

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 December 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 Defence Request for Leave to Appeal the Oral Decision on Defence
Objections to Report of P-0447**

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

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**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**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 Article 82(1)(d) of the Rome Statute (‘Statute’) issues the following ‘Decision on Defence Request for Leave to Appeal the Oral Decision on Defence Objections to Report of P-0447’.

I. Procedural history and submissions

1. On 1 October 2019, the Chamber allowed the presentation of evidence in rebuttal by the Office of the Prosecutor (the ‘Prosecution’) following the testimony of Defence expert witnesses D-0041 and D-0042 (the ‘Defence Experts’).¹ The Chamber considered such rebuttal evidence appeared ‘necessary in light of the content of the second report and expected expert testimonies’, and found that it should concern ‘only points and facts previously not addressed by the Prosecution Expert Witness’.² At the same time, and with reference to the principles of a fair trial and the rights of the accused pursuant to Article 67 of the Statute, the Chamber allowed the Defence to present evidence in rejoinder, should it wish to do so.³
2. A request for leave to appeal this decision by the Defence⁴ was rejected.⁵
3. On 25 November 2019, when witness P-0447 took the stand to testify as rebuttal witness, the Defence objected to the rebuttal report prepared by witness P-0447 (the ‘Rebuttal Report’) to be admitted into evidence.⁶ The Defence argued that the Rebuttal Report was against previous rulings of the Chamber in respect of the parameters of rebuttal evidence and did not meet the three-part test to be met for rebuttal evidence to be allowed.⁷
4. Having heard the response from the Prosecution,⁸ the Chamber issued its oral ruling which allowed the submission of the Rebuttal Report. It found that the Rebuttal Report discussed the testimonies of the Defence Experts as well as their second and

¹ Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, ICC-02/04-01/15-1623 (the ‘Initial Decision on Rebuttal’).

² Initial Decision on Rebuttal, ICC-02/04-01/15-1623, para. 16.

³ Initial Decision on Rebuttal, ICC-02/04-01/15-1623, para. 17.

⁴ Defence Request for Leave to Appeal ‘Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042’, 7 October 2019, ICC-02/04-01/15-1627.

⁵ Decision on Defence Request for Leave to Appeal the Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, 22 October 2019, ICC-02/04-01/15-1644.

⁶ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 3, lines 21-24.

⁷ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 4, line 2 – p. 6, line 13.

⁸ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 6, line 16 – p. 7, line 7.

supplementary reports, in line with the Initial Decision on Rebuttal and ‘consistent with the bona fide character of rebuttal evidence’ (the ‘Impugned Decision’).⁹ The Chamber also reiterated that the Defence was allowed to call an expert in rejoinder and in that context could fully address the entire content of the Rebuttal Report.¹⁰

5. On 27 November 2019, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’)¹¹ in relation to the following issue (the ‘Issue’):

Whether the Trial Chamber’s Oral Decision, allowing the introduction of portions of P-0447’s rebuttal evidence report that pertains 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.

6. The Defence submits that the Rebuttal Report in its entirety does not meet the three-part test for rebuttal evidence since some of the medical conditions discussed are not matters which arose *ex improviso*.¹² According to the Defence, the fact that it was able to present rejoinder evidence does not erase the prejudice created by ‘allowing the Prosecution to get another opportunity to re-open and perfect its case-in-chief’, which, it argues, is against the ‘legal essence’ of rebuttal evidence.¹³
7. The Prosecution responded on 28 November 2019, opposing the Request (the ‘Prosecution Response’).¹⁴ Specifically, the Prosecution argues that the Request mischaracterises the Impugned Decision as it did not allow the introduction of evidence which would already have been presented by the Prosecution during its case-in-chief.¹⁵ It further submits that even if the Issue arose from the Impugned Decision, the other requirements of Article 82(1)(d) of the Statute are not met.¹⁶
8. One day after the Defence filed the Request, it also called witness D-0042 as expert witness in rejoinder and submitted a report prepared by this witness. The rejoinder report

⁹ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 7, line 16 – p. 8, line 10.

¹⁰ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 8, lines 6-9.

¹¹ 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, ICC-02/04-01/15-1682.

¹² Request, ICC-02/04-01/15-1682, paras 4-8.

¹³ Request, ICC-02/04-01/15-1682, para. 9.

¹⁴ 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”, ICC-02/04-01/15-1687.

¹⁵ Prosecution Response, ICC-02/04-01/15-1687, paras 8-10.

¹⁶ Prosecution Response, ICC-02/04-01/15-1687, paras 12-13.

as well as the rejoinder testimony of witness D-0042 addressed the content of the Rebuttal Report as well as of the rebuttal testimony of witness P-0447.¹⁷

II. Analysis

9. At the outset, the Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹⁸
10. Turning to the merits of the Request, the Chamber is of the view that it attempts to re-litigate the same submissions which had been made by the Defence in its oral objection and which were as such decided upon by the Chamber in the Impugned Decision. The argument that the Rebuttal Report does not meet the three-part test for rebuttal evidence¹⁹ was rejected by the Chamber when it found that the Rebuttal Report discusses the testimonies of the Defence Experts as well as their second and supplementary reports, in line with the Initial Decision on Rebuttal and the *bona fide* character of rebuttal evidence.²⁰
11. The Issue now presented by the Defence argues, again, that allowing the submission of the Rebuttal Report is not in line with the three-part test for rebuttal evidence. It does not identify any matters different from the arguments raised in the objections presented by the Defence during the hearing. As such, the Chamber considers that the Request fails to identify a subject matter other than a mere question over which there is disagreement with the prior decision of the Chamber. Therefore, the Issue does not qualify as an appealable issue within the meaning of Article 82(1)(d) of the Statute.
12. Accordingly, the Request is rejected.

¹⁷ Transcript of hearing, 28 November 2019, ICC-02/04-01/15-T-254-ENG; Transcript of hearing, 29 November 2019, ICC-02/04-01/15-T-255-ENG; and UGA-D26-0015-1574.

¹⁸ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

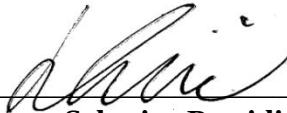
¹⁹ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 4, lines 2-7 and p. 6, lines 6-13.

²⁰ Transcript of hearing, ICC-02/04-01/15-T-252-ENG, p. 7, line 22 – p. 8, line 2.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 9 December 2019

At The Hague, The Netherlands