

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **27 September 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

**Defence Reply to the Prosecution Response Regarding the Mode of D-41 and D-42's
Testimony**

Source: Defence for Mr Dominic Ongwen

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. On 23 September 2019, the Single Judge of Trial Chamber IX ('Chamber') issued the 'Decision on Defence Request for Leave to Reply'¹. The Decision granted the Defence Request for Leave to Reply on specific issues raised in the 'Prosecution Response to "Defence Motion Regarding the Mode of D-41 and D-42's Testimony"'² and the 'Prosecution's request for the Trial Chamber to order the Defence to specify a date for the testimony'.³ Pursuant to the Decision, the Defence is replying to the three issues identified from the Prosecution Response.

II. SUBMISSIONS

A. The availability of the Defence Experts

2. As indicated in the Defence Request for Leave to Reply, the Defence has contacted its Experts and sought their availability to testify before this Chamber. The Experts confirmed to the Defence that they are available to testify in the period of 18 to 25 November 2019, including the practice of Wednesdays off.⁴

B. Prof Weierstall's schedule and requirement to be present in the courtroom

3. First, given that the Defence confirmed to the Prosecution the availability of the Defence Expert and that the dates leave two days for the Defence direct examination, two days for the Prosecution cross examination and one additional day for potential re-direct examination, the Defence considers the Prosecution arguments in this respect moot. Second, the Defence maintains that Prof Weierstall's busy schedule and 'requirement to be present in the courtroom during the testimony of the Defence Experts' are internal matters of the Prosecution team, and therefore should not interfere with the Defence Experts' long-envisaged testimony.⁵
4. In relation to the Prosecution's remarks regarding Prof Weierstall's being called as a rebuttal evidence, the Defence reiterates that the Prosecution has not filed any formal application

¹ *Ongwen*, Decision on Defence Request for Leave to Reply, [ICC-02/04-01/15-1608](#), 23 Sept. 2019 ('**Decision**'); see also *Ongwen*, 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, 23 Sept. 2019 ('**Defence Request for Leave to Reply**').

² *Ongwen*, Prosecution Response to "Defence Motion Regarding the Mode of D-41 and D-42's Testimony", [ICC-02/04-01/15-1601](#), 19 Sept. 2019 ('**Prosecution Response**'); see also *Ongwen*, Defence Motion Regarding the Mode of D-41 and D-42's Testimony, [ICC-02/04-01/15-1598](#), 17 Sept. 2019 ('**Defence Request of 17 September**').

³ *Ongwen*, 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 Sept. 2019 ('**Prosecution Request of 17 September**').

⁴ Defence Request for Leave to Reply, paras 6-8.

⁵ Defence Request for Leave to Reply, para. 9.

requesting him to be a rebuttal witness. It would be premature and potentially prejudicial for the Defence to submit any opinion regarding Prof Weierstall's role at this point.⁶ Furthermore, if the Prosecution applies to adduce evidence in rebuttal 'over the three days following the conclusion' of D-41's and D-42's testimony (either 22 or 25 November), and the request is granted, then Prosecution's prediction that 'it should be possible to conclude the oral evidence in the week beginning 2 December 2019' is not feasible.⁷ Hypothetically, if we assume that the Defence Experts conclude their testimony on 22 November, then the Prosecution application to adduce Prof Weierstall's evidence falls on 25 November. It is axiomatic that the Defence be allowed to exhaust its right to respond to any such application, within the period of 10 calendar days (the deadline for the Defence response would fall on 5 December). Following the outcome of the Chamber's decision (which may also require a couple of days), the Defence may possibly apply for evidence in rejoinder. This, in the best scenario, brings the Chamber and parties to the second or third week of December.⁸ In addition, the Defence reserves the right to request its Experts to be present in the courtroom for the rebuttal evidence.⁹ This point also needs to be considered in scheduling.

C. The joint testimony of the Defence Experts

5. The Defence submits that the fair and expeditious conduct of the proceedings, and the roles of both the Defence and the Prosecution to assist the Chamber in establishing the truth, will be best served during the Experts' joint testimony conducted in an equal and uniform manner.¹⁰
6. In respect to the Defence request for its Experts to testify jointly, the Prosecution submits that 'whatever ruling the Chamber may make concerning the adoption of the concurrent testimony procedure for questioning by the Defence, the Prosecution submits that its own questioning of the Defence Experts should proceed consecutively'.¹¹ To support this, the Prosecution refers to the *Ayyash et al.* Decision; it compares the amount of time spent for the examination-in-chief of its three experts with the Defence's two experts and it submits that the Experts' joint

⁶ Defence Request for Leave to Reply, para. 10. In addition, as stated in the Defence Request for Leave to Reply, para. 10, the Prosecution's position in its Request of 17 September 2019, at para. 4, notes that 'two new diagnoses of mental disease or defect' were made in the June 2018 report, and 'it contains a significant quantity of new material [...]'. The Defence, at the time of the filing of this Reply, does not accept this characterization without the opportunity to seek advice from its Experts.

⁷ Prosecution Request of 17 September, paras 7-8.

⁸ Defence Request for Leave to Reply, para. 11.

⁹ Defence Request for Leave to Reply, para. 11.

¹⁰ Defence Request for Leave to Reply, para. 19.

¹¹ Prosecution Response, paras 10-12.

testimony could give rise to influencing each other's answers, which in turn limits the Prosecution's 'ability to test the extent to which each expert contributed to their report'.¹²

7. The Defence emphasizes again that the Defence Experts' joint reports and conclusions were considered as one evidentiary item since the beginning of this trial. It was known to all parties that the Experts' reports are co-signed, which presupposes that both Experts agreed on their methodology and conclusions. Separate testimonies of two Defence Experts, who have worked together and shared the same expertise for the same purpose throughout the last years, would be incomplete.¹³
8. To this end, the Defence submits also that the Trial Chamber's decision in the *Ayyash et al.* case rejecting the Prosecution's request to order concurrent testimony of two experts is substantially distinguishable from the Defence Request. It is distinguishable from the Defence Request, because *Ayyash et al.* concerned the testimony of two experts who contributed separate expertise in their joint reports.¹⁴ This is not the case of the Defence Experts.¹⁵
9. With respect to the procedure to be followed during the Experts' joint testimony, the Defence agrees essentially with the Prosecution's proposal outlined in its Prosecution Response.¹⁶ Another advantage of this procedure is that giving evidence in this way can considerably reduce the court time costs. The saving of court time and resources is already supported by the fact that the Defence intends to use 6 sessions for the direct-examination of its mental health Experts, as opposed to the Prosecution's use of 6.35 sessions for the direct examination of its mental health experts, addressing the same topic.¹⁷
10. The Defence request that the Experts testify jointly shows good cause, causes no prejudice to the parties and participants involved and supports the fair and expeditious conclusion of the Defence's presentation of evidence.

¹² Prosecution Response, para. 12.

¹³ Defence Request for Leave to Reply, para. 17.

¹⁴ [Ayyash et al.](#) Decision, paras 2 and 35.

¹⁵ Defence Request for Leave to Reply, paras 13-14.

¹⁶ Prosecution Response, para. 5.

¹⁷ Defence Request for Leave to Reply, para. 16; see also Prosecution Response, para. 10.

III. RELIEF SOUGHT

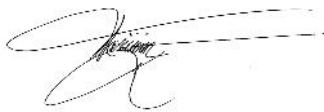
11. For the reasons stated above, the Defence respectfully requests the Chamber to:

GRANT the request for the Defence Experts' testimony in the period of 18 to 25 November 2019;¹⁸

GRANT the request for the Defence Experts to testify jointly; *and*

REJECT the arguments of the Prosecution.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Mr Dominic Ongwen

Dated this 27th day of September, 2019

At Kampala, Uganda

¹⁸ Including the practice of Wednesdays off.