

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **13 September 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**

**Defence Request for Leave to Appeal ‘Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence’ (ICC-02/04-01/15-1589)**

**Source: Defence for Dominic Ongwen**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:****The Office of the Prosecutor**

Fatou Bensouda, Prosecutor  
 James Stewart, Deputy Prosecutor  
 Benjamin Gumpert, QC

**Counsel for the Defence**

Krispus Ayena Odongo  
 Chief Charles Achaleke Taku  
 Beth Lyons

**Legal Representatives of the Victims**

Joseph Akwenyu Manoba  
 Francisco Cox

**Common Legal Representative for Victims**

Paolina Massidda  
 Jane Adong

**Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda

Caroline Walter

Orchlon Narantsetseg

**States' Representatives****The Office of Public Counsel for the  
Defence**

Xavier-Jean Keita

**Amicus Curiae****REGISTRY****Registrar**

Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit**

Nigel Verrill

**Detention Section****Victims Participation and Reparations  
Section****Other**

## I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the 6 September 2019 Trial Chamber IX ('Trial Chamber') "Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence"<sup>1</sup> in respect to D-158. The appellate issue is:

*Whether the Trial Chamber correctly applied its discretion, pursuant to Article 64(2), when it denied the addition of the Defence's sexual and gender based violence ('SGBC') Expert to the witness list, thus denying Mr Ongwen's fair trial rights under Article 67(1)(e) by privileging scheduling considerations over fair trial rights of the Accused.*

2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.<sup>2</sup>

## II. SUBMISSIONS

3. The issue arises<sup>3</sup> in the Impugned Decision at paragraph 11 where it refuses to re-consider whether it should permit the Defence to call as a witness its SGBC expert – D-158. In its Request, the Defence points out that a similar request was granted by the Trial Chamber in respect to the CLRV.<sup>4</sup> In paragraph 11, however, the Trial Chamber holds that its prior decision on the Common Legal Representative's ('CLRV') request was a "fundamentally different [ruling] made in [a] vastly different [context]" and contrasts this with the Defence request which was "was filed at a very late stage of the trial proceedings". Having made this finding the Trial Chamber concluded that the other Defence arguments are either repetitive<sup>5</sup> or not substantiated.<sup>6</sup>
4. The Trial Chamber appears to have considered that the most salient difference in the two motions to add a SGBC Expert was the timing of filing by CLRV and by the Defence. This is further suggested by the paragraph 12 emphasis on "advanced stage of the proceedings".

<sup>1</sup> ICC-02/04-01/15-1589 ('Impugned Decision').

<sup>2</sup> ICC-02/04-01/15-1334-Red, paras 4 to 10.

<sup>3</sup> The Defence notes that the Impugned Decision addresses the Defence request for leave to appeal in respect to untimeliness at paragraph 16; however, the present issue identified is similar but separate as it arises from the reasoning in respect to re-consideration.

<sup>4</sup> ICC-02/04-01/15-1567, paras 8 to 12.

<sup>5</sup> Impugned Decision, para. 12.

<sup>6</sup> *Ibid.*, para. 13.

5. In examining whether the “exceptional remedy”<sup>7</sup> of re-consideration was warranted, the Trial Chamber examined the issue within the framework of expeditiousness versus Defence concerns over fair-trial rights. The Chamber held that the two rulings were made in “vastly different contexts.”<sup>8</sup> However, the Trial Chamber failed to acknowledge and discuss that the roles of the Defence as a Party and the CLRV as a Participant in a proceeding are vastly different: the CLRV’s role in a trial is a subsidiary one and there are fewer specific rights that can be invoked during the trial. In addition, none of the CLRV’s clients are deprived of their liberty during the proceedings.
6. Untimeliness or lateness in the context of Article 64(2) is a matter of the Trial Chamber’s discretion. Thus, what constitutes untimeliness or lateness is not explicitly defined in terms of time periods in the Statute.<sup>9</sup> However, the Statute identifies criteria, including whether a potential decision is “conducted with full respect for the rights of the accused”.
7. Here, the Defence submits that the Trial Chamber violated the fair trial rights of Mr Ongwen by denying the application to add the SGBC Expert to the witness list, especially given the context that 25.7% percent of the confirmed charges<sup>10</sup> against him are SGBC and the Trial Chamber permitted a Participant, the CLRV to add a SGBC expert to its list of witnesses. The SGBC Expert, as the Defence has argued<sup>11</sup> is essential.
8. Even the Prosecution has recognized the significance of the SGBC criminal allegations to the *Ongwen* case. In his law review article, Mr Paul Bradfield, a former lawyer from the *Ongwen* Prosecution, 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 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.”<sup>12</sup>

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<sup>7</sup> Impugned Decision, para. 9.

<sup>8</sup> *Ibid.*, para. 11.

<sup>9</sup> We note, for example, that two years elapsed in the Comoros case, between the Appeals Chamber dismissal of the Prosecution appeal against the 16 July 2015 Decision, and the filing of the Prosecution’s final decision regarding reconsideration of its decision not to initiate an investigation. See ‘Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the “Application for Judicial Review by the Government of the Union of the Comoros”’, ICC-01/13-98 OA2, 2 September 2019, paras 9 to 12.

<sup>10</sup> Charges 50-68 of the confirmed charges.

<sup>11</sup> ‘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’, 10 July 2019, ICC-02/04-01/15-1559-Conf, para. 14, 20, and 21.

<sup>12</sup> UGA-D26-0026-0279, page 374, also available at: [https://brill.com/view/journals/icla/19/3/article-p373\\_373.xml](https://brill.com/view/journals/icla/19/3/article-p373_373.xml).

**A. The issue will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial**

9. In denying the attendance and examination of a witness, the Impugned Decision most directly impacts upon Mr Ongwen's Article 67(1)(e) right to "to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him" and "be entitled to raise defences and to present other evidence admissible under this Statute".
10. The negative impact is not nullified by considering the possibility of submission of academic work as contemplated by paragraph 13 of the Impugned Decision. This is not a substitute for live testimony in this case, where approximately one quarter of confirmed charges are sexual and gender-based allegations.
11. The prejudice of the decision is further increased because it is premised upon an inaccuracy. The original Defence request indicated difficulties in finding a SGBC expert,<sup>13</sup> so that it is factually inaccurate to write in the Impugned Decision at para 11 that the Defence did not provide any explanation for the delay. Footnote 24 of the Impugned Decision partially acknowledges that the Defence provided an explanation, but it appears that the explanation was not satisfactory to the Trial Chamber. The internal workings of the Defence team are presumed to be internal to the team. However, the Trial Chamber could have asked for more detailed information, but it did not do this. The Trial Chamber has also appeared to overlook the fact – which the Defence initially explained on 4 June 2018<sup>14</sup> – that finding an individual from a small academic-field is not easy where many of the gender violence specialists will have already worked with individuals from the region, and there is the reality on the ground of social or political pressure for experts to not assist those persons who are accused of SGBC crimes.
12. The Impugned Decision will impact upon the fair conduct of the proceedings. The Defence believes that the witness whom it proposes to bring will place the SGBC in the context of our defences under Articles 31(1)(a) and (d). Without a SGBC Expert, the Defence is severely handicapped in making its arguments. The resolution of the issue is therefore prejudicial to the Defence.

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<sup>13</sup> ICC-02/04-01/15-1272-Conf-Red, para. 22.

<sup>14</sup> *Ibid.*

13. The Impugned Decision will impact on the expeditious conduct of the proceedings. In rejecting re-consideration of the addition of this witness, the Trial Chamber's decision based on expeditiousness is misleading since the issues to be raised are simply postponed to a later date in the future. The issues will arise either in rebuttal and rejoinder and/or alternatively upon appeal as the expert's evidence is fundamental to Mr Ongwen's fair trial rights.<sup>15</sup>
14. It is also clear that the issue impacts upon the outcome of the trial. SGBC allegations are a core part of the prosecution in this trial, which makes it also a core part of the defence.

**B. An immediate resolution by the Appeals Chamber may materially advance the proceedings**

15. The evidence of witness D-158, as stated above, is essential to the Defence case. The actual testimony is not envisioned to take up extensive court-time. The issue is discrete and could in principle be resolved quickly by the Appeals Chamber. That, in turn, could materially advance the proceedings by "pre-empt[ing] the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial."<sup>16</sup>
16. Though the trial is moving towards a close, the reverberations of denying reconsideration to correct the fair trial violation will have lasting impact upon the proceedings. Granting leave now can, perhaps, avoid this, and clearly set this aspect of the trial on a sound footing.

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<sup>15</sup> ICC-02/04-01/15-1577-Conf, para. 3.

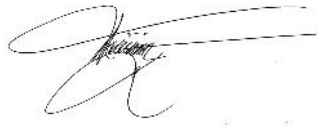
<sup>16</sup> ICC-01/04-168, para. 19.

### III. RELIEF

17. For the reasons stated above, the Defence respectfully requests that leave be granted by the Trial Chamber to appeal the issue of:

*Whether the Trial Chamber correctly applied its discretion, pursuant to Article 64(2), when it denied the addition of the Defence's SGBC Expert to the witness list, thus denying Mr Ongwen's fair trial rights under Article 67(1)(e) by privileging scheduling considerations over fair trial rights of the Accused.*

Respectfully submitted,



.....  
Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 13<sup>th</sup> day of September, 2019

At Lira, Uganda