



TRIAL CHAMBER IX

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Prosecution request to present evidence in rebuttal

Dissenting Opinion of Judge Pangalangan

1. This is simply a procedural motion where one party, whose evidence has been specifically impugned, seeks the chance to answer and rebut, and in a very limited form via a written submission. I believe the motion should be granted as a matter of fair play, and I am thus unable to join my colleagues in the Majority who have voted to deny it.
2. The movant, the Prosecution, asks to be allowed to submit a written explanation and will not cause any delay in the proceedings. Should the opposing party, the Defence, ask to submit rejoinder evidence, I would likewise be inclined to allow it provided it likewise will not prolong the proceedings.
3. I actually agree with the Majority that the evidence in question may, in the end, not be as consequential as the contending parties purport. There is a wealth of other, more direct proof on this and related points, e.g., on the voluntariness of the abductees staying in captivity or escaping to liberty. But I will abide by the wisdom of this Chamber in a long line of evidentiary rulings that defer the consideration of the probative value of evidence to the final decision after completion of the trial, when the full record can be weighed and appreciated wholistically and in context.¹ I have concurred consistently in those rulings and see no reason to detract from judicial precedent that we have upheld from the beginning of this trial.

¹ See Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras 24-26; Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520, para. 7; Decision on Interception Material, 1 December 2016, ICC-02/04-01/15-615, para. 4(ii); Decision on Prosecution's Request to Submit 1006 Items of Evidence, 28 March 2017, ICC-02/04-01/15-795, paras 5, 50.

4. I realise that the Chamber retains the power to deviate from this practice on a case-by-case basis, but make the case we must each time we deviate, that is to say, why we applied the rule elsewhere but not here. Such criteria must be clear, and are part of the rule-based constraints constituting the rule of law, the principle that open-ended discretion “be canalized into banks that keep it from overflowing.”²
5. Accordingly I will resolve the pending motion without weighing the proffered evidence in advance of the completion of trial, and will rule upon it simply as a question of fair procedure. I find that the Prosecution’s motion is, in my own determination as a judge, about a *bona fide* reply to a fresh challenge that supervened its main presentation of evidence.
6. I recognize that this opens the door to the risk that parties might dress up their dithering and delay in the garb of rebuttal evidence. But it is precisely the function of the judge to tell the true from the sham, the genuine from the bogus. In my judgment, the Prosecution’s proffered evidence is authentic rebuttal and not belated afterthought, and accordingly will grant the Prosecution’s motion to submit rebuttal evidence on this limited basis.

18 September 2019.



Raul C. Pangalangan
Judge

² United States of America, Supreme Court, *Panama Refining Co. v. Ryan*, 7 January 1935, 293 U.S. 388, p. 340 (Cardozo, J., dissenting) (1935).