

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **10 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

Prosecution's Response to "Defence Request for Leave to Appeal 'Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042' (ICC-02/04-01/15-1627), notified 7 October 2019"

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 Request for Leave to Appeal (“Defence Request”)¹ the “Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042” (“Impugned Decision”)² should be denied because neither of the two issues proposed for certification meet the cumulative requirements under article 82(1)(d) of the Rome Statute (“Statute”) that their resolution:

- J would significantly affect the fair and expeditious conduct of the proceedings; and
- J may materially advance the proceedings.

Submissions

Issue 1

2. In their exposition of the first proposed issue - “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” – the Defence claims that it has been deprived of its “fair trial right to exhaust its right to respond”³ and that the Trial Chamber has “prioritised timing and expediency over procedural fairness”.⁴

3. The Trial Chamber made no error of law. The Defence’s complaints ignore the specific reference in the Impugned Decision to the Trial Chamber’s obligation under regulation 43 of the Regulations of the Court (“Regulations”). The provision requires it to make ‘...the presentation of evidence *fair* and effective for the determination of the truth’ (Prosecution emphasis) and to ‘ensure the effective use of time’.

¹ ICC-02/04-01/15-1627.

² ICC-02/04-01/15-1623.

³ Defence request, para.6.

⁴ Defence request, para.8.

4. Unless D-0041 and D-0042 (“Defence Experts”) are to abandon the findings set out in their second report,⁵ their testimony will contain new material relevant to article 31(1)(a) of the Statute, concerning mental diseases or defects from which the Accused will be said to have been suffering at the time he is alleged to have committed the charged crimes. This second report was filed after the mental health expert witnesses called by the Prosecution (including P-0447) had concluded their evidence. None of them was therefore able to address its content.

5. This is material which “is of high importance in this case”,⁶ as will be the expert opinion of P-0447 on this new material, and any potential rejoinder evidence from Defence Experts. Crucially, the Defence Experts’ second report is already available, and thus the circumstances warranting rebuttal evidence are ripe for decision now; waiting for the Defence experts to testify before addressing the inevitable scheduling issues would elevate form over substance, with no benefit in terms of fairness and obvious costs to the efficiency of the proceedings.

6. The Defence argues that the Trial Chamber should have ignored this opportunity to schedule the remaining evidence which may have a bearing on article 31(1)(a) issues fairly, swiftly and definitively, as required by regulation 43 of the Regulations. Instead, the Defence argues, the Trial Chamber should have required the Parties and Participants to go through a process of formal request, response, decision (and no doubt application for leave to appeal) which could only have begun once the Defence Experts had concluded their testimony towards the end of November, and would have therefore likely delayed the proceedings, in effect suspending all activity in the case, for several weeks.

⁵ UGA-D26-0015-0948.

⁶ Impugned Decision, para.16.

7. At no stage does the Defence set out in concrete terms what the advantages of the process it proposes would be. The costs for the effectiveness and efficiency of the proceedings, on the other hand, are plain and significant. The Trial Chamber properly conducted the balancing of interests required by regulation 43 of the Regulations, and did not abuse its discretion.

Issue 2

8. The second proposed issue - “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” ignores the Trial Chamber’s careful consideration⁷ of the fact that the Prosecution had not, at the time of the Impugned Decision, made a formal application to call P-0447 in rebuttal and that the testimony to be rebutted had not yet been given.

9. The Trial Chamber came to a reasoned conclusion that, even in these circumstances, it was necessary to make an immediate determination of the matter, thereby giving “all parties and participants sufficient time and foreseeability to prepare”⁸ for possible testimony both in rebuttal and rejoinder on the new issues raised for the first time in the Defence Experts’ second report.

10. Such a determination is entirely in accordance with the wide discretion provided to the Trial Chamber in regulation 44(5) of the Regulations concerning the manner in which expert evidence is to be presented.

11. Furthermore the Trial Chamber made a detailed assessment of the need for, and fairness of, rebuttal evidence in this particular instance⁹ and set out its reasons

⁷ Impugned decision, paras.14-16.

⁸ Defence Request, para.13.

⁹ Impugned decision, para.16.

for concluding that all the criteria were satisfied. In particular, the Impugned Decision makes it clear that the Defence, through the Defence Experts, will have the opportunity to have the last word on this matter, despite no formal request being made for that procedural advantage either.

12. If, in fact, the Defence does not intend to adduce evidence relating to these new issues from the Defence Experts (either by way of oral testimony, or by the submission of the second report under the provisions of rule 68(3) of the Rules of Procedure and Evidence), it has been, and remains, open to the Defence to give an undertaking in this regard and to request reconsideration of the Impugned Decision in the light of that undertaking.

The two issues do not meet the article 82(1)(d) criteria

13. First, the issues proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.¹⁰

14. The Trial Chamber has not established any precedent in respect of theoretical future applications by the Prosecution to call evidence in rebuttal.¹¹ As argued above, the Impugned Decision does no more than embody a fair and reasonable exercise of the Trial Chamber’s discretion under regulations 43 and 44(5) in respect of the matter at hand and a proper fulfilment of the Trial Chamber’s obligations concerning the expeditious conduct of the proceedings under regulation 43 of the Regulations. Particularly in light of the safeguards adopted by the Trial Chamber, such as allowing the Defence Experts to have the last word, there is no risk that the Impugned Decision will significantly affect the fairness or the outcome of the trial.

¹⁰ Rome Statute, article 82(1)(d).

¹¹ As suggested in para.13 of the Defence Request.

15. Second, immediate resolution by the Appeals Chamber of these issues would not “materially advance the proceedings”.¹² At the advanced stage which this trial has reached, it will only delay them.

Conclusion

16. For the reasons set out above, the Defence Request for leave to appeal the Impugned Decision should be rejected.



Fatou Bensouda, Prosecutor

Dated this 10th day of October 2019
At The Hague, the Netherlands

¹² Rome Statute, article 82(1)(d).