

**Cour
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**International
Criminal
Court**

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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 “Motion for Reconsideration or, In the Alternative, for Leave to Appeal Portion of the ‘Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence’”

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 respectfully seeks reconsideration of the Trial Chamber IX's ('TC IX') 'Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence'¹ in respect to D-158. The Defence submits this motion for reconsideration in relation to the Decision rejecting the addition of D-158, an expert on sexual and gender based crimes ('SGBC'). Reconsideration of this aspect of the Decision is essential given the fair and expeditious conduct of the trial as required under Articles 64(2) and 67(1) of the Statute.
2. In the alternative, the Defence seeks leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute. Accordingly, the Defence includes, by reference, the jurisprudence of the Appeals Chamber with regard to seeking leave to appeal as specified in prior requests.²

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Defence files this motion as confidential because it discusses a confidential matter arising from a confidential filing. Public redacted version will be filed in due course.

III. THE APPLICABILITY OF A MOTION FOR RECONSIDERATION

4. The remedy of reconsideration is an exceptional remedy.³ Reconsideration is applicable where a "clear error of reasoning has been demonstrated or if it is necessary [...] to prevent an injustice."⁴ In the *Bemba et al.* case, the Trial Chamber VII asserted that "[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment."⁵

¹ *Ongwen*, Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, [ICC-02/04-01/15-1565](#) ('Decision').

² *Ongwen*, Defence Request for Leave to Appeal "Decision on Defence Request for Amendment of the Seating Schedule", [ICC-02/04-01/15-1334-Red](#), paras 4 to 10.

³ *Ongwen*, Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence, [ICC-02/04-01/15-1547](#), para. 7.

⁴ *Ntaganda*, Decision on Defence request for reconsideration, [ICC-01/04-02/06-611](#), para. 12; see also *Yekatom & Ngaïssona*, Decision on the 'Ngaïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters', [ICC-01/14-01/18-206](#), para. 20; *Ongwen*, Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence, [ICC-02/04-01/15-1547](#), para. 7.

⁵ *Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', [ICC-01/05-01/13-1282](#), para. 8; *Ruto & Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, [ICC-01/09-01/11-1813](#), para. 19; *Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, [ICC-01/09-02/11-863](#), para.11.

Conversely, reconsideration may be denied if the new argument was “within the Chamber’s contemplation at the time of issuing the Decision.”⁶ In other cases, the Prosecution has also sought reconsideration on the grounds that the Trial Chamber “wrongly construed”⁷ or “misunderstood”⁸ a submission which led to “manifestly unsound and unsatisfactory consequences”.⁹

5. The current request is supported by new arguments that cannot be seen to have been considered by TC IX in rejecting the addition of D-158. The Defence is presenting a new argument below in respect to D-158, based on the TC IX’s reasoning and holding in **paragraph 35** of its ‘Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests’.¹⁰
6. Although the Defence’s Initial Request at **paragraph 11**¹¹ and the Decision at **footnote 2**¹² refer to the Decision on LRVs Request, it is for the purposes of deadlines. Below, in the submissions, the Defence refers to the same decision for a different purpose, which it neglected to point out in its Initial Request to add D-158 to the witness list.
7. In sum, on an exceptional basis, the Defence avers that the reconsideration of the Decision is justified because of the following errors in reasoning and the necessity to prevent an injustice.

III. RECONSIDERATION SUBMISSIONS

A. Fairness suggests that a SGBC Expert, D-158, be added for the Defence

8. TC IX’s denial to add expert witness, D-158, to the Defence list of witnesses is inconsistent with its holding to grant the Legal Representatives of the Victims (‘LRVs’) request for an

⁶ *Ruto & Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, [ICC-01/09-01/11-1813](#), para. 21; *Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, [ICC-01/05-01/13-1282](#), para. 9.

⁷ *Ntaganda*, Prosecution’s motion for reconsideration of a discrete portion of the Decision on the updated document containing the charges or in the alternative, application for leave to appeal, [ICC-01/04-02/06-460](#), para. 2.

⁸ *Ntaganda*, Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, [ICC-01/04-02/06-519](#), paras 8- 9.

⁹ *Ntaganda*, Prosecution’s motion for reconsideration of a discrete portion of the Decision on the updated document containing the charges or in the alternative, application for leave to appeal, [ICC-01/04-02/06-460](#), para. 2.

¹⁰ *Ongwen*, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, [ICC-02/04-01/15-1199-Red](#) (**‘Decision on LRVs Request’**), para. 35.

¹¹ *Ongwen*, Defence’s request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence, [ICC-02/04-01/15-1559](#) (**‘Defence Initial Request’**), para. 11.

¹² [Decision](#), para. 2, fn. 2.

expert witness related to rape and SGBC.¹³ In the case of the proposed expert witness, Professor Daryn Reicherter, TC IX distinguished between first-hand accounts by direct victims and the anticipated expert witness testimony:

The Chamber finds that the proposed testimony is not repetitive, since the anticipated expert evidence differs from a first-hand account by a direct victim. The anticipated expert testimony will allow the Chamber to assess the impact of rape and SGBC on the lives of the victims in a more universal manner, which includes victims who did not provide testimony before this Chamber.¹⁴

9. The Defence submits that D-0158's expertise cited in **paragraph 21** of the Defence Initial Request is not repetitive of evidence submitted by fact witnesses. While some witnesses testified about rules and regulations in the LRA concerning relations between men and women, no fact witness provided an interpretation of sexual relations between men and women in the LRA within the particular cultural context of Uganda, and within a continuing armed conflict between the Government of Uganda and the LRA. This would be done by an expert witness who could position the evidence within a more universal framework of SGBC in conflict situations, and the impact of the rules and regulations concerning sexual relations within the milieu of one side of the conflict: the LRA.
10. Looking at the two decisions side-by-side, the LRVs Request and the Defence Initial Request, it appears that TC IX has applied a double standard. On its face, this is inconsistent with fairness in the proceedings and violates Mr Ongwen's fair trial rights under Article 67(1)(e) of the Statute – the right to raise defences and to present evidence.
11. SGBC are approximately one-quarter of the charged crimes against Mr Ongwen. Considering that there are 70 criminal allegations and 7 or 8 modes of liability¹⁵ charged, this amounts to 490 to 560 individual charges. This is a hefty number of crimes and modes of liability on which to deny a defendant the right to present expert evidence.
12. To conclude, the application of different reasoning within the same case and to the same identical request from a party and a participant is unfair, and not in the interests of justice. Hence, the exceptional remedy of reconsideration by TC IX of its Decision is warranted.

¹³ [Decision on LRVs Request](#), paras 33-37; see also *Ongwen*, Victims' requests for leave to present evidence and to present victims' views and concerns in person, [ICC-02/04-01/15-1166](#) ('LRVs Request').

¹⁴ [Decision on LRVs Request](#), para. 35.

¹⁵ If Article 25(3)(d) is counted as a single mode of liability, there are 7; but because two parts (i and ii) are both charged, the total number of modes of liability is 8.

B. TC IX’s denial of the addition of SGBC expert, D-158, violates Mr Ongwen’s fair trial rights under Article 67 of the Statute, especially Articles 67(1)(b) and (e)

13. TC IX’s denial to add D-158 to the witness list is based on two points: a) the request is late; and b) based on the terms of reference, it is repetitive of previous testimony.¹⁶
14. TC IX states that the Defence (as well as other parties and participants) have known about the existence of D-158 since 2017,¹⁷ based on his book “Social Torture” and that the “Defence must have been familiar with D-158’s work for a considerable span of time.”¹⁸
15. It is incorrect to equate awareness of an academic and his work, with the identification of that person as a potential SGBC expert witness. As the Defence stated in its Initial Request, it has been difficult to identify an expert witness willing to testify for the Defence on SGBC.¹⁹ The Defence considers it inappropriate to provide more details about this in a filing; however, it is not correct for TC IX to conclude that the Defence provided no explanation for adding D-158 only now.²⁰
16. The Defence notes again, as a general proposition, that investigations can be long, and drawn out. It does take time for a party to find what evidence it is looking for. A case in point is the Prosecution investigation in this case: The Office of the Prosecutor has been investigating since 2004. As the Defence pointed out in ‘Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources’, the Prosecution had an eleven year head-start.²¹ Lead Counsel was appointed in 2015. The CoC Decision was issued in March 2016. In December 2016, the Prosecution opened its case, and the first witness was heard in January 2017. The staggering inequality in investigation time, combined with the inequality of personnel and resources provides a picture of inequality of arms which does not support a conclusion that the Defence should have been able to know that D-158 was a potential expert witness when he was first mentioned in this trial. Moreover, this inequality illustrates a violation of Article 67(1)(b) of the Statute and causes injustice to Mr Ongwen.
17. The point is that the Defence has now – during the ongoing trial – identified an expert witness and submitted terms of reference, and that TC IX has rejected adding him to the witness list.

¹⁶ [Decision](#), paras 17-19.

¹⁷ [Decision](#), para. 14.

¹⁸ [Decision](#), para. 15.

¹⁹ [Defence Initial Request](#), para. 13.

²⁰ [Defence Initial Request](#), para. 15.

²¹ *Ongwen*, Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources, [ICC-02/04-01/15-1098](#), paras 13-15.

18. While TC IX provides reasons (discussed above), there is also the push to finish the presentation of Defence evidence this year.²² The expeditiousness of the proceedings must not override the fair trial rights of Mr Ongwen, especially his ability to call witnesses in his defence. In the interests of justice, pre-established timeframes for the conclusion of the evidentiary phase of the Defence case should not violate Mr Ongwen's fair trial rights.

IV. LEAVE TO APPEAL SUBMISSIONS

19. The appellate issues arising out of the Decision are:

Whether TC IX's denial of the Defence Initial Request to add the SGBC expert witness, D-158, to the witness list, violates Mr Ongwen's fair trial rights under Article 67, and especially Article 67(1)(e) of the Statute ('Issue 1').

Whether TC IX properly applied the legal standard for expert evidence ('Issue 2').

A. Issue 1

20. As discussed above, the Defence submits that Mr Ongwen's fair trial right to present a SGBC expert witness in his case was violated by the TC IX's denial to add D-158 to the witness list. While admission of expert testimony is discretionary, it appears – on its face – that it was unfair and unjust for TC IX to have admitted the expert testimony of the LRVs SGBC expert witness, while rejecting the admission of testimonial evidence of the Defence SGBC expert witness.
21. SGBC criminal allegations are approximately one-quarter of the charges against Mr Ongwen. Being denied the right to fully defend himself on these charges is grossly prejudicial.
22. The significance of the SGBC allegations to this case is underscored by the Prosecution itself, in a law review article by Mr Paul Bradfield. He writes "[h]owever, what was unusual about these proceedings [Article 56 proceedings] was that at the time the Article 56 testimony began, Dominic Ongwen had not even been charged with any crimes relating to these women. His trial

²² [Decision](#), para. 13.

was not to start for over a year. Yet when the Article 56 testimony concluded, a significant part of that trial was over before it had even began.”²³

23. The TC IX’s Decision takes the position that other expert witnesses, particularly, D-60 and D-133, have already addressed the topics identified in the D-158’s terms of reference, and therefore a SGBC expert is not necessary. This is based on an incorrect assumption that all experts in the Defence case are fungible. This conclusion disregards the point that different disciplines do not necessarily have the identical interpretations and analyses of a particular set of facts or circumstances. It is wrong to pre-judge what the SGBC expert witness would testify in his evidence. Moreover, given the plethora of SGBC crimes alleged against Mr Ongwen, it is unclear from the Decision, why TC IX would not welcome testimony of a SGBC expert witness from the Defence, especially since it heard an expert witness from the LRVs on this topic.

24. [REDACTED]

25. It is logical to assume, then, that the Prosecution has been investigating the issue of SGBC at least since 2005 – or about one decade at the time of the Article 56 hearings. Yet, the Defence has not had equal and adequate time to investigate these charges. Especially in this context, the denial of the Defence request to call a SGBC expert is a violation of Mr Ongwen’s fair trial rights.

B. Issue 2

26. The standard to be applied when considering expert evidence is: A Chamber must (i) make a discretionary determination as to whether testimony in the relevant subject area of expertise would be of assistance, (ii) be satisfied that the proposed witness is an expert, giving due consideration as to whether the person is included in the Registry’s List of Experts, and (iii)

²³ Article is available [here](#); see page 374 (see also UGA-D26-0026-0279). In addition, the Defence notes that the Article 56 hearings were used to preserve evidence for trial (CoC Decision, para. 6) and were relied upon by the Prosecution for the purposes of the CoC hearing (CoC Decision, para. 102).

determine that the anticipated testimony falls within the expertise of the witness and does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.²⁵

27. SGBC expert, D-158, meets these criteria:

- The expert can offer assistance to TC IX by contextualizing the factual evidence and their impact on particularly abducted girls and boys in a coercive environment including in armed conflict situations;
- D-158 is on the Registry's List of Experts and his extensive CV, clearly indicates his recognized expertise;²⁶
- Based on his CV, D-158's proposed testimony falls within his areas of expertise and does not usurp the TC IX's functions in the proceedings.

28. The TC IX's Decision, however, does not discuss these criteria, but rather focuses only on the lateness of the Initial Request and that the Defence "should have known" about this expert. In short, while the Decision applies the criteria of timing and knowledge, it appears that it does not specifically discuss the criteria applicable to expert testimony, based on ICC jurisprudence to date. This is an error of selectivity and silence on the legal criteria for expert testimony.

C. Issues 1-2 satisfy the legal criteria under Article 82(1)(d) of the Statute

1. Issue 1 satisfies the legal criteria under Article 82(1)(d) of the Statute

29. *First*, the resolution of Issue 1 is essential to implement Mr Ongwen's fair trial rights under Article 67(1) of the Statute, especially Articles 67(1)(b) and (e) of the Statute. *Second*, Issue 1 significantly affects the fair and expeditious conduct of the proceedings because Mr Ongwen should be allowed to present his expert evidence during the *ongoing* trial, especially on the issue of SGBC that represents a quarter of the charges against him. *Third*, immediate resolution by the Appeals Chamber will materially advance the proceedings, as it would clarify whether the TC IX's Decision violated Mr Ongwen's fair trial rights by refusing to add D-158 to the witness list, as his expert witness on SGBC.

²⁵ *Ruto & Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, [ICC-01/09-01/11-844](#), para. 12.

²⁶ See Confidential Annex A attached to the Defence Initial Request, ICC-02/04-01/15-1559-Conf-AnxB.

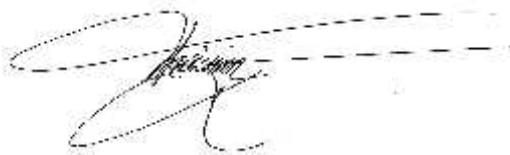
2. *Issue 2 satisfies the legal criteria under Article 82(1)(d) of the Statute*

30. *First*, the resolution of Issue 2 is essential for the correct application of criteria when considering the expert witness evidence. *Second*, Issue 2 significantly affects fair and expeditious conduct of the proceedings, and will significantly affect the outcome of the trial because the TC IX's Decision reasoning failed to take into account criteria when considering an addition of an expert witness, such as D-158. *Third*, the Defence is of the view that an immediate resolution of Issue 2 by the Appeals Chamber will materially advance the proceedings. This is because, as noted by TC IX, the Defence's "presentation is expected to be finished in the upcoming months."²⁷ Thus an immediate resolution by the Appeals Chamber would clarify whether D-158, as an expert on SGBC, should be added to the Defence's list of witnesses.
31. In sum, the Issues 1-2 arising from the Decision justify reconsideration or, in the alternative, leave to appeal. If this was denied, it would affect the fairness of the trial and cause severe injustice as D-158's expertise on SGBC is undeniably of prospective significance, but also in the Defence's view, of imminent significance to Mr Ongwen's presentation of evidence.

V. RELIEF SOUGHT

32. For the reasons stated above, the Defence requests that TC IX:
- A) RECONSIDER** the Decision regarding the addition of expert witness, D-158;
- B) ALLOW** the Defence to add D-158 to its lists of witnesses;
- Alternatively*
- C) GRANT** the Defence request for leave to appeal the Decision.

Respectfully submitted,



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²⁷ [Decision](#), para. 13.

Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 19th day of August, 2019

At The Hague, Netherlands