

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **7 October 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 ‘Decision on Requests related to the Testimony of
Defence Expert Witnesses D-0041 and D-0042’**

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**

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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') "Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042".¹ The appellate issues are:
 - A. Whether the Trial Chamber erred in law by incorrectly exercising its discretion to permit the Prosecution to introduce rebuttal evidence without a formal substantiated request from the Prosecution for rebuttal evidence ('Issue 1').
 - B. Whether the Trial Chamber erred in law by incorrectly exercising its discretion by allowing the Prosecution to present rebuttal evidence partially to rebut testimony that has not yet happened ('Issue 2').

II. SUBMISSIONS

2. The Defence previously set out in an earlier motion the three-part test in the jurisprudence of the Trial Chambers of the International Criminal Court ('ICC') which requires the Prosecution to demonstrate firstly, that an issue of significance arose *ex improviso*, secondly that the rebuttal evidence satisfies the admissibility criteria and thirdly that it will not undermine the rights of the accused.²
3. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.³

¹ *Ongwen*, Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, 1 October 2019, ICC-02/04-01/15-1623 ('**Impugned Decision**').

² *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').

³ *Ongwen*, Public Redacted Version of 'Defence Request for Leave to Appeal "Decision on Defence Request for Amendment of the Seating Schedule"', filed on 10 September 2018, 1 October 2018, ICC-02/04-01/15-1334-Red, paras 4 to 10.

A. Issue 1

4. The Trial Chamber referred to a previous Decision it delivered where it held that if the Prosecution wishes to recall its expert to give “supplementary testimony” following the end of the Defence presentation of evidence “a substantiated request to exceptionally recall them can be made.”⁴ It appears from the Prosecution’s request that it also understood it to be the case that it will need to make a further request to substantiate calling P-0447 as a rebuttal witness.⁵
5. While agreeing with the Defence that the Prosecution did not file a formal application to introduce P-0447 as a rebuttal witness, the Chamber held that in order to maintain the expeditiousness of the proceedings, “a discussion of rebuttal evidence and its mode of presentation must be undertaken already now.”⁶
6. However, the Defence highlighted that it could not present any submissions on P-0447 because it would be premature without a formal Prosecution application, and underlined that if the Prosecution presented such a request, the Defence should “be allowed to exhaust its right to respond to any such application”.⁷ In the present case, without a formal substantiated application from the Prosecution, the Defence could not make submissions regarding P-0447 and his potential rebuttal report. In turn, the Defence was deprived of its fair trial right to exhaust its right to respond to the application and argue its position regarding P-0447’s rebuttal evidence and the mode of presentation upon which the Trial Chamber based its Impugned Decision.
7. The Trial Chamber refers to decisions rendered by other Trial Chambers at the ICC to substantiate that rebuttal evidence can be heard under the Rome Statute.⁸ In those cases, it is clear that a formal application was made by the Prosecution and the Trial Chambers did not decide the matter *sua sponte*.⁹ The case at bar is clearly distinguishable from the ICC cases

⁴ *Ongwen*, Decision on Prosecution Requests Related to Mental Health Expert Evidence, 16 November 2017, ICC-02/04-01/15-1073, para. 19.

⁵ *Ongwen*, Prosecution’s request for the Trial Chamber to order the Defence to specify a date for the testimony, 17 September 2019, ICC-02/04-01/15-1596, para. 5 (*‘Ongwen*, ICC-02/04-01/15-1596’).

⁶ Impugned Decision, para. 13.

⁷ *Ongwen*, Defence Reply to the Prosecution Response Regarding the Mode of D-41 and D-42’s Testimony, 27 September 2019, ICC-02/04-01/15-1615, para. 4.

⁸ Impugned Decision, para. 12 and corresponding footnote.

⁹ In *Lubanga*, the Prosecution made an oral request to admit a transcript as rebuttal evidence and was asked to address exactly what the evidence was and why it was making the application, the Prosecution also provided draft copies of the transcript for the Chamber, the Chamber then asked questions regarding the rebuttal evidence as well as asked the Defence’s views and gave the parties the opportunity to present further submissions in the form of email, ICC-01/04-01/06-T-350-Red2-ENG, page 18, line 25 until page 34, line 11 and see ICC-01/04-01/06-2727-Red, para. 17 to 34. In *Katanga*, the Chamber dealt with the general question from the Prosecution concerning when it can bring rebuttal

cited by the Trial Chamber because there has been no application filed by the *Ongwen* Prosecution for rebuttal evidence.

8. The Defence understands that the Chamber has the discretion to allow the introduction of rebuttal evidence as well as the importance of expeditiousness.¹⁰ However, the Defence avers that the Impugned Decision of the Trial Chamber effectively prioritized timing and expediency over procedural fairness and erred in law by incorrectly exercising its discretion. This resulted in the violation of due process and the fair trial rights of Mr. Ongwen. This is especially since P-0447 is brought as a Prosecution witness, not as witness called by the Chamber.¹¹

Issue 2

9. While the Chamber held that “[i]rrespective of the exact content of the testimonies of the Defence Expert Witnesses”¹² the Prosecution experts did not have the opportunity to address the Second report.¹³ That said, although the Prosecution underlined that its experts were unable to comment on the Second report, it also emphasized that “it will not be possible to make a final decision about the application [regarding rebuttal evidence] until after the testimony of the Defence Experts”.¹⁴ At the time of writing of this pleading, the testimonies of D-41 and D-42 have not yet occurred. In other words, the Prosecution’s rebuttal evidence which was granted by the Trial Chamber prematurely, partially seeks to rebut testimony that has not yet happened.

evidence, and it held that in instances where the Defence raised new issues during the Defence presentation of evidence, the Prosecution can make a specific and justified application to bring rebuttal evidence to address these issues (see ICC-01/04-01/07-T-222-Red2-ENG, page 72, line 22 until page 77). In *Bemba* although the request initially concerned additional evidence, in a reply to the Defence response, the Prosecution alternatively requested the Chamber to consider it as a rebuttal request and specified the reasons behind it, ICC-01/05-01/08-3029, para. 8 and 14 see also ICC-01/05-01/08-2948-Red para. 11 to 12. Additionally, while the Trial Chamber does not cite to this Decision, *see also Ntaganda*, where the Prosecution filed preliminary submissions regarding the evidence it would present as rebuttal evidence and the Defence argued that the submission did not amount to a specific request to admit rebuttal evidence, the Prosecution then later filed its formal request substantiating the rebuttal evidence it sought to present which was then considered by the Trial Chamber, ICC-01/04-02/06-2246, paras. 2-3 and 21-22.

¹⁰ The importance of expeditiousness has been recognized by the Defence in ICC-02/04-01/15-1605, para. 11 and ICC-02/04-01/15-1615, para. 4.

¹¹ In *Lubanga*, the Prosecution requested to bring rebuttal evidence; the Defence made submissions and objected, the Chamber held that the issues the Prosecution sought to rebut did not arise *ex improviso*, however the Chamber called the witness as a Chamber witness due to the “importance for the determination of the truth”, ICC-01/04-01/06-2727-Red, paras. 65 to 66 and 61 to 62, see also footnote 9 of this motion.

¹² Impugned Decision, para. 15.

¹³ Impugned Decision, para. 14 and 15.

¹⁴ *Ongwen*, ICC-02/04-01/15-1596, para. 5.

10. The Trial Chamber refers to decisions rendered by other Trial Chambers at the ICC to substantiate that rebuttal evidence can be heard under the Rome Statute.¹⁵ None of the cited cases dealt with a request to rebut *potential* evidence from the Defence; in other words, the evidence the Prosecution sought to rebut already existed.¹⁶ The Defence submits that the Trial Chamber erred in law by incorrectly exercising its discretion by allowing the Prosecution to present rebuttal evidence partially to rebut testimony that has not yet happened.

B. Issues 1-2 satisfies the legal criteria under Article 82(1)(d) of the Statute

1. Issue 1 satisfies the legal criteria under Article 82(1)(d) of the Statute

11. Firstly, the resolution of Issue 1 is essential for the determination of whether the Trial Chamber has the discretion to allow the presentation of rebuttal evidence without a formal application from the Prosecution.
12. Secondly, the Defence avers that Issue 1 significantly affects the fair and expeditious conduct of the proceedings, and will significantly affect the outcome of the trial. This is because rebuttal evidence may be brought in the future by the Prosecution,¹⁷ and by allowing it to bring rebuttal evidence without a formal application enables the Prosecution to make requests without substantiating them. In turn, without a formal and substantiated request for rebuttal evidence from the Prosecution, the Defence is prejudiced because it is denied its fair trial right to respond to issues which affect the fair conduct of the proceedings.
13. Thirdly, the Defence submits that an immediate resolution of Issue 1 by the Appeals Chamber will materially advance the proceedings. As previously mentioned, the Prosecution may make further rebuttal requests in the future. Without these substantiated requests, the proceedings could be prolonged because the Defence would have to make objections during the proceedings whereas the objections could possibly be addressed had it been able to exercise its right to respond. An immediate resolution by the Appeals Chamber on whether the Trial Chamber properly exercised its discretion by allowing the Prosecution to present rebuttal

¹⁵ Impugned Decision, para. 12 and corresponding footnote.

¹⁶ In *Lubanga* the evidence the Prosecution sought to rebut arose during the testimony of defence witnesses (ICC-01/04-01/06-2727-Red, paras. 17 and 56), and in *Katanga*, the Prosecution raised the issue in general terms of when rebuttal evidence can be brought by the Prosecution, and Chamber ordered the parties and participants to file observations on this subject (see ICC-01/04-01/07-T-222-Red2-ENG, page 72, lines 22 to page 73, line 10). In *Bemba*, the evidence which the Prosecution initially called “additional evidence” affected the evidence of specific Defence witnesses (see ICC-01/05-01/08-3029, para. 8). While the Chamber does not cite to this case, see also *Ntaganda*, where the Prosecution sought to rebut an issue that arose during Mr. Ntaganda’s testimony, (see ICC-01/04-02/06-2246, para. 30).

¹⁷ *Ongwen*, Prosecution request to present evidence in rebuttal, 20 August 2019, ICC-02/04-01/15-1569, para. 26.

evidence without a formal application would ensure that the proceedings materially advance and proceed fairly.

2. Issue 2 satisfies the legal criteria under Article 82(1)(d) of the Statute

14. Firstly, the resolution of Issue 2 is essential for the determination of whether the Trial Chamber has the discretion to allow the Prosecution to present rebuttal evidence to rebut testimony that has not yet happened. Secondly, Issue 2 significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial. As previously mentioned, the Prosecution has indicated that it is considering making additional requests for rebuttal evidence,¹⁸ and if it does, the Trial Chamber will render more decisions regarding rebuttal requests. Thus, an immediate resolution would materially advance the proceedings by ensuring that the conduct and integrity of the proceedings remain fair, and would remove doubt about whether the Trial Chamber correctly exercised its discretion.¹⁹

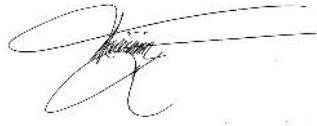
III. RELIEF

15. 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 erred in law by incorrectly exercising its discretion to permit the Prosecution to introduce rebuttal evidence without a formal substantiated request from the Prosecution for rebuttal evidence. (**'Issue 1'**)
 - b. Whether the Trial Chamber erred in law by incorrectly exercising its discretion by allowing the Prosecution to present rebuttal evidence partially to rebut testimony that has not yet happened. (**'Issue 2'**)

¹⁸ *Ongwen*, ICC-02/04-01/15-1569, para. 26.

¹⁹ "The meaning conveyed by "advance" in the latter part of sub-paragraph (d) is "move forward"; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings." *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.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of October, 2019
At Lira, Uganda