, para. 8; Defence Response, ICC-02/04-01/15-1579-Red, para. 29.

³¹ Request, ICC-02/04-01/15-1569, footnote 9.

³² CLRV Response, ICC-02/04-01/15-1578, paras 9 and 10.

³³ Defence Response, ICC-02/04-01/15-1579-Red, para. 8 and footnote 13.

³⁴ Request, ICC-02/04-01/15-1569, para. 22. See, UGA-OTP-0272-0002 at 0147-0148.

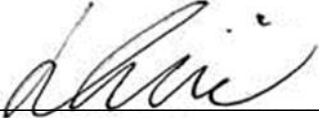
evidence submitted on the case record that relate to the issue of prevalence and possibility of escape from the LRA. In fact, as the Defence correctly points out, the suggested evidence is redundant, 'since there is a plethora of evidence on the record about the manner and the circumstances through which witnesses left the LRA'.³⁵ Moreover, as noted above, the book chapter authored by P-0453 already contains an explanation on the methodology followed. P-0422, who edited the book, also testified before the Chamber. The Chamber is thus perfectly capable of evaluating the evidence of D-0133 in light of all the evidence submitted during the trial. Accordingly, the Chamber considers that authorisation of this evidence in rebuttal is unnecessary. Bearing all of the above in mind, and in light of the advanced stage of the proceedings, authorisation to submit the rebuttal evidence would be detrimental to the fairness and expeditiousness of the trial proceedings and the rights of the accused.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Judge Pangalangan appends a Dissenting Opinion.

Done in both English and French, the English version being authoritative.


Judge Bertram Schmitt, Presiding Judge


Judge Péter Kovács


Judge Raul C. Pangalangan

Dated 19 September 2019

At The Hague, The Netherlands

³⁵ Defence Response, ICC-02/04-01/15-1579-Red, para. 18.