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**International
Criminal
Court**



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

Date: **1 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

**Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041
and D-0042**

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

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Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and (6), and 67 of the Rome Statute (the ‘Statute’), Rule 101 of the Rules of Procedure and Evidence and Regulations 43 and 44 of the Regulations of the Court (the ‘Regulations’) issues the following ‘Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042’.

I. Procedural history and submissions

1. On 17 September 2019, the Defence filed a motion requesting that Defence witnesses D-0041 and D-0042 (the ‘Defence Expert Witnesses’) be allowed to testify jointly from 19 to 22 November 2019 (the ‘Defence Request’).¹ It cites to considerations of expeditiousness and the fact that the experts worked on the reports they produced for the Defence (the ‘Defence Expert Reports’) together.²
2. On that same date, the Office of the Prosecutor (the ‘Prosecution’) submitted a related request (the ‘Prosecution Request’).³ The Prosecution first requests that the Defence be ordered to specify the dates on which the Defence Expert Witnesses will testify.⁴ Further, it explains that from the content of the second report produced by the Defence Expert Witnesses it ‘is almost inevitable that the Prosecution [...] will ask for permission to call evidence in rebuttal.’⁵
3. The Prosecution seeks that an expert witness who already testified for the Prosecution, P-0447 (the ‘Prosecution Expert Witness’) is allowed to attend the testimony of the Defence Expert Witnesses, produces a new report on the basis of this testimony and then takes the stand, again, to testify.⁶
4. On 19 September 2019, the Prosecution filed its response to the Defence Request opposing the Defence Request (the ‘Prosecution Response’).⁷ It submits that in order to

¹ Defence Motion Regarding the Mode of D-41 and D-42’s Testimony, ICC-02/04-01/15-1598.

² Defence Request, ICC-02/04-01/15-1598, para. 3.

³ Prosecution’s request for the Trial Chamber to order the Defence to specify a date for the testimony, ICC-02/04-01/15-1596.:17, instructing the Prosecution to submit a formal filing in relation to the testimony of the Defence Expert Witnesses.

⁴ Prosecution Request, ICC-02/04-01/15-1596, paras 9-11.

⁵ Prosecution Request, ICC-02/04-01/15-1596, para. 5.

⁶ Prosecution Request, ICC-02/04-01/15-1596, paras 6-7.

⁷ Prosecution Response to “Defence Motion Regarding the Mode of D-41 and D-42’s Testimony”, ICC-02/04-01/15-1601.

be allowed, a concurrent testimony must significantly shorten the proceedings. It avers that the Defence has failed to proof this in the current case.⁸

5. On 23 September 2019, the Defence requested leave to reply to the Prosecution Response and said that in this reply it would also respond to the Prosecution Request (the ‘Request for Leave to Reply’).⁹
6. On the same day, the Single Judge granted leave to reply and ordered the Defence to file the reply by 27 September 2019.¹⁰
7. On 27 September 2019, the Defence filed its reply (the ‘Reply’).¹¹ It confirmed that the Defence Expert Witnesses are available to testify from 18 to 25 November 2019.¹² Regarding the joint testimony of the Defence Expert Witnesses it largely reiterated what it submitted in its Request for Leave to Reply and repeated its request that the two experts be allowed to testify together.¹³

II. Analysis

1. Mode of the testimony of the Defence Expert Witnesses

8. The Chamber notes that Regulation 44(5) of the Regulations provides the Chamber with a wide discretion as to the presentation of expert evidence. The Chamber notes the submissions by the Defence, notably that a joint – or concurrent – testimony would save time and resources of the Court and that this form of testimony would be preferred by the Defence Expert Witnesses who wrote the Defence Expert Reports together.¹⁴
9. However, the Chamber considers that the Prosecution’s interest in independently questioning the Defence Experts overrides any advantage which could be achieved by a joint testimony. This preference of the Prosecution is also not merely ‘adversarial

⁸ Prosecution Response, ICC-02/04-01/15-1601, para. 10.

⁹ Defence Request for Leave to Reply to Prosecution Response Regarding the Mode of D-41 and D-42’s Testimony, ICC-02/04-01/15-1605.

¹⁰ Decision on Defence Request for Leave to Reply, ICC-02/04-01/15-1608.

¹¹ Defence Reply to the Prosecution Response Regarding the Mode of D-41 and D-42’s Testimony, ICC-02/04-01/15-1615.

¹² Reply, ICC-02/04-01/15-1615, para. 2.

¹³ Reply, ICC-02/04-01/15-1615, paras 5-11.

¹⁴ Defence Request, ICC-02/04-01/15-1598, para. 3.

tactics’, as argued by the Defence¹⁵ but a legitimate interest of a cross-examining party to fully question and test each witness.

10. The Chamber is aware that the witnesses authored the Defence Expert Reports together and agrees with the Defence that each report is to be considered as one piece of evidence. However, this does not mean that the experts’ respective testimonies must be heard together. The Defence submits that the witnesses ‘agreed on their methodology and conclusions’.¹⁶ But even assuming this, both witnesses are being called as individual experts. This means they are able to give their professional opinion independently and testify on the manner of production of the Defence Expert Reports.
11. Accordingly, and considering the discretion the Chamber enjoys on this matter, the Chamber decides that it will be more appropriate to hear the testimony of each expert witness consecutively and independently.

2. *Rebuttal evidence*

12. The Chamber will now turn to the proposal of the Prosecution regarding a potential rebuttal witness. The Chamber agrees with decisions of previous chambers of this Court that it is in principle possible to hear ‘rebuttal evidence’ under the Rome Statute system.¹⁷
13. The Chamber concurs with the Defence¹⁸ that no formal application for a rebuttal witness has been filed. Nevertheless, as the Prosecution explained in its request, it is ‘almost inevitable that [it] will ask the Trial Chamber for permission to call evidence in rebuttal’.¹⁹ The Chamber also considers its obligations arising from Regulation 43 of the Regulations, which mandate the Chamber to make the questioning of witnesses and the presentation of evidence fair and effective, avoid delays and ensure the effective use of time. Accordingly, the Chamber is of the view that a discussion of rebuttal evidence and

¹⁵ Request for Leave to Reply, ICC-02/04-01/15-1605, para. 19.

¹⁶ Reply, ICC-02/04-01/15-1615, para. 7.

¹⁷ Trial Chamber I, *The 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, paras 36-38; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of hearing on 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG WT, p. 72, line 22 - p. 78, line 2; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on “Prosecution’s Application to Submit Additional Evidence”, 2 April 2014, ICC-01/05-01/08-3029, paras 24-25.

¹⁸ Request for Leave to Reply, ICC-02/04-01/15-1605, para. 10; Reply, ICC-02/04-01/15-1615, para. 4.

¹⁹ Prosecution Request, ICC-02/04-01/15-1596, para. 5.

its mode of presentation must be undertaken already now. The Chamber must not postpone a discussion on these matters until the termination of the testimony of Defence Expert Witnesses particularly since the significance of the evidence is already foreseeable in light of the expert reports. Bearing in mind the advanced stage of the proceedings, such a late discussion could lead to significant delays and go against the expeditiousness of the proceedings, which is both of interests to the Prosecution and the Defence.²⁰ A determination on the matter now will give all parties and participants sufficient time and foreseeability to prepare for an eventual testimony in rebuttal or rejoinder.

14. The Chamber notes that the first report²¹ by the Defence Expert Witnesses (the ‘First Report’) was produced in late 2016. The expert witnesses called by the Prosecution on this subject testified in March and April 2018.²² All of them were also questioned on the First Defence Report. Since the second report of the Defence Expert Witnesses (the ‘Second Report’)²³ was produced in June 2018, none of the experts called by the Prosecution had a possibility to read and comment on it. Accordingly, the Second Report contains new information which the expert witnesses called by the Prosecution could not address yet. This is particularly the case since the Second Report states that ‘[w]here any conflict still arises between the two reports, the current report supersedes the report prepared in 2016.’²⁴
15. It is logical to expect that the Defence will request the submission of the Second Report into the record of the case once D-0041 and D-0042 testify. Irrespective of the exact content of the testimonies of the Defence Expert Witnesses, the expert witnesses called by the Prosecution did not have a chance to address this part of the evidence.
16. The Chamber has a wide discretion to limit or preclude rebuttal evidence. In the current case, and in light of the expected testimonies and the Defence Expert Reports, the Chamber finds it appropriate to allow additional evidence in rebuttal. First, as previously

²⁰ See also, Request for Leave to Reply, ICC-02/04-01/15-1605, para. 9; Reply, ICC-02/04-01/15-1615, para. 4.

²¹ UGA-D26-0015-0004.

²² Testimony of witness P-0446, from 19-20 March 2018, ICC-02/04-01/15-T-162-Red-ENG and ICC-02/04-01/15-T-163-Red-ENG; testimony of witness P-0445 from 26 and 28 March 2018, ICC-02/04-01/15-T-166-ENG, ICC-02/04-01/15-T-167-ENG and ICC-02/04-01/15-T-168-ENG and testimony of witness P-0447 from 11-12 April 2018, ICC-02/04-01/15-T-169-ENG and ICC-02/04-01/15-T-170-ENG.

²³ UGA-D26-0015-0948.

²⁴ UGA-D26-0015-0948, at -0949.

indicated by the Chamber,²⁵ the subject matter of the testimony of the Defence Expert Witnesses and the reports produced by them is of high importance in this case. Second, the rebuttal evidence is not caused by any negligence or fault of the Prosecution, which called its own expert witnesses on the matter. The rebuttal evidence appears to be necessary in light of the content of the Second Report and expected expert testimonies, which were not foreseeable for the Prosecution.²⁶ Accordingly, the Chamber will allow rebuttal evidence on this issue, should the Prosecution wish to introduce any after the testimony of the Defence Expert Witnesses. The Chamber anticipates that this evidence will concern only points and facts previously not addressed by the Prosecution Expert Witness. The Chamber will not allow any repetition of evidence previously provided.

17. However, the considerations with regard to the importance of the subject matter of this evidence also apply to the Defence. The Chamber takes further into account the principles of a fair trial and the rights of the accused pursuant to Article 67 of the Statute. Accordingly, it decides that, should the Defence wish to call D-0041 and/or D-0042 after the presentation of the rebuttal evidence, the Chamber will allow the presentation of evidence in rejoinder. Such evidence should be limited to address any new evidence raised by the Prosecution's rebuttal witness.

3. Manner of execution with regard to potential rebuttal and rejoinder evidence and dates of the testimonies

18. As to the concrete manner proposed by the Prosecution, and considering Regulations 43 and 44 of the Regulations, the Chamber finds no objections to the Prosecution Expert Witness attending the testimony of the D-0041 and D-0042 in order to prepare his report. Since both Defence witnesses are experts, the Chamber considers that the presence of the Prosecution expert will not affect their testimonies. However, P-0447 is not to

²⁵ Decision on Prosecution Requests Related to Mental Health Expert Evidence, 16 November 2017, ICC-02/04-01/15-1073, para. 13..

²⁶ In this regard, *see* ICC-02/04-01/15-1073, para. 19 (with emphasis added; rendered during the Prosecution's evidence presentation: 'The Single Judge likewise does not consider it necessary for the Prosecution Experts to appear after the close of the Defence evidence presentation [...] It is currently the Prosecution's turn to present evidence, and the Single Judge sees no reason why it cannot call these new witnesses within its evidence presentation. *Should the Prosecution consider it necessary for the Prosecution Experts to give supplementary testimony after the conclusion of the Defence evidence, a substantiated request to exceptionally recall them can be made*').

communicate with the Prosecution during the ongoing testimonies about the content of the testimonies of D-0041 and D-0042.

19. The Prosecution is to file any report produced by the Prosecution Expert Witness no later than 12:00, noon, on Monday, 25 November 2019. It should provide courtesy copies of the report to the other parties and participants and the Chamber as soon as feasible.
20. Equally, should the Defence wish to call an expert to present rejoinder evidence, this person may attend the testimony of the Prosecution Expert Witness under the same conditions.
21. In case the witness called by the Defence in rejoinder would like to also file a report, this must be done no later than 12:00, noon, on Thursday, 28 November 2019. The Defence should provide courtesy copies of any such report to the other parties and participants and the Chamber as soon as possible.
22. As to the length of the testimonies, the Chamber notes that the Defence currently estimates the length of testimony for each witness with two and a half days.²⁷ The Chamber considers that two hearing days, with the possibility of extended sitting hours, are sufficient for the testimony of each witness. This will amount to approximately the same time initially foreseen by the Defence for the testimony of each witness. Accordingly, D-0041 and D-0042 will testify consecutively, on 18 and 19 November 2019 and on 21 and 22 November 2019.
23. The rebuttal witness, if called by the Prosecution, will testify on 25 or 26 November 2019. Any potential witness to be called by the Defence for rejoinder evidence will testify on 28 or 29 November 2019. Both parties are to indicate the exact starting time of the respective witness's testimony as early as possible to the Chamber, the other parties and participants and the Registry.

²⁷ According to the overview order of witnesses sent around each month by the Defence.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that the Defence Expert Witnesses will testify independently and consecutively;

DETERMINES that the Defence Expert Witnesses will testify from 18 to 22 November 2019, in accordance with paragraph 22 above;


DECIDES that the Prosecution is allowed to call P-0447 as a rebuttal witness, should it wish to do so, in accordance with paragraphs 16, 18 and 19 above;

DETERMINES that any eventual rebuttal witness will be heard on 25 or 26 November 2019 in accordance with paragraph 23 above;

DECIDES that the Defence is allowed to call a rejoinder witness, should it wish to do so, in accordance with paragraphs 17, 20 and 21 above; and

DETERMINES that any eventual rejoinder witness will be heard on 28 or 29 November 2019 in accordance with paragraph 23 above.

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


 Judge Bertram Schmitt, Presiding Judge


 Judge Péter Kovács


 Judge Raul C. Pangalangan

Dated 1 October 2019

At The Hague, The Netherlands