

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 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

Prosecution's Response to "Defence Request for leave to Appeal 'Decision on Defence Motion for Reconsideration 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'"

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 D-0158 to its list of witnesses and various related documents to its list of evidence (“Initial Decision”).¹ On 19 August the Defence requested² reconsideration of, or alternatively, leave to appeal that decision and on 6 September the Chamber refused both remedies (“Impugned Decision”).³ Now the Defence has requested leave to appeal the Chamber’s refusal to reconsider (“Motion”).⁴ The Motion should be rejected for failure to meet the requirements for leave to appeal under article 82(1) (d) of the Rome Statute (“Statute”).

2. The Motion demonstrates no error of reasoning. The issue identified as being ripe for leave to appeal has already been considered and rejected by the Chamber, and in any event does not arise from the Impugned Decision. It is merely an expression of the Defence’s now repeatedly-stated disagreement with the Trial Chamber’s Initial Decision. 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

3. The Defence characterises the issue purportedly arising from the Impugned Decision as “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.”

¹ ICC-02/04-01/15-1565.

² ICC-02/04-01/15-1567.

³ ICC-02/04-01/15-1589.

⁴ ICC-02/04-01/15-1594.

Repetition

4. This issue is functionally identical to the first of the two issues identified by the Defence in its filing of 19 August referred to above.⁵ The Trial Chamber considered the merits of this issue, in the context of whether leave to appeal should be granted, at paragraph 15 of the Impugned Decision.

5. The Trial Chamber ruled that the issue was “not sufficiently discrete to be identified as an appealable issue arising from the [Initial Decision]” and that the claim that Mr Ongwen’s fair trial rights had been violated was too general in nature.

6. It is true that the Defence has now garnished its original allegation of a violation of the Accused’s fair trial rights with the notion that scheduling considerations have been ‘privileged’ over those rights, but, as before, the Defence have failed to spell out the specifics of the alleged violation, in other words the concrete ways in which Mr Ongwen has been left unfairly disadvantaged by the Trial Chamber’s decision.

7. The Trial Chamber has already decided that this issue does not give rise to leave to appeal. The Defence cannot simply tinker with the wording of the issue and then demand that it be relitigated.

8. Further repetition is to be found in paragraphs 7 and 8 of the Motion where the Defence reproduce, almost verbatim, arguments set out at paragraphs 21 and 22 of their 19 August filing. Those arguments have already been disposed of in the Impugned Decision, and even there, were correctly characterised as “merely repetitive of arguments already raised in the Initial Request.”⁶

⁵ ICC-02/04-01/15-1567, para 19 ‘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)(c) of the Statute’.

⁶ ICC-02/04-01/15-1589, para 12.

The issue does not arise from the Impugned Decision

9. The Trial Chamber did not exercise its discretion to deny the addition of D-0158 to the witness list in the Impugned Decision. It did that in the Initial Decision of 13 August. Consequently, even if the issue were “sufficiently discrete to be identified as an appealable issue”, it would have arisen from that Initial Decision rather than the Impugned Decision. The time for applying for leave to appeal in respect of any such issue has passed.

False characterisation

10. Paragraphs 3, 4 and 5 of the Motion characterise the Impugned Decision as being based upon an incorrect appreciation of the alleged similarity between the request to add D-0158 to the Defence witness list and a request previously made in respect of an expert witness to be called at the behest of the CLRV. Specifically the Defence asserts that “the Trial Chamber appears to have considered that the most salient difference in the two motions to add a SGBC Experts was the timing of the filing by CLRV and by the Defence.”⁷

11. On the contrary, the Trial Chamber considered the two requests to give rise to “fundamentally different rulings made in vastly different contexts”.⁸ The suggestion that the Trial Chamber was then at fault because it “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”⁹ is incoherent. The Trial Chamber never suggested any similarity between the two. The notion that the way in which the Trial Chamber dealt with the Defence’s request should have been informed by its treatment of the request from the CLRV originates entirely from the Defence.

⁷ ICC-02/04-01/15-1594, para 4.

⁸ ICC-02/04-01/15-1589, para 11.

⁹ ICC-02/04-01/15-1594, para 5.

The issue does not meet the remaining criteria of article 82(1)(d)

12. In any event, the Defence has failed to demonstrate how the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

13. The Trial Chamber has already determined that testimony from D-0158 is not warranted. A careful determination of this matter was made in the Initial Decision. The Trial Chamber there noted that direct evidence has already been elicited by the Defence from first hand sources on the very issues where D-0158 could give only secondary evidence.¹⁰ It recalled that Defence expert witnesses D-0133 and D-0060 have 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.¹¹ The Trial 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.¹²

14. It is not open to the Defence to seek leave to appeal these determinations, which are not made in the Impugned Decision, for a second time simply by invoking the Accused's fair trial rights. The Defence has made no showing of how the Chamber's ruling would, in concrete terms, impact the fair or expeditious conduct of the proceedings, much less the outcome of the trial.

15. Further the Defence again fails to acknowledge that the Trial Chamber has allowed the submission of D-0158's existing academic work on matters where it believes the Chamber may need further assistance.

¹⁰ ICC-02/04-01/15-1565, para 21.

¹¹ ICC-02/04-01/15-1565, paras 17-18.

¹² ICC-02/04-01/15-1565, para 19.

16. The threats made in paragraph 13 of the Motion are speculative, inaccurate and inappropriate. If the Defence considers that any evidence adduced by the Prosecution gives rise to the need for evidence rebuttal or rejoinder, then it must make the necessary application, which will be considered on its merits. Assertions that, in refusing leave to appeal, the Trial Chamber has adopted a 'misleading' approach¹³ which may be raised on appeal, after any conviction, cannot form a proper basis for a renewed application for leave to appeal.

17. Immediate resolution of the issues by the Appeals Chamber will not materially advance the proceedings. With the anticipated conclusion of the evidence only two or three months distant, it is more likely to cause delay.

Conclusion

18. For the reasons above, the Motion should be rejected.



Fatou Bensouda, Prosecutor

Dated this 17th day of September 2019
At The Hague, the Netherlands

¹³ ICC-02/04-01/15-1594, para 13.