

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 7 June 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's Response to Defence's 'Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence'

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. On 24 May 2019 the Single Judge rejected the Defence's request for addition of, *inter alia*, items UGA-D26-0015-1212, UGA-D26-0018-3999 and UGA-D26-0018-4000 to its List of Evidence ("LOE").¹ The Defence Motion² now seeks the reconsideration of, or, alternatively, leave to appeal that decision. The Motion should be rejected because it does not meet the requirements for reconsideration or those for leave to appeal under article 82(1) (d) of the Rome Statute ("Statute").

2. The Motion does not demonstrate any error of reasoning in the Impugned Decision. It also fails to show the necessity of reconsideration for the purpose of preventing injustice.³ The issue identified for leave to appeal,⁴ does not arise from the decision; it merely reflects the Defence's disagreement with the Single Judge's decision to reject the addition of the three items to Defence's LOE. The Issue does not have any impact on the fair and expeditious conduct of the proceedings or the outcome of the trial and its immediate resolution by the Appeals Chamber would not materially advance the proceedings.

Submissions

i. Conditions for reconsideration of the Impugned Decision are not met

3. Reconsideration of a decision is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.⁵ A Chamber may reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,⁶ or when new or previously unavailable

¹ Decision on Defence Third Request to Add 12 Items to its List of Evidence, ICC-02/04-01/15-1523 (Impugned Decision).

² Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on Defence Third Request to Add 21 Items to its List of Evidence ("Motion"), ICC-02/04-01/15-1527.

³ ICC-01/04-02/06-611, para.12 (citing decisions of this Court—including ICC-01/09-01/11-1813, para.9; ICC-01/09-02/11-863, para.11; ICC-01/04-01/06-2705, para.19—as well as decisions of other international courts and tribunals). See also ICC-01/05-01/13-1085-Conf, para.4.

⁴ Whether the Single Judge has erred in his reasoning by not allowing the Defence to add items UGA-D26-0015-1212, UGA-D26-0018-3999, and UGA-D26-0018-4000 to the list of evidence thereby violating his obligations under article 64(2) of the Statute to "ensure that a trial is fair [...] and is conducted with full respect for the right of the accused" ("Issue").

⁵ ICC-02/04-01/15-468, para 4.

⁶ ICC-01/04-01/06-2705, paras 13-18; ICC-02/04-01/05-50, para 18; ICC-01/04-01/06-772 OA4, paras 36-39.

information requires the Chamber to reconsider its previous ruling.⁷ None of these conditions are met by the Motion. In *Bemba*, Trial Chamber III also held that when a party fails to specify any change in circumstances or new and compelling reasons that justify reconsideration, such a request may be summarily dismissed.⁸

Item UGA-D26-0015-1212

4. The item is an excerpt of the video recording of the opening hearing in this trial. The Defence's argument that the Impugned Decision is inconsistent with the ruling in Decision 1314 regarding the formal submission of audio-visual material is incorrect. Neither Decision 1314 nor the Initial Directions on the Conduct of Proceedings address video recordings of the Trial Chamber's own trial hearings.

5. As the Single Judge clearly reasoned, the addition of a video excerpt to demonstrate a statement made by the accused before this very Trial Chamber is not necessary. The official record of the trial proceedings is the transcript and this should be the basis for referring to statements made by the accused before the Trial Chamber.⁹ The Defence fails to demonstrate why the reasoning of the Single Judge in this regard is in any way flawed or unjust.

Items UGA-D26-0018-3999 and UGA-D26-0018-4000

6. The Single Judge rejected the request with regard to these two items, because the Defence did not specify the reason(s) why they should be added to the LOE.¹⁰ The Defence now submits that the Impugned Decision should be reconsidered for the purpose of assisting the court to ascertain the state of mind of witness P-0235, of Dominic Ongwen and their children and to fully understand the nature of the relations between the witness and Dominic Ongwen.¹¹

⁷ ICC-01/05-01/08-1691-Red, para 17.

⁸ ICC-01/05-01/08-3343, para 30.

⁹ ICC-02/04-01/15-1523, para 10.

¹⁰ ICC-02/04-01/15-1523, para. 9.

¹¹ ICC-02/04-01/15-1527, paras 13-15.

7. The submissions raised by the Defence are neither new nor do they amount to previously unavailable information that would require reconsideration of the Impugned Decision. The Defence itself acknowledges that it had not adduced these reasons previously, without giving an explanation why.¹² The Motion therefore fails to meet the high test for the exceptional remedy of reconsideration.

ii. *The alternative request for leave to appeal should be rejected, because the Issue is not appealable*

8. Article 82(1) (d) of the Statute provides that a party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals chamber may materially advance the proceedings.

9. An “issue” is an identifiable and discrete subject or topic requiring a decision for its resolution and *not merely a matter over which there is disagreement or conflicting opinion*.¹³ The Motion fails to identify an appealable issue arising from the Impugned Decision.

10. The proposed issue – whether the Single Judge has erred in his reasoning by not allowing the Defence to add items UGA-D26-0015-1212, UGA-D26-0018-3999 and UGA-D26-0018-4000 to the LOE thereby violating his obligations under Article 64(2) of the Statute to “ensure that a trial is fair [...] and is conducted with full respect for the right of the accused”¹⁴ – is a mere disagreement with the Impugned Decision. The Defence disagrees with how its initial request was resolved, but this, as the Single Judge has noted in another recent decision,¹⁵ does not constitute an issue for appeal. The Motion does not cite to any specific facts which the Impugned Decision would have ignored or misstated.¹⁶

¹² ICC-02/04-01/15-1527, para 8.

¹³ See ICC-01/04-168 OA3, para. 9; ICC-02/11-01/15-117 paras. 19-22; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27. (emphasis added).

¹⁴ ICC-02/04-01/15-1527, para 17.

¹⁵ ICC-02/04-01/15-1525, para. 13.

¹⁶ Ibid.

11. Further, the Defence, as mentioned above i) misunderstands the ruling in Decision 1314 as being applicable to item UGA-D26-0015-1212; and ii) admits that it did not adduce arguments in relation to the intended purpose and significance of items UGA-D26-0018-3999 and UGA-D26-0018-4000 in its initial request.

12. A mere conflicting opinion does not render the Issue appealable and the request for leave to appeal should be rejected.

iii. The remaining article 82(1)(d) criteria are also not met

13. Article 82(1) (d) criteria are cumulative: a failure to fulfil one of them is fatal to any application for leave to appeal. Even if the Trial Chamber considers that the Defence has identified an appealable issue the Motion fails to meet the remaining criteria for leave to appeal.

14. Arguing that “if the items are not added to the LOE at present, another request would likely be required further down the line”¹⁷ is insufficient to demonstrate that the fairness of the proceedings may be affected. The Defence must explain how their arguments apply to the concrete issue, i.e., how *that* issue “specifically affects” the fairness of the proceedings.¹⁸

15. Further, the Defence also fails to demonstrate how the Impugned Decision significantly affects the fair conduct of the proceedings. More specifically, the Defence does not articulate any concrete prejudice to the accused.

16. Finally, immediate resolution of the issue by the Appeals Chamber would also not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.¹⁹ The Defence advances the same argument raised with regard to fairness and

¹⁷ ICC-02/04-01/15-1527, para 18.

¹⁸ ICC-01/05-01/08-2925, para. 34.

¹⁹ ICC-01/04-01/06-2404, para. 33.

expeditiousness, i.e. that it would likely have to make an additional request.²⁰ In these circumstances, the intervention of Appeals Chamber is not needed.

Conclusion

17. For the reasons above, the Motion should be rejected in its entirety.



Fatou Bensouda, Prosecutor

Dated this 7th day of June 2019
At The Hague, the Netherlands

²⁰ ICC-02/04-01/15-1527, para 18.