

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 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

Prosecution's Response to the "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: The Office of the Prosecutor

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

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Introduction

1. The Defence request¹ for leave to appeal the Trial Chamber's oral decision² on the Defence objection to the report³ ("Prosecution Report") presented by P-0447⁴ should be rejected. The issue identified in the Defence Request mischaracterises the Impugned Decision and lacks specificity. Even if it did not suffer from these defects, it does not satisfy the other cumulative requirements of article 82(1) (d) of the Rome Statute ("Statute"). It would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Its immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Procedural Background

2. On 1 October 2019 the Trial Chamber decided that it would allow rebuttal evidence to be called by the Prosecution in respect of the content of a report⁵ ("Second Defence Report") from the Defence psychiatric experts ("Defence Experts")⁶ with the limitation that this rebuttal evidence should "concern only points and facts previously not addressed".⁷ As the Chamber noted, the Second Defence Report was produced a few months after the Prosecution's three mental health experts had testified, and therefore "none of the experts called by the Prosecution had a possibility to read and comment on it" or address the "new information" contained in it.⁸ The Defence sought leave to appeal this decision.⁹ Leave was refused.¹⁰

¹ ICC-02/04-01/15-1682 ("Defence Request").

² ICC-02/04-01/15-T-252-ENG ET, p. 7, ln. 16 to p. 8 ln.10 ('Impugned Decision').

³ UGA-OTP-0287-0072.

⁴ ICC-02/04-01/15-T-252-ENG ET, p. 9, lns. 19-20.

⁵ UGA-D26-0015-0948.

⁶ D-0041 and D-0042.

⁷ ICC-02/04-01/15-1623, para. 16.

⁸ ICC-02/04-01/15-1623, para. 14.

⁹ ICC-02/04-01/15-1627.

¹⁰ ICC-02/04-01/15-1644.

3. On 18, 19, 21 and 22 November the Defence Experts testified. The Second Defence Report was introduced into evidence under the provisions of Rule 68(3).

4. In accordance with directions previously given by the Trial Chamber¹¹ the Prosecution provided the Chamber, Defence and Victims' Representatives with copies of the Prosecution Report on 23 November, and on 25 November P-0447, the author of the Prosecution Report, sat in the courtroom, ready to testify.

5. Immediately after P-0447 took the solemn declaration the Defence made an oral objection to the introduction of the Prosecution Report into evidence under Rule 68(3).¹² The essence of the objection was that the Prosecution Report went beyond the limitation described above (in that it discussed diseases which had been diagnosed by the Defence Experts before the writing of the Second Defence Report, and the phenomenon of malingering) and that it did not adhere to the tripartite test which the Defence set out for the proper calling of rebuttal evidence at paragraph 3 of the Defence Request.¹³

6. The Prosecution responded to the objection, asserting that, in fact, P-0447 has taken great care to address only matters which had been raised anew in the Second Defence Report and in the testimonies of D-0041 and D-0042.¹⁴

7. After brief deliberation the Trial Chamber ruled that the Prosecution Report did indeed contain appropriate discussion of the Second Defence Report and of the testimonies of the Defence Experts and that its content was "in line with the decision 1623 and consistent with bona fide character of rebuttal evidence".¹⁵ The Chamber also reminded the Defence that its directions on the matter, referred to above,

¹¹ ICC-02/04-01/15-1623, paras. 18-23.

¹² ICC-02/04-01/15-T-252-ENG ET, p. 4.

¹³ ICC-02/04-01/15-T-252-ENG ET, pp. 4-6.

¹⁴ ICC-02/04-01/15-T-252-ENG ET, pp. 6-7.

¹⁵ ICC-02/04-01/15-T-252-ENG ET, p. 8, lns. 1 and 2.

included the right for the Defence to call their expert in rejoinder, and that this witness would be permitted to address the entire content of the Prosecution Report.¹⁶

The issue¹⁷ raised in the Defence Request arises from a mischaracterisation of the Impugned Decision

8. The Defence is wrong to characterise the Impugned Decision as “allowing the introduction of...issues and evidence already presented by the Prosecution in its case-in-chief.”¹⁸ The fact that three of the five diseases (Dissociative Identity Disorder, Major Depressive Disorder and Post Traumatic Stress Disorder) diagnosed in the Second Defence Report were discussed in previous reports written by the Defence Experts does not rule out their discussion in the Prosecution Report. Extensive further remarks about these three diagnoses were made in Second Defence Report. There had been no prior opportunity for the Prosecution to address these remarks.

9. Furthermore, in addition to making extensive further remarks and analysis about those disorders in the Second Defence Report, the Defence Experts also detailed additional relevant information that they had elicited from Mr Ongwen, including his purported experience of having his person split into two—Dominic A and Dominic B.¹⁹ The Prosecution had no way of obtaining or anticipating this new information (since Mr Ongwen has refused to meet with Prosecution-appointed mental health experts) and could not have addressed it during the presentation of its case. Similarly in the Second Defence Report the Defence Experts addressed, for the first time, the concept of malingering, and dismissed it as being inapplicable to the case of the accused.²⁰ The fact that this concept had previously been raised in

¹⁶ ICC-02/04-01/15-T-252-ENG ET, p. 8.

¹⁷ “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.”

¹⁸ Defence Request, para. 1

¹⁹ UGA-D26-0015-0948 at 0966.

²⁰ UGA-OTP-0015-0948 at 0969.

proceedings prior to P-0447's 2018 testimony cannot be a reason for preventing the Prosecution, through him, of calling evidence in rebuttal concerning these remarks.

10. In fact P-0447 was meticulous, in the Prosecution Report, to specify the new material (and its location in either the Second Defence Report or the testimony of the Defence Experts) to which he was referring, and restricted himself entirely to material which appeared therein. He made no reference at all to their previous reports. The Defence fail to point to a single concrete portion or sentence of the Prosecution report which exemplifies the repetition of which they complain.

11. The tripartite test proposed by the defence is inapplicable to the instant proceedings, since the Trial Chamber will not determine admissibility until it retires to deliberate. Nonetheless it follows from the arguments advanced above that the tripartite test (the need arose '*ex improviso*', the proposed rebuttal evidence is relevant and potentially important, and that the rights of the accused are not undermined) is satisfied in this case.

The issue raised in the Defence Request does not meet the other requirements of article 82(1)(d) of the Statute

12. Even if the issue could be said properly to arise from the Impugned Decision the issue does not significantly affect the fair and expeditious conduct of the proceedings. This is because the introduction of the Prosecution Report, in its entirety, was necessary to prevent the unfairness of the Defence Experts being able to put their revised, or wholly new, expert opinions before the Trial Chamber without the Prosecution being able to respond. Furthermore the Trial Chamber is permitting one of the Defence Experts the last word on these matters.

13. Nor will the immediate resolution of the issue by the Appeals Chamber materially advance the proceedings. Interlocutory appellate intervention will adversely affect the expeditious conduct of the proceedings, which are all but

concluded. The Defence's rejoinder evidence, which should be brief, not lengthy, will have to be delayed, in a state of uncertainty, until the Appeals Chamber has ruled. At this final stage of the trial, the issue raised should be better dealt with as part of a final appeal, if the Defence considers it has affected the judgement.

Conclusion

14. For the forgoing reasons the Prosecution requests that the Defence Request be rejected.



Fatou Bensouda, Prosecutor

Dated this 28th day of November 2019

At The Hague, the Netherlands