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No.: **ICC-02/04-01/15**
Date: **23 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 with CONFIDENTIAL Annex A

Defence Request for Leave to Reply to 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. The Defence for Mr Dominic Ongwen ('Defence') requests leave to reply to the 'Prosecution Response to "Defence Motion Regarding the Mode of D-41 and D-42's Testimony"'.[1]

2. Regulation 24(5) of the Regulations of the Court ('RoC') stipulates: 'Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying could not reasonably have anticipated'. Previously, the Chamber ordered the Defence to file a reply, considering that it 'will be assisted by the Defence being able to fully present their views' on issues identified in the request for leave to reply.[2]

3. Three new issues were identified that could not reasonably have been anticipated by the Defence. Alternatively, if the Chamber finds that any of the identified issues were either not new or were reasonably anticipated, the Defence respectfully requests that the Chamber permit a reply in the interests of justice, and fairness and expeditiousness, to assist the Chamber in deciding the mode of D-41 and D-42's testimony.

4. The Prosecution Response of 19 September repeats, cross-references and elaborates on issues from the Prosecution Request of 17 September.[3] In order to expedite the scheduling matter, the Defence will reference both the Prosecution Response of 19 September and the Prosecution Request of 17 September in this Request for Leave to Reply. Accordingly, the Defence will not be filing any response to the Prosecution Request of 17 September.

II. SUBMISSIONS

5. At the outset, the Defence notes that the Prosecution's pressure concerning the Defence Experts' testimony is unnecessary. The Defence has provided the Prosecution with information about the approximate availability of the Experts on 29 August.[4] Meanwhile, the Experts

[1] *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 of 19 September**'); *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**').
[2] *Ongwen*, Decision on Defence Request for Leave to Reply to Prosecution and CLRV Responses on the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute, ICC-02/04-01/15-1455, 19 Feb. 2019, para. 5.
[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] Confidential Annex A.

confirmed to the Defence their availability to testify in the period of 19-22 November. The Defence reiterates that the information has been shared with the Chamber and parties two months in advance of the Experts' anticipated testimony.[5]

6. *First issue*. In the Prosecution Response of 19 September, the Prosecution presents a proposed length of time for cross-examination of the Defence Experts – four sessions (6 hours) in total.[6] The estimate for 'the totality of the questioning' in the Prosecution Request of 17 September reads 'a day and a half for each expert'.[7] But, suffice to say, both Prosecution pleadings are the first information the Defence has about this matter.

7. In an effort to resolve the problem, the Defence proposes that it will attempt to see if the Experts are available to start on 18 November, which leaves two days for the Defence direct examination and two days for the Prosecution cross-examination, including the practice of Wednesdays off. This means also that re-direct examination, if needed, may have to be done on Monday morning of the next week, 25 November.

8. The Defence, with this update from the Prosecution, will thus contact its Experts to seek their availability on 18 as well as potentially 25 November. After the Defence receives confirmation from the Experts regarding the two additional days, it will share this information with the Chamber and parties.

9. *Second issue*. The reasons behind the Prosecution's pleadings are Prof Weierstall's busy schedule and 'requirement to be present in the courtroom during the testimony of the Defence Experts'.[8] First, the Defence notes that these are internal matters of the *Ongwen* Prosecution office and they should not affect the Defence Experts' long-envisaged testimony. Second, if Prof Weierstall's schedule prevents his presence in the courtroom, he may follow the proceedings from his home or office. If the Prosecution requires Prof Weierstall to watch the private or closed sessions of the testimony, the Court Management Section ('CMS') offers the possibility to provide the testimony of any witness on a DVD copy, including private or closed sessions. The Defence has used the CMS's services in this respect on many occasions.

[5] Defence Request of 19 September, para. 2.
[6] Prosecution Response of 19 September, para. 13.
[7] Prosecution Request of 17 September, para. 3.
[8] Prosecution Request of 17 September, paras 6, and 9; Prosecution Response of 19 September, para. 4.

10. Furthermore, the Defence points out that the Prosecution has not filed a formal application requesting Prof Weierstall to be a rebuttal witness. Hence, it would be premature for the Defence to submit any opinion regarding Prof Weierstall's role at this point.[9]

11. The Prosecution's proposal that 'it should be possible to conclude the oral evidence in the week beginning 2 December 2019' is misconceived too.[10] If the Prosecution applies to adduce evidence in rebuttal 'over the three days following the conclusion' of D-41 and D-42's testimony, the Defence has a right to respond to the Prosecution's request within 10 calendar days. Moreover, if the Chamber grants the Prosecution's request for rebuttal evidence, then the Defence may apply for evidence in rejoinder. In addition, the Defence reserves the right to request its Experts to be present in the courtroom for the rebuttal evidence. Due to potential scheduling issues, this, inevitably, delays the conclusion of oral evidence beyond the week of 2 December.

12. *Third issue*. In respect to the Defence request for its Experts to testify jointly, 'the Prosecution doubts that [the] Defence' has presented any compelling reason to depart from the normal practice of consecutive testimony and 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]

13. To support its position, the Prosecution claims that the STL's *Ayyash et al.* case should be adopted by the Chamber as guidance. While quoting the contents of the *Ayyash et al.* decision,[12] the Prosecution omits to mention, perhaps unconsciously, that the STL's Trial Chamber considered as relevant the fact that 'although [the Prosecution's two experts] had produced two joint reports, each had contributed *separate expertise*, and either expert could explain his or her own analysis and conclusions for a particular aspect of the report'.[13] This is not the case of the Defence Experts. Both Experts has contributed the *same expertise* to their joint reports and conclusions.

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[9] The Prosecution's position in its Prosecution Request of 17 September, 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.
[10] Prosecution Request of 17 September, paras 7-8.
[11] Prosecution Response of 19 September, paras 10-12. (Italics added).
[12] Prosecution Response of 19 September, paras 7-9.
[13] Ayyash et al. Decision, paras 2 and 35. (Italics added).

14. The Defence thus submits that the circumstances of the STL's *Ayyash et al*. trial and the ICC's *Ongwen* trial differ. Moreover, regulation 44(5) of the RoC vests the Chamber with wide discretion regarding 'the manner in which the evidence is to be presented' in this trial's setting.

15. The Prosecution compares also the time taken for the examination-in-chief of their *three* mental health experts (who produced their reports separately) with the anticipated time to be used for the examination-in-chief of the *two* Defence Experts (who produced their reports jointly). The Prosecution submits that it questioned Prof Mezey for 3 hours 43 minutes, Dr Abbo for 2 hours 45 minutes and Prof Weierstall for 3 hours 4 minutes.

16. In total the examination-in-chief of the Prosecution's *three* mental health experts amounted to 572 minutes, which equals to approximately 6.35 court sessions (90 minutes per session). The Defence's two full days for examination-in-chief of its *two* mental health Experts equal to 6 court sessions (90 minutes per session). In other words, the Defence indicated already that it will be using less time and less Court's resources than the Prosecution did with its mental health experts, addressing the same topic.

17. The Chamber and parties knew that the Defence Experts' reports and conclusions are a joint product, and therefore, were treated as such since the beginning of the trial. There was never any objection from the Prosecution against this mode of presentation of evidence. During their testimonies, all Prosecution mental health experts addressed the work and conclusions of D-41 and D-42 as one piece of evidence. Ordering two Experts to testify separately on their joint product would thus be confusing, redundant and against a fair and expeditious conclusion of the Defence's presentation of evidence.[14]

18. Finally, the Prosecution submits that the joint testimony 'could give rise to the possibility that the Defence experts would, perhaps unconsciously, influence each other's answers to Prosecution questions'. This would, in the Prosecution's view, limit its 'ability to test the extent to which each expert contributed to their report'.[15] Put differently, the Prosecution is arguing that the joint testimony could hinder its strategy to undermine their credibility, based on details regarding their joint work and conclusions.

[14] Defence Request of 19 September, para. 3.
[15] Prosecution Response of 19 September, para. 12.

19. The Defence avers that conventional 'adversarial tactics' should not be the reason for the Prosecution to urge the Chamber to order consecutive testimony procedure, especially not when dealing with professionals and experts in their fields.[16] On the contrary, the role of both the Defence and the Prosecution should be to assist the Chamber in establishing the truth, during the Experts' joint testimony conducted in an equal and uniformed manner.[17]

III. RELIEF SOUGHT

20. For the reasons stated above, the Defence respectfully requests leave to reply to the Prosecution Response of 19 September.

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Mr Dominic Ongwen

Dated this 23rd day of September, 2019

At Lira, Uganda

[16] See, for example, Ayyash et al. Decision, para. 36: 'Common sense, however, dictates that experts who have worked together and prepared a joint report are already likely to have 'influenced' each other well before their courtroom testimony. The fact that the report is jointly signed normally indicates an agreement as to methodology and conclusions'.

[17] Article 54(1)(a) of the Statute obliges the Prosecution: 'In order to *establish the truth*, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, *investigate incriminating and exonerating circumstances equally'*.