

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 19 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**

**Prosecution Response to “Defence Motion Regarding the Mode of D-41 and D-42’s  
Testimony”**

**Source:** The Office of the Prosecutor

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

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## Introduction

1. In its filing of 17 September 2019 the Defence indicated that the “tentative dates of availability of witnesses D-0041 and D-0042 are in the period of 19 to 22 November 2019”<sup>1</sup> and requested that the Trial Chamber permit them to “testify jointly”.<sup>2</sup> The Prosecution has concerns about both the indication and the request both because they are unclear and because they may give rise to difficulty.

## Prosecution concerns

### *Indication concerning dates*

2. It is unclear whether the Defence is indicating that the end date (22 November) is a date beyond which D-0041 and D-0042 (“Defence Experts”) will no longer be available to testify.

3. If this is the case then (given that one of the days indicated by the Defence is a Wednesday, on which day the Trial Chamber does not customarily sit) the Defence indication would limit the testimony of the Defence Experts to just three working days. The Defence have indicated that, even if their request for joint testimony is granted, they estimate that their own questioning of the Defence Experts would take up two full days.<sup>3</sup> The Defence have given no indication concerning the time for their own questioning if the Trial Chamber requires the Defence Experts to testify separately, but have suggested that this would add “a considerable amount of time” to their estimate.<sup>4</sup>

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<sup>1</sup> ICC-02/04-01/15-1598, para 2.

<sup>2</sup> ICC-02/04-01/15-1598, para 3.

<sup>3</sup> ICC-02/04-01/15-1598, para 3.

<sup>4</sup> ICC-02/04-01/15-1598, para 3.

4. The Defence states that the dates proposed for the Defence Experts to testify are only “tentative”. This hinders the smooth running of proceedings. There is no good reason why the Defence cannot provide the Court with dates which are not “tentative” but certain, barring any unforeseen emergencies. The reason why certainty is needed is because the Prosecution’s own expert, Professor Weierstall, is required to be present in the courtroom during the testimony of the Defence Experts.<sup>5</sup>

#### *Joint testimony*

5. The Defence does not specify precisely what it has in mind when it requests that the experts be permitted to testify jointly. The Prosecution proceeds on the basis that the suggested procedure is that both Defence Experts sit in the witness box at the same time, both take the oath, and the questioning parties and participants (and perhaps the Trial Chamber), in the normal sequence, then ask questions which first one and then the other Defence Expert answers. In other proceedings (see below) this has been described as “concurrent testimony” and the Prosecution adopts that nomenclature here.

### **Prosecution submissions**

6. The powers of the Trial Chamber in respect of this matter are set out in Regulation 44 (5) of the Regulations of the Court. This gives wide powers to “issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, *the manner in which the evidence is to be presented* and the time limits for the preparation and notification of their report” (emphasis added).

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<sup>5</sup> ICC-02/04-01/15-1596.

7. Perhaps the most useful guidance as to the course the Trial Chamber might adopt in the instant case comes from the Trial Chamber at the Special Tribunal for Lebanon (STL) in the case of *Ayyash and others*.<sup>6</sup> In that case the Prosecution had requested permission for two experts who had jointly written reports about the crater and the damage caused by an explosion in Beirut on 14 February to testify ‘simultaneously’.

8. The Trial Chamber at the STL, having considered ICC Regulation 44 (5), ruled that “It is evident that concurrent testimony is permitted only when a court is convinced that - without violating the right of the opposing party to fully cross-examine the witnesses - it would significantly facilitate the elucidation of expert evidence and speed up the proceedings. Otherwise, just like any other witness, experts should generally provide their evidence individually...[T]o justify a departure from the normal practice of individual testimony in criminal trials using international criminal procedural law, *the circumstances must be compelling*.”<sup>7</sup>

9. In the event, having considered the circumstances, which had changed somewhat from the time the Prosecution first made its request for concurrent testimony, the Trial Chamber at the STL further ruled that it was “not convinced that the Prosecution has demonstrated that hearing the two witnesses concurrently would be more efficient than hearing them individually or that it would significantly shorten the proceedings. For these reasons, the Trial Chamber is not satisfied that compelling reasons exist to justify a departure from the ordinary practice of hearing expert witnesses individually rather than concurrently, and dismisses the motion.”<sup>8</sup>

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<sup>6</sup> Corrected Version of 'DECISION ON SIMULTANEOUS OR CONCURRENT TESTIMONY OF EXPERT WITNESSES' of 17 February 2015, STL-11-01/T/TC F 1858/COR/20 150323/R27257 6-R272589/EN/af, (“*Ayyash* decision”) – emphasis added.

<sup>7</sup> *Ayyash* decision, para 33 and 34.

<sup>8</sup> *Ayyash* decision, para 39.

10. Applying the guidance set out above to the circumstances of this case, the Prosecution submits that it is for the Defence to demonstrate that hearing the Defence Experts concurrently would significantly shorten the proceedings, or that there is some other compelling reason to depart from the normal practice of consecutive testimony. The Prosecution doubts that Defence has done so. The Defence estimate is that, even adopting the concurrent testimony procedure, two full days will be required for the questioning of the Defence Experts by the calling party. The Prosecution notes that the time taken for individual questioning of its own mental health experts (using the rule 68(3) procedure) by the calling party was as follows: Professor Mezey 3 hours 43 minutes, Dr Abbo 2 hours 45 minutes and Professor Weierstall 3 hours 4 minutes.

11. If the Trial Chamber considers that the Defence has made such a demonstration the Prosecution has no objection to concurrent testimony being adopted in the course of the Defence's own questioning of its Experts.

12. 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. Concurrent testimony at this stage would give rise to the possibility that the Defence Experts would, perhaps unconsciously, influence each other's answers to Prosecution questions. It would also limit the Prosecution's ability to test the extent to which each expert contributed to their report. The Trial Chamber would derive greater benefit from an independent exploration of the Defence Experts' findings and opinions under the normal consecutive testimony procedure.

13. The Prosecution estimates that its own questioning of the Defence Experts will take about four sessions (6 hours) in total.

## Conclusion

14. For the reasons set out above the Prosecution requests that the Trial Chamber orders that:

- a) The Defence provide a fixed date on which the Defence Experts will begin to testify, in the absence of any unforeseen emergencies;
- b) The Defence specify the date up until which the Defence Experts are able to continue their testimony;
- c) The Prosecution be permitted to question the Defence Experts consecutively.



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**Fatou Bensouda, Prosecutor**

Dated this 19<sup>th</sup> day of September 2019  
At The Hague, the Netherlands