

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **22 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 Defence Request for Leave to Appeal the 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:

**The Office of the Prosecutor**

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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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**Registrar**

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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 (the ‘Statute’), issues the following ‘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’.

## **I. Procedural history and submissions**

1. On 17 September 2019, the Office of the Prosecutor (the ‘Prosecution’) filed a motion concerning Defence expert witnesses D-0041 and D-0042 (the ‘Defence Expert Witnesses’ and the ‘Prosecution Request’).<sup>1</sup> In it the Prosecution explains, *inter alia*, that from the content of the second report produced by the Defence Expert Witnesses (the ‘Second Report’),<sup>2</sup> it ‘is almost inevitable that the Prosecution [...] will ask for permission to call evidence in rebuttal.’<sup>3</sup>
2. Also on 17 September 2019, the Defence for Mr Ongwen filed a request with regard to the mode of testimony of the Defence Expert Witnesses, asking that they testify between 19 and 22 November 2019, and that they be allowed to testify jointly.<sup>4</sup>
3. On 19 September 2019, the Prosecution responded to the Defence Request on Testimony of Defence Expert Witnesses, asking that a fixed time frame be indicated in which the testimony would be given and that it be permitted to question the Defence Expert Witnesses consecutively.<sup>5</sup>
4. On 23 September 2019, the Defence requested leave to reply to this motion, submitting that, if granted, it would in the same filing also respond to the Prosecution Request (the ‘Request for Leave to Reply’).<sup>6</sup> The Single Judge granted the Request for Leave to Reply on the same day.<sup>7</sup>

<sup>1</sup> Prosecution’s request for the Trial Chamber to order the Defence to specify a date for the testimony, ICC-02/04-01/15-1596.

<sup>2</sup> UGA-D26-0015-0948.

<sup>3</sup> Prosecution Request, ICC-02/04-01/15-1596, para. 5.

<sup>4</sup> Defence Motion Regarding the Mode of D-41 and D-42’s Testimony, ICC-02/04-01/15-1598 (the ‘Defence Request on Testimony of Defence Expert Witnesses’).

<sup>5</sup> Prosecution Response to “Defence Motion Regarding the Mode of D-41 and D-42’s Testimony”, ICC-02/04-01/15-1601.

<sup>6</sup> 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.

<sup>7</sup> Decision on Defence Request for Leave to Reply, ICC-02/04-01/15-1608.

5. On 27 September 2019, the Defence filed its reply (the ‘Reply’).<sup>8</sup> Regarding the Prosecution’s remarks to call evidence in rebuttal, the Defence argued that the Prosecution has not filed any formal application to call a rebuttal witness.<sup>9</sup>
6. On 1 October 2019, the Chamber issued its decision in which it ruled on both the Prosecution Request and the Defence Request on Testimony of Defence Expert Witnesses (the ‘Impugned Decision’).<sup>10</sup> The Chamber decided, *inter alia*, ‘that the Prosecution is allowed to call P-0447 as a rebuttal witness, should it wish to do so’.<sup>11</sup> In its decision the Chamber pointed out its wide discretion concerning limiting and precluding rebuttal evidence and found it ‘appropriate to allow additional evidence in rebuttal.’<sup>12</sup> For the Chamber this appeared ‘to be necessary in light of the content of the Second Report and expected expert testimonies, which were not foreseeable for the Prosecution.’<sup>13</sup> It clarified that the presentation of rebuttal evidence will concern only points and facts previously not addressed by the rebuttal witness.<sup>14</sup> Furthermore, the Chamber decided ‘that the Defence is allowed to call a rejoinder witness, should it wish to do so’.<sup>15</sup>
7. On 7 October 2019, the Defence requested leave to appeal the following two issues that arise, in its view, of the Impugned Decision (the ‘Request’)<sup>16</sup>:
  - i) ‘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 ‘First Issue’);<sup>17</sup> and
  - ii) ‘Whether the Trial Chamber erred in law by incorrectly exercising its discretion by allowing the Prosecution to present rebuttal evidence partially to rebut testimony

<sup>8</sup> Defence Reply to the Prosecution Response Regarding the Mode of D-41 and D-42’s Testimony, ICC-02/04-01/15-1615.

<sup>9</sup> Reply, ICC-02/04-01/15-1615, para. 4; and previously in the Request for Leave to Reply, ICC-02/04-01/15-1605, para. 10.

<sup>10</sup> Decision on Requests related to the Testimony of Defence Expert Witnesses D-0041 and D-0042, ICC-02/04-01/15-1623.

<sup>11</sup> Impugned Decision, ICC-02/04-01/15-1623, p. 9.

<sup>12</sup> Impugned Decision, ICC-02/04-01/15-1623, para. 16.

<sup>13</sup> Impugned Decision, ICC-02/04-01/15-1623, para. 16.

<sup>14</sup> Impugned Decision, ICC-02/04-01/15-1623, para. 16.

<sup>15</sup> Impugned Decision, ICC-02/04-01/15-1623, para. 17.

<sup>16</sup> 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.

<sup>17</sup> Request, ICC-02/04-01/15-1627, paras 1 and 15 a.

that has not yet happened’ (the ‘Second Issue’, together with the First Issue, ‘Issues’).<sup>18</sup>

8. The Defence submits that the Issues will significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.<sup>19</sup> Specifically, regarding the Second Issue the Defence argues that ‘Prosecution’s rebuttal evidence which was granted by the Trial Chamber prematurely, partially seeks to rebut testimony that has not yet happened’<sup>20</sup> and that ‘none of the cited cases dealt with a request to rebut *potential* evidence from the Defence’.<sup>21</sup> Further, the Defence avers that an immediate resolution by the Appeals Chamber would materially advance the proceedings.<sup>22</sup>
9. On 10 October 2019, the Prosecution filed its response (the ‘Prosecution Response’).<sup>23</sup> It submits that the Chamber committed no error in law<sup>24</sup> and states that both Issues fail to meet the criteria of Article 82(1)(d) of the Statute.<sup>25</sup>

## II. Analysis

10. At the outset, the Chamber recalls its interpretation of Article 82(1)(d) of the Statute as set out in detail previously.<sup>26</sup>
11. In a substantial part of its submissions the Defence argues that the Impugned Decision is unreasonable and constitutes an abuse of discretion of Regulation 43(a) of the Regulations of the Court (the ‘Regulations’).<sup>27</sup> These arguments address the merits of the

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<sup>18</sup> Request, ICC-02/04-01/15-1627, paras 1 and 15 b.

<sup>19</sup> Request, ICC-02/04-01/15-1627, paras 12 and 14.

<sup>20</sup> Request, ICC-02/04-01/15-1627, para. 9.

<sup>21</sup> Defence refers to Impugned Decision, ICC-02/04-01/15-1623, para. 12 and the corresponding footnote, Request, ICC-02/04-01/15-1627, para. 10.

<sup>22</sup> Request, ICC-02/04-01/15-1627, paras 13 and 14.

<sup>23</sup> 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”, ICC-02/04-01/15-1633.

<sup>24</sup> Prosecution Response, ICC-02/04-01/15-1633, paras 3 and 10.

<sup>25</sup> Prosecution Response, ICC-02/04-01/15-1633, para. 6; the Legal Representative for Victims did not file a response but indicated via e-mail that they also oppose the Request. E-mail to Trial Chamber IX Communications on 11 October 2019, at 16:50.

<sup>26</sup> 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.

<sup>27</sup> See Request, ICC-02/04-01/15-1627, paras 2-10.

Issues, namely why the Impugned Decision should be overturned, but is not responsive to the criteria required under Article 82(1)(d) of the Statute.

12. Turning to the First Issue, the Defence fails to show how the fair and expeditious conduct of the proceedings or the outcome of the trial are significantly affected, as required by Article 82(1)(d) of the Statute. The argumentation that further requests regarding rebuttal evidence might be brought by the Prosecution and then ruled on by the Chamber without the Defence having had a chance to respond is speculative. In this regard it needs to be noted that the Defence had the opportunity to respond to the issue which is underlying the Request for Leave to Appeal, namely the addition of a rebuttal witness. Instead it chose to be silent on the matter.<sup>28</sup> Regarding the outcome of the trial, the Defence states that it will be affected but makes no submissions on how. Therefore, the Chamber rejects the Request with regard to the First Issue.
13. Regarding the Second Issue the Defence does also not make any substantiated submissions regarding the fulfilment of the criteria of Article 82(1)(d) of the Statute. It repeats its argument regarding potential further requests for rebuttal evidence by the Prosecution. As stated above, the Chamber finds that this is not sufficient to justify that the fair and expeditious conduct of the proceedings are significantly affected. The Defence is again silent on how the issue affects the outcome of the trial. Accordingly, the Chamber also rejects leave to appeal the Second Issue.

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<sup>28</sup> Request for Leave to Reply, ICC-02/04-01/15-1605, para. 10 and Reply, ICC-02/04-01/15-1615, para. 4.


**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

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

  
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**Judge Bertram Schmitt, Presiding Judge**

  
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**Judge Péter Kovács**

  
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**Judge Raul C. Pangalangan**

Dated 22 October 2019

At The Hague, The Netherlands