

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-02/04-01/15**
Date: **30 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

**Decision on Defence Request for Leave to Appeal a Decision Denying Leave to
Appeal or Reconsideration of Rejection of Proposed Additional Witness**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Unrepresented Applicants for
Participation/Reparation**

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Victims**

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Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Defence Request for Leave to Appeal a Decision Denying Leave to Appeal or Reconsideration of Rejection of Proposed Additional Witness’.

I. Procedural history and submissions

1. On 10 July 2019, the Defence filed a request to add two witnesses to its list of witnesses and related documents to its list of evidence (the ‘Initial Request’).¹ The Chamber granted the Request with regard to one witness (D-0013) and rejected it in relation to the other witness (D-0158, an expert witness on sexual and gender based crimes) (the ‘Initial Decision’).²
2. On 19 August 2019, the Defence filed a motion for the Chamber to reconsider the Initial Decision or, in the alternative, requesting leave to appeal it.³
3. On 6 September 2019, the Chamber rejected the request for reconsideration as well as the alternative request for leave to appeal (the ‘Impugned Decision’).⁴ As regards the request for reconsideration, the Chamber considered the claim of a ‘double standard’ between allowing the Common Legal Representative for Victims (the ‘CLR V’) to call an expert on sexual and gender based crimes and denying it to the Defence. The Chamber explained the different reasoning for allowing the CLR V expert, as well as the timing of the initial request.⁵ As regards the request for leave to appeal, the Chamber considered that the Defence presented no appealable issue arising from the Initial Decision. It found that the first issue raised by the Defence was too general in nature, that the second issue

¹ 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, with three annexes, ICC-02/04-01/15-1559-Conf. A public redacted version was filed on 14 August 2019.

² Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence, 13 August 2019, ICC-02/04-01/15-1565.

³ 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-Conf (the ‘Request for Reconsideration or Leave to Appeal’). A public redacted version was filed that same day, ICC-02/04-01/15-1567-Red.

⁴ 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.

⁵ Impugned Decision, ICC-02/04-01/15-1589, paras 10-11.

was based on a misconception and that overall the requirements under Article 82(1)(d) of the Statute were not met.⁶

4. On 13 September 2019, the Defence filed another request for leave to appeal (the ‘Request’).⁷ It requests leave to appeal the following issue:

*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.*⁸

5. The Defence submits that the issue will significantly affect the fair conduct of the proceedings and the outcome of the trial.⁹ It further submits that the Impugned Decision will impact the expeditious conduct of the proceedings as the issue will arise either in rebuttal and rejoinder and/or alternatively upon appeal.¹⁰ Finally, the Defence avers that an immediate resolution by the Appeals Chamber could materially advance the proceedings.¹¹
6. In its response, the Prosecution submits that the issue raised by the Defence is ‘functionally identical’ to the two issues raised in the Request for Reconsideration or Leave to Appeal.¹² It states that the Defence cannot ‘tinker with the wording of the issues and then demand that it be relitigated.’¹³ The Prosecution submits that the issue does not meet the criteria of Article 82(1)(d) of the Statute.¹⁴ Finally, it states that the Defence

⁶ Impugned Decision, ICC-02/04-01/15-1589, paras 15-17.

⁷ 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), ICC-02/04-01/15-1594.

⁸ Request, ICC-02/04-01/15-1594, paras 1 and 17.

⁹ Request, ICC-02/04-01/15-1594, paras 9-14.

¹⁰ Request, ICC-02/04-01/15-1594, para. 13.

¹¹ Request, ICC-02/04-01/15-1594, paras 15-16.

¹² 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’”, 17 September 2019, ICC-02/04-01/15-1597 (the ‘Prosecution Response’), para. 4.

¹³ Prosecution Response, ICC-02/04-01/15-1597, para. 7.

¹⁴ Prosecution Response, ICC-02/04-01/15-1597, paras 12-13.

fails to acknowledge that the Trial Chamber has allowed the submission of D-0158's existing academic work where necessary.¹⁵

II. Analysis

7. At the outset, the Chamber recalls its interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹⁶
8. The Defence misinterprets the Impugned Decision. The issue proposed by the Defence concerns whether the Chamber exercised its discretion correctly by 'privileging scheduling considerations over fair trial rights of the Accused'. However, the Chamber actually rejected the request for reconsideration by finding that the Defence failed to justify the exceptionality of this remedy.¹⁷
9. This was not done 'within the framework of expeditiousness versus Defence concerns over fair-trial rights', as argued by the Defence.¹⁸ Considerations as to timeliness were only part of the reasons for rejecting the Initial Request in the Initial Decision. In the Impugned Decision, the Chamber merely found that no exceptional circumstances justified reconsideration.
10. Accordingly, the issue as presented by the Defence does not arise from the Impugned Decision. Consequently, the Chamber rejects the Request.

¹⁵ Prosecution Response, ICC-02/04-01/15-1597, para. 14.

¹⁶ Decision on Defence Request for Leave to Appeal Decision, ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

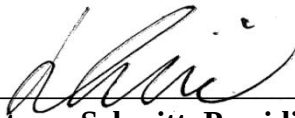
¹⁷ Impugned Decision, ICC-02/04-01/15-1589, paras 9 and 13.

¹⁸ Request, ICC-02/04-01/15-1594, para. 5.

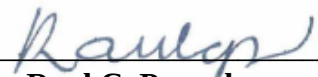
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Raul C. Pangalangan

Dated 30 September 2019

At The Hague, The Netherlands