

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **3 April 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

**Public Redacted Version of “Defence Response to the Prosecution Request for
Reconsideration, ICC-02/04-01/15-778”, filed on 3 April 2017**

Source: Defence for 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 Dominic Ongwen ('Defence') responds to the "Prosecution request for the Trial Chamber to make supplementary Directions concerning the use of documents in the course of proceedings"¹ ('Request').
2. Firstly, the Defence argues that the Request is nothing more than a second attempt by the Office of the Prosecutor ('Prosecution') to ask for reconsideration of the "Initial Directions on the Conduct of the Proceedings"² ('Decision'). Nothing new or profound since the Decision requires Trial Chamber IX ('Chamber') to reconsider or, as the Prosecution mischaracterises, supplement the Decision. As such, the Chamber should deny the Request.
3. Secondly, should the Chamber decide that the Request is not a motion for reconsideration, the Defence argues that the Chamber's guidance from the Decision and oral rulings on objections provides all the supplementary directions required in the case, and that the supplementary directions would place an undue restriction on the Chamber's power to regulate the mode of questioning witnesses.

II. CONFIDENTIALITY

4. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court ('RoC'), the Defence files this response as confidential because it contains passages from witness interviews which, if known to the public, might reveal the identity of witnesses currently covered by protective measures. A public redacted version shall be filed on or before 4 April 2017.

III. BACKGROUND

5. On 30 June 2016, the Defence and Prosecution (jointly 'Parties') filed a joint submission which contained recommendations by the Parties to the Chamber on the conduct of the proceedings ('Joint Submission').³ Within the submission, the Parties

¹ ICC-02/04-01/15-778.

² ICC-02/04-01/15-497.

³ ICC-02/04-01/15-486.

made joint and singular recommendations to the Chamber about the questioning of witnesses.⁴

6. On 13 July 2016, the Presiding Judge, on behalf of the Chamber, issued the Decision.⁵
7. On 14 March 2017, the Prosecution made a loose oral request for reconsideration of the Decision pertaining to refreshing a witness's memory.⁶ The Presiding Judge, on behalf of the Chamber, denied the oral request.⁷
8. On 21 March 2017, the Prosecution submitted its Request.⁸

IV. SUBMISSIONS

a) *The Law*

9. Regulation 43 of the RoC states:

Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:

- (a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth;*
- (b) Avoid delays and ensure the effective use of time.*

10. In the Decision, the Presiding Judge, on behalf of the Chamber, stated he,

*will not regulate the questioning of witnesses in the abstract. The necessity or propriety of any particular question will be dealt with on a case-by-case basis, noting the Presiding Judge's obligations to: (a) make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth and (a) avoid delays and ensure the effective use of time.*⁹

11. Furthermore, as defined by Trial Chamber VII, and adopted by the Chamber:

Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or it is necessary to do so to prevent an

⁴ *Id.*, paras 30-48.

⁵ Decision.

⁶ ICC-02/04-01/15-T-53-CONF-ENG ET, p. 28, lns 4-15.

⁷ *Id.*, p. 28, ln. 16 to p. 29, ln. 15.

⁸ Request.

⁹ Decision, para. 5 (*citing* Regulation 43 of the RoC).

*injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.*¹⁰

b) The Prosecution does not meet the Standard for Reconsideration

12. The arguments and requests advanced by the Prosecution in the Request are not new facts and arguments arising since the Decision. The Request asks the Chamber to rule upon issues already decided in the Decision and/or in oral rulings since the trial began.
13. In respect of paragraphs 2(i) and (ii) of the Request,¹¹ the Prosecution made arguments on refreshing a witness's memory in paragraphs 42 and 43 of the Joint Submission. The Presiding Judge responded to these suggestions in paragraphs 5 and 15 of the Decision. Furthermore, the Presiding Judge elaborated to the Prosecution on memory refreshing during the testimony of P-0330 when asked by the Prosecution.¹² As the Presiding Judge stated during the morning session of 3 April 2017, "[w]e said already that putting former statements to the witness can have two reasons. There might be an issue that the witness does not recall any more, and the second issue might be that there is a contradiction, so to speak, and I think you are referring to a contradiction more and I allow it."¹³ The instructions and use of prior statements could not be clearer.
14. In respect of paragraphs 2(iii) and (iv) of the Request,¹⁴ the Prosecution made arguments on the use of documents and types of questions which can be put to a witness in paragraphs 30-37 of the Joint Submission. Since the Decision, the Prosecution retrospectively objected to the style of questioning put forth to a witness.¹⁵ The Presiding Judge noted the issue and stated, "as I have understood it, not been submitted to any suggestion that might have been in this question. So there is nothing to discuss, to relitigate, so to speak, was has been in the past. We have noted that, we are attentive to that."¹⁶ Furthermore, when an objection to knowledge of documents and case material came about, the Prosecution made a timely objection, the Presiding Judge over-ruled the objection, but advised the Defence to "refrain from that because

¹⁰ ICC-02/04-01/15-468, para. 4. (citing ICC-01/05-01/13-1282, para. 8 and ICC-01/09-01/11-1813, para. 19). See also ICC-01/05-01/13-1085, para. 4.

¹¹ See also Request, pp 9-10, suggested additions 23A and 23B to the Decision.

¹² See ICC-02/04-01/15-T-53-CONF-ENG ET, p. 28, ln. 4 to p. 33, ln. 8.

¹³ ICC-02/04-01/15-T-64-CONF-ENG RT, p. 16, ns 20-25.

¹⁴ See also Request, p. 10, suggested additions 23C to the Decision

¹⁵ ICC-02/04-01/15-T-50-CONF-ENG ET, p. 31, ln. 10 to p. 32, ln. 7.

¹⁶ *Id.*, p. 32, ln. 23 to p. 33, ln. 1.

he has not produced the report, this is the problem that we always have in that respect.”¹⁷

15. The Chamber has given supplementary directions during the beginning of the trial, and no new facts or arguments have been raised by the Prosecution that have not been dealt with by the Chamber. Nothing which the Prosecution has submitted in the Request meets the standard of reconsideration applicable to this case, and as such, the Request should be denied.

c) *The Prosecution Request is a demand for an unreasonable restriction on the Chamber’s power to regulate the mode of witness questioning*

16. The RoC grants the Chamber wide latitude on the regulation of the questioning of witnesses at trial.¹⁸ The Chamber, in its exercise of this function, has ruled on the appropriateness of the type and manner of questions put to witnesses. More restrictive rules for the non-calling party and more generous rules for the calling party, as the Prosecution asks in the Request, would unreasonably restrict the Chamber’s ability to regulate the mode of questioning. The Chamber is comprised of professional judges, and their discretion on the mode of questioning witness should not be restricted.
17. As written above in paragraph 13, there is a clear understanding of when a party may read parts of a witness’s statement to him or her. Without such restrictions, a party could be free to read a significant amount of a witness’s statement into the record of the case, thus depriving the Chamber of the spontaneity which live testimony offers.
18. Conversely, the Prosecution Request seeks to restrict the Chamber’s ability to regulate the non-calling party’s questioning by limiting its scope of questioning. Challenging a witness with ancillary case material can be an effective tool when questioning a witness.
19. The Defence cites three examples from the Prosecution’s material:

(1) In June 2006, the Prosecution interviewed witness P-0142. Apparently unhappy with the answers P-0142 gave, the Prosecution played alleged LRA radio chatter from [REDACTED], which are ISO recordings given to the

¹⁷ ICC-02/04-01/15-T-51-CONF-ENG ET, p. 29, lns 6-24.

¹⁸ Decision, para. 5.

Prosecution.¹⁹ The Prosecution then questioned P-0142 about why [REDACTED].²⁰ The Prosecution went on to challenge P-0142 again,²¹ telling him *“When I hear you talk about the attack...I think that one part that probably we are disagreeing about right now. I don’t think that I think they probably there were times when you were in the camp. Ok? And...and this idea that you left before anything happened in the camp, or before you were seeing was up to the fact. And am not asking you anything but I don’t really agree with that.”*²² [REDACTED].

(2) In December 2015, the Prosecution again questions the veracity of P-0142.²³ The Prosecution states at first *“And why I am asking these questions is, from this point, the information, from the point of the camp, the information is sometimes not consistent with the information we already have.”*²⁴ The Prosecution went on to question the witness about his feelings toward Mr Ongwen, and then Joseph Kony, as if the Prosecution investigators were attempting to get P-0142 emotional against Mr Ongwen.²⁵ The Defence leaves the full interpretation for the Chamber.

(3) In July 2016, the Prosecution interviewed D26-0033.²⁶ The Defence notes that the Prosecution showed/read to the witness from a government intercept log books in an attempt to refresh and/or test the witness’s memory.²⁷ D26-0033 was not an LRA signaller.

20. The techniques employed by the Prosecution in its interviews, namely to test the memory of a witness, must not be lost merely because this is trial. Both Parties must be allowed, within reason, to inform and present testifying witnesses of significantly contrasting information to test the memory, credibility and veracity of witnesses. As such, the Defence respectfully request the Chamber to deny the Prosecution Request

¹⁹ See UGA-OTP-0228-4583, starting from p. 4597. The Defence assumes that the CD played to the witness was a copy of a tape given from ISO because of the label which was read out on pages 4598-99, lines 491-524.

²⁰ *Id.*, at 4608-4611, lns 828-934.

²¹ *Id.*, at 4611-4617, lns 935-1155.

²² *Id.*, at 4612-4613, lns 987-1000.

²³ See UGA-OTP-0273-0348, at 0383-0384, lines 1210-1248 and UGA-OTP-0273-0384, at 0385-0389.

²⁴ UGA-OTP-0273-0348, at 0384, lns 1220-1222.

²⁵ UGA-OTP-0273-0384, at 0389-0390.

²⁶ UGA-OTP-0269-0764-R01.

²⁷ *Id.*, at 0780-0783.

as it places an unreasonable restriction on the Chamber's ability to regulate the mode of questioning witnesses.

V. RELIEF

21. The Defence respectfully requests the Chamber to deny the Prosecution Request as it:

(1) Does not meet the standard for reconsideration and

(2) It unduly restricts the Chamber's power to regulate the mode of questioning.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 3rd day of April, 2017
At The Hague, Netherlands