

**Cour
Pénale
Internationale**



**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

Prosecution's Response to Defence's "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: 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 13 August 2019 Trial Chamber IX (“Trial Chamber”) rejected the Defence’s request to add expert witness UGA-D26-P-0158 to its list of witnesses and his related documents to its list of evidence (“LOE”).¹ The Defence Motion² seeks reconsideration of, or alternatively, leave to appeal a portion of the Impugned Decision that relates to expert witness UGA-D26-P-0158. The Motion should be rejected for failure to meet the requirements for reconsideration or those for leave to appeal under article 82(1) (d) of the Rome Statute (“Statute”).

2. The Motion neither demonstrates an error of reasoning in the Impugned Decision nor does it show the necessity of reconsideration for the purpose of preventing injustice.³ The issues identified for leave to appeal do not arise from the decision and reflect the Defence’s disagreement with the Trial Chamber’s decision to reject the addition of UGA-D26-P-0158 to its list of witnesses and his related documents to the Defence’s LOE. The issues do not have any impact on the fair and expeditious conduct of the proceedings or the outcome of the trial and their 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 an exceptional remedy that should only be granted where a clear error of reasoning in a decision has been demonstrated or if it

¹ Decision on Defence Request to Ad Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, ICC-02/04-01/15-1565 (“Impugned Decision”).

² 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’, ICC-02/04-01/15-1567-Red (“Motion”).

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.

is necessary to do so to prevent an injustice.⁴ A Chamber may reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory.⁵ New facts and arguments arising since the issuance of the decision might be taken into account.⁶ However, failure to specify any change in circumstances or new and compelling reasons that justify reconsideration warrants summary dismissal of a request for reconsideration.⁷ The Motion fails to meet the requisite conditions for reconsideration.

4. The Defence requests reconsideration on the basis of two purportedly new arguments. *First*, as a primary ‘new argument’ the Defence avers that the Impugned Decision should be reconsidered for purposes of consistency with the Trial Chamber’s ruling permitting the testimony of the expert witness on issues related to rape and sexual and gender based crimes (“SGBC expert”) that was proposed by the Common Legal Representative for Victims (“CLRv”).⁸ This argument is not ‘new’ but rather one which the Defence should have raised in its 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 (“Initial Request”) but failed to do so. The Defence itself acknowledges this omission.⁹

5. The two requests - that of the CLRVs in relation to their SGBC expert witness and the Initial Request – are distinguishable and consequently yielded different rulings from the Trial Chamber. The CLRV submitted their request within the timeframe set by Chamber and well in advance of the presentation of their evidence.¹⁰ The Defence, in contrast, submitted its request at a very late stage in the

⁴ ICC-01/04-01/07-3833, para 25; ICC-02/04-01/15-1547, para 7; ICC-02/04-01/15-711, para 4; ICC-02/04-01/15-468, para 4.

⁵ 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.

⁶ ICC-01/04-01/07-3833, para 25; ICC-01/09-01/11-1813, para 19; ICC-01/09-02/11-863, para 11; ICC-02/04-01/15-1210, para 6; ICC-02/04-01/15-1259, para 12

⁷ ICC-01/05-01/08-3343, para 30.

⁸ ICC-02/04-01/15-1567-Red, paras 8-12.

⁹ ICC-02/04-01/15-1567-Red, para 6.

¹⁰ ICC-02/04-01/15-1199-Red, paras 1-7.

proceedings, specifically 13 months after the deadline for providing the final lists of witnesses and evidence had expired, and after having called two thirds of its own *viva voce* witnesses. The Defence did not provide the Trial Chamber any justification for doing so.¹¹

6. The Trial Chamber found that the proposed testimony of the SGBC expert of the CLRV was not repetitive because it differed from a first-hand account by a direct victim and would allow the chamber assess the impact of SGBC on the lives of the victims who did not provide testimony.¹² On the other hand the Trial Chamber considered it inappropriate to allow Defence expert UGA-D26-P-0158 to testify as much of his anticipated testimony had already been discussed by other Defence witnesses that had already testified.¹³ Thus the Defence's assertion that the Trial Chamber applied a double standard¹⁴ is a misconception.

7. *Second*, the Defence alleges as a secondary 'new' argument that to deny the addition of UGA-D26-P-0158 to its list of witnesses violates Mr Ongwen's fair trial rights envisaged in Article 67(1) (b) and (e) of the Statute.¹⁵ However the Defence fails to demonstrate how these rights are violated by the Impugned Decision. Instead the Defence disagrees with the Chamber's observation that the Defence has known of UGA-D26-P-0158's existence and his work for a considerable period of time¹⁶ and repeat their previous submissions regarding the alleged disparity between Prosecution and Defence resources for purposes of investigations.¹⁷

8. These submissions are unpersuasive at this phase of the trial, since they do not amount to a new fact or argument that has arisen since the Impugned Decision was issued and neither were they previously unavailable so as to warrant

¹¹ ICC-02/04-01/15-1565, paras 13 & 15.

¹² ICC-02/04-01/15-1199-Red, para 35.

¹³ ICC-02/04-01/15-1565, paras 16-22

¹⁴ ICC-02/04-01/15-1567-Red, para 10.

¹⁵ ICC-02/04-01/15-1567-Red, paras 13-18.

¹⁶ ICC-02/04-01/15-1567-Red, paras 14-15.

¹⁷ ICC-02/04-01/15-1567-Red, para 16.

reconsideration of the Impugned Decision. Moreover the Defence has not demonstrated in which way the Impugned Decision is flawed by an error of reasoning or amounts to an injustice so as to warrant reconsideration. The Motion therefore fails to meet the high test for the exceptional remedy of reconsideration.

ii. The alternative request for leave to appeal

9. The Defence alternatively seeks leave to appeal the Impugned Decision in relation to two issues proposed for certification:

- i) Whether the Trial Chamber'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; and
- ii) Whether the Trial Chamber properly applied the legal standard for expert evidence.

10. Article 82(1) (d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.¹⁸ Moreover 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.¹⁹ 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.

iii. The First issue is not appealable

11. As its first issue, the Defence seeks to establish 'whether the Trial Chamber'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

¹⁸ ICC-01/05-01/08-3273, para 8.

¹⁹ 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).

Article 67(1) (e) of the Statute’.²⁰ The Defence criticises the Trial Chamber for permitting the testimony of the CLRV’s SGBC expert but not that of the Defence SGBC expert, in the light of the significance of the SGBC charges in the trial.²¹ The Defence also contests the ruling that UGA-D26-P-0158’s anticipated testimony has already been addressed through the testimony of other witnesses; alleging that it is wrong to pre-judge what an expert witness would testify about and incorrect to assume that all experts in the Defence case are fungible.²²

12. The Defence’s submissions do not identify a subject or topic requiring a decision by the Appeals Chamber for their resolution. Its mere conflicting opinion does not render the issue appealable.

iv. The Second issue does not arise from the Decision

13. The Defence asks ‘whether the Trial Chamber properly applied the legal standard for expert evidence’.²³ This is not an appealable issue because it does not arise from the Impugned Decision. The Chamber was not assessing whether or not UGA-D26-P-0158 was qualified as an expert. What the Trial Chamber had to consider at that phase – prior to an assessment of an expert’s qualification - was whether i) the Initial Request was filed out of time²⁴ and ii) the Chamber needed to hear more about the subject matter under discussion.²⁵

14. The Trial Chamber similarly addressed these criteria in the Impugned Decision and found they were not met where the request to add expert witness UGA-D26-P-0158 was concerned.²⁶ Thus by arguing that the Trial Chamber did not consider the criteria for UGA-D26-P-0158’s qualification as an expert witness, the Defence has misinterpreted the Impugned Decision.

²⁰ ICC-02/04-01/15-1567-Red, para 19.

²¹ ICC-02/04-01/15-1567-Red, paras 20-21.

²² ICC-02/04-01/15-1567-Red, para 23.

²³ ICC-02/04-01/15-1567-Red, para 19.

²⁴ ICC-02/04-01/15-1565, paras 12-15.

²⁵ ICC-02/04-01/15-1565, paras 16-22.

²⁶ ICC-02/04-01/15-1565, paras 13-21.

v. The two issues do not meet the remaining criteria of article 82 (1) (d)

15. The Defence has failed to demonstrate how either of the issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Arguing that “Mr Ongwen should be allowed to present his expert evidence during the on-going trial, especially on the issue of SGBC that represents a quarter of the charges against him” is insufficient to demonstrate that the fairness of proceedings may be affected; particularly considering that the Trial Chamber has already ruled that the testimony and report of UGA-D26-P-0158 are not warranted as they would merely be additional evidence for topics for which direct evidence has already been elicited by the Defence.²⁷ Further the Defence fails to acknowledge that in any event the Trial Chamber has allowed the submission of UGA-D26-P-0158’s academic work. UGA-D26-P-0158’s evidence was not considered necessary given that Defence expert witnesses UGA-D26-P-0133 and UGA-D26-P-0060 had already testified about child soldiers, the role of spirits within the LRA, the question of ‘free choice and will’ as well as spirituality and the role of Joseph Kony in this process.²⁸ The Chamber also noted that matters such the LRA command structure, the rules of punishment in relation to marriage and sexual relations in the LRA, the distribution of wives and the possibility to disobey rules in the LRA have been extensively discussed during the proceedings during the testimonies of both Prosecution and Defence witnesses.²⁹

16. To assert that the Trial Chamber’s reasoning failed to take into account criteria when considering the addition of an expert witness is similarly insufficient to demonstrate how the Impugned Decision significantly affects the fair conduct of the proceedings because the Defence misinterpreted the decision. As established in paragraph 13 above, the Defence merely made a premature argument that would

²⁷ ICC-02/04-01/15-1565, para 21.

²⁸ ICC-02/04-01/15-1565, paras 17-18.

²⁹ ICC-02/04-01/15-1565, para 19.

arise only after a finding, by the Trial Chamber, that an expert in SGBC is warranted, not one that finds an application to add an expert out of time. This premature argument therefore has no impact on the fairness of the proceedings.

17. Immediate resolution of the issues by the Appeals Chamber also would not materially advance the proceedings. The Prosecution notes that the Defence makes no argument concerning the Impugned Decision having any effect upon the outcome of the trial. The Defence offers no specific argument to say why the Appeals Chamber's intervention is necessary at this point. In any case the Appeals Chamber is not warranted to "clarify" matters given that the Defence misunderstands aspects of the Impugned Decision. Furthermore, the Appeals Chamber is unlikely to interfere with the Trial Chamber's routine exercise of discretion in managing the trial on this discrete issue and neither has the Defence shown why this may be so.

18. It is much more likely that the appellate litigation at this late stage of the proceedings will result in delays and distractions for all Parties and Participants at this crucial phase of the case. The intervention of the Appeals Chamber is not needed in these circumstances.

Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 29th day of August 2019
At The Hague, the Netherlands