

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **27 November 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

**Defence Request for Leave to Appeal Trial Chamber IX's Oral Decision on the Objections
of the Defence to the report presented by the rebuttal expert, P-0447**

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

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda
 Caroline Walter
 Orchlou Narantsetseg
States' Representatives

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

Xavier-Jean Keita

Amicus Curiae**REGISTRY****Registrar**

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations
Section****Other**

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Trial Chamber IX's ('Trial Chamber' respectively) Oral Decision regarding the Defence's objections on P-0447's expert rebuttal report.¹ The appellate issue is:

Whether the Trial Chamber's Oral Decision, allowing the introduction of portions of P-0447's rebuttal evidence report that pertain to issues and evidence already presented by the Prosecution in its case-in-chief, for example, including but not limited to, Dissociative Identity Disorder, Major Depressive Disorder, PTSD and malingering is consistent with the legal criteria for rebuttal evidence ('Issue').

2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²

II. SUBMISSIONS

3. The Defence previously set out in a preceding motion the three-part test derived from the jurisprudence of the Trial Chambers of the International Criminal Court ('ICC') which necessitates the Prosecution to demonstrate the following in order to introduce rebuttal evidence:

- (1) An issue of significance arose *ex improviso*
- (2) The rebuttal evidence satisfies the admissibility criteria
- (3) It will not undermine the rights of the accused.³

¹ ICC-02/04-01/15-T-252-ENG ET, page 7, line 16 to page 8 line 10.

² ICC-02/04-01/15-1334-Red, paras 4 to 10.

³ *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. 40-43 ('*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').

A. Issue

4. Trial Chamber IX previously held with respect to P-0447's anticipated rebuttal evidence that it "will not allow any repetition of evidence previously provided."⁴ The Chamber in its Oral Decision held that P-0447's Rebuttal Report is "consistent with bona fide character of rebuttal evidence."⁵ P-0447's Rebuttal Report in its entirety does not meet the three-part test for rebuttal evidence, as neither Post-Traumatic Stress Disorder ('PTSD'), Dissociative Identity Disorder, Major Depressive Disorder nor malingering⁶ are issues that arose *ex improviso*.
5. Firstly, D-0041 and D-0042's First Psychiatric Report was available to the Prosecution during its case-in-chief.⁷ Their First Report discusses Dissociative Disorder,⁸ Multiple Identity Disorder⁹ and Multiple Personality Disorder,¹⁰ as well as Major Depressive Illness,¹¹ and PTSD.¹² Thus, these issues were known to both the Prosecution and P-0447 before he even started to write his first report and before the start of his testimony.¹³
6. Secondly, P-0447's first expert report devotes an entire section to the First Psychiatric Examination by D-0041 and D-0042.¹⁴ In this section, P-0447 discusses issues such as PTSD,¹⁵ Dissociative Identity Disorder and Multiple Personality Disorder¹⁶ and Depressive Disorder.¹⁷ Therefore, these issues were known to the Prosecution during its case-in-chief.

⁴ ICC-02/04-01/15-1623 at para. 16,

⁵ ICC-02/04-01/15-T-252-ENG ET, page 7 line 24 to page 8 line 2.

⁶ UGA-OTP-0287-0072; see Table of Contents on page 0073 that indicate the relevant pages where the abovementioned diagnoses are discussed.

⁷ ICC-02/04-01/15-628-Conf-AnxB.

⁸ UGA-D26-0015-0004 at page 0008 and 0015.

⁹ UGA-D26-0015-0004 at 0015.

¹⁰ UGA-D26-0015-0004 at 0016.

¹¹ UGA-D26-0015-0004 at 0006.

¹² UGA-D26-0015-0004 at 0008 and 0009.

¹³ UGA-OTP-0280-0674 at 0711 and see 0706 and 0708 for context.

¹⁴ UGA-OTP-0280-0674, from 0689 to 0694.

¹⁵ UGA-OTP-0280-0674 at pages 0690, 0691-0692 and 0695.

¹⁶ UGA-OTP-0280-0674 at page 0693.

¹⁷ UGA-OTP-0280-0674 at 0693.

7. Thirdly, the Prosecution already had the chance to question and elicit testimony from P-0447 during its case-in-chief on issues such as multiple personality disorder,¹⁸ major depressive disorder,¹⁹ and PTSD.²⁰
8. Moreover, malingering is also not a matter that arose *ex improviso*. Malingering was raised in P-0446's Report,²¹ and the issue also came up during her testimony.²² Thus it is not a new issue, and given that P-0446's testimony took place before P-0447 took the stand,²³ the Prosecution had ample opportunity to question P-0447 about malingering during its case-in-chief.
9. The fact that the Defence is able to present rejoinder evidence²⁴ does not erase the prejudice of allowing the Prosecution to get another opportunity to re-open and perfect its case-in-chief. It is against the legal essence of rebuttal evidence to allow the Prosecution to re-open or perfect its case²⁵ and violates the fair trial rights of Mr Ongwen. Hence, Mr Ongwen suffers severe prejudice because the Prosecution is permitted to present its evidence in its case-in-chief for a second time, after it has closed its case on 13 April 2018.²⁶

B. The issue satisfies the legal criteria under Article 82(1)(d) of the Statute

10. The Defence maintains that the Issue significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. The effect of allowing those sections of P-0447's Rebuttal report that pertain to issues of PTSD, Dissociative Identity Disorder, Major Depressive Disorder and malingering to be introduced into evidence enables the Prosecution to have a second bite of the apple. This impacts on the fairness of the proceedings and the outcome of the trial. Immediate resolution would significantly affect the expeditiousness of the conduct of proceedings as the Defence's

¹⁸ ICC-02/04-01/15-T-169-ENG ET WT at page 21, line 18 to page 22 line 8 and page 49 line 1 to page 50 to line 2.

¹⁹ ICC-02/04-01/15-T-169-ENG ET WT ('T-169') at page 20 lines 13 to 16 and page 21 lines 8 to 17.

²⁰ For example at T-169 at page 23 lines 13 to 25 and page 24.

²¹ UGA-OTP-0280-0786 at 0806, para. 81.

²² ICC-02/04-01/15-T-162-CONF-ENG ET ('T-162') page 18 (open session) and page 38, line 13 to page 39, line 25 (open session).

²³ P-0446 began her testimony on 19 March 2018 (see T-162, open session) and P-0447 began his testimony on 11 April 2018 (see T-169).

²⁴ ICC-02/04-01/15-T-252-ENG ET, page 8, lines 6 to 9.

²⁵ Prosecutor v Ndindiliyimana et al. No. ICTR-2000-56-T, Decision on the Prosecution Motion to Call Rebuttal Evidence, 20 February 2009, para. 4.

²⁶ ICC-02/04-01/15-1225.

presentation of rejoinder evidence has not yet begun, an immediate resolution by the Appeals Chamber could prevent unnecessary and lengthy questioning.

11. Given that the presentation and introduction of rebuttal evidence is exceptional,²⁷ resolution of this issue by the Appeals Chamber would materially advance the proceedings by ensuring that the conduct and the integrity of the proceedings remain fair,²⁸ and remove any doubts regarding the development of the jurisprudence concerning rebuttal evidence.

III. RELIEF

12. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue:
 - a. Whether the Trial Chamber's Oral Decision, allowing the introduction of portions of P-0447's rebuttal evidence report that pertain to issues and evidence already presented by the Prosecution in its case-in-chief, for example, including but not limited to, Dissociative Identity Disorder, Major Depressive Disorder, PTSD and malingering is consistent with the legal criteria for rebuttal evidence.

Respectfully submitted,



.....
 Hon. Krispus Ayena Odongo
 On behalf of Dominic Ongwen

Dated this 27th day of November, 2019

At The Hague, The Netherlands

²⁷ *Lubanga*, ICC-01/04-01/06-2727-Red, para. 40.

²⁸ Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 15.