

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **30 January 2017**

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's Response to Defence Request for Re-consideration of
ICC-02/04-01/15-596-Conf**

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. The Defence for Dominic Ongwen (“Defence”) requests reconsideration¹ of the Trial Chamber’s decision on the submission of the statements of Prosecution Witnesses P-0337, P-0384, P-0404 and P-029 in lieu of their testimony (“Rule 68 decision”)². The Defence argue that the Chamber “misapprehended” the Defence position on the reliability of the direction-finding evidence most notably by misunderstanding paragraph 17 of the Defence response³ to the Prosecution’s rule 68 application⁴.

2. The Prosecution opposes the Defence Request as it fails to meet the threshold for reconsideration. Reconsideration “should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”.⁵ The Defence has identified no prejudice or injustice in the Rule 68 decision or any clear error of reasoning on the part of the Chamber that has the potential to lead to a miscarriage of justice. The Defence Request also fails to provide any new facts or compelling reason why the motion should be granted. The Defence has simply changed strategy on its use of the direction-finding evidence.

3. Accordingly, the Defence has failed to show any exceptional reasons to warrant a re-consideration of the Trial Chamber’s Rule 68 decision and the present Request should be rejected.

¹ ICC-02/04-01/15-659

² ICC-02/04-01/15-596-Conf

³ ICC-02/04-01/15-509-Conf

⁴ ICC-02/04-01/15-465-Conf-Corr

⁵ ICC-01/05-01/13-1085-Conf-para 4

Submission

4. Pursuant to article 64(2) of the Rome Statute, the Trial Chamber in ensuring that a trial is fair and expeditious with full respect to the rights of the accused has the power to reconsider interlocutory decisions.⁶ The test for the grant of a request for reconsideration is whether exceptional circumstances have occurred⁷ and where the decision is “manifestly unsound and their consequences are manifestly unsatisfactory”.⁸ The Defence Request has failed to demonstrate any exceptional reason or circumstances warranting a reconsideration of the Rule 68 decision of the Trial Chamber. In its previous filing, #555, the Defence had argued that it will “challenge the direction finding operation”⁹ of the UPDF. The Defence now argues that “it did not indicate that it would not rely upon the direction-finding evidence” and that “any ambiguity understood by the Trial Chamber should [...] be seen [...] as arguing for the *viva voce* testimony of witnesses”.¹⁰ This about-turn by the Defence does not constitute a new fact or circumstance warranting reconsideration. Indeed, a change of strategy by a Defence team, or a belated realisation that its prior position was flawed, are irrelevant for the purposes of assessing the reasonableness of a Chamber’s prior ruling.

5. The Defence Request further ignores the fact that the Chamber in admitting the evidence of the four witnesses, took cognisance of the upcoming testimony of other witnesses who provide similar evidence. With regards to P-0029, the Chamber was “of the view that the rest of Witness P-0029’s prior recorded testimony regarding the UPDF interception procedure, including its historical background, concerns matters which are not in themselves, materially in dispute and, in any case, could be satisfactorily addressed

⁶ ICC-01/04-01/06-2705 para. 13

⁷ ICC-01/09-02/11-863, para. 11

⁸ ICC-01/04-01/06-2705 para. 18

⁹ ICC-02/04-01/15-555-Conf

¹⁰ *Supra* para 15

viva voce through the examination at trial of witness P-0059".¹¹ For P-0337, the Chamber noted that the matters to which P-0337 will speak, "*will be addressed by witnesses P-0003 and P-0339 who will testify live at trial and be subject to questioning*"¹² and the evidence of P-0384, will be provided in greater detail by P-0059 who will be a live witness and therefore no prejudice will be occasioned to the Defence.¹³ The same reasoning was applied by the Chamber with regards to P-0404 whose evidence is similar to and will be provided by P-0003 and P-0339.

Relief

6. For the above reasons, the Prosecution requests that the Chamber reject the Defence Request for reconsideration.



Fatou Bensouda, Prosecutor

Dated this 30th day of January 2017
At The Hague, The Netherlands

¹¹ ICC-02/04-01/15-596-CONF. para. 161

¹² ICC-02/04-01/15-596-CONF. para. 184

¹³ ICC-02/04-01/15-596-CONF. para. 191