

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-02/04-01/15**
Date: **6 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 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**

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

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Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67 and 82(1)(d) of the Rome Statute (the ‘Statute’) issues the following ‘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’.

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.¹ The Chamber granted the Initial Request with regard to one witness (D-13) and rejected it in relation to the other witness (D-158, an expert witness on sexual and gender based crimes).²
2. On 19 August 2019, the Defence filed a motion for the Chamber to reconsider the Impugned Decision or, in the alternative, requesting leave to appeal it.³ The Defence submits that reconsideration is justified in light of ‘new arguments that cannot be seen to have been considered by TC IX in rejecting the addition of D-158’.⁴
3. Specifically, the Defence presents a new argument based on a previous decision of the Chamber which authorised the Common Legal Representatives for Victims (the ‘CLRV’) request to call another expert witness on sexual and gender based crimes earlier during the trial.⁵ Although the Defence accepts that it ‘neglected to point out’ such an argument in its Initial Request,⁶ it submits that the Impugned Decision is unfair and violates Mr Ongwen’s fair trial rights. In particular, the Defence avers that looking at the Impugned Decision and the previous decision ‘side-by-side’, it appears that the Chamber ‘has applied a double standard’.⁷ It argues that similar to the previous authorised expert on sexual and gender based crimes, the expertise of D-158 is not repetitive of evidence

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 (the ‘Initial Request’). 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 (the ‘Impugned Decision’).

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’). A public redacted version was filed that same day.

⁴ Request, ICC-02/04-01/15-1567-Red, para. 5.

⁵ Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red.

⁶ Request, ICC-02/04-01/15-1567-Red, para. 6.

⁷ Request, ICC-02/04-01/15-1567-Red, para. 10.

provided by fact witnesses. It also submits that D-158 ‘could position the evidence within a more universal framework’ of sexual and gender based crimes in conflict situations, and the ‘impact of the rules and regulations concerning sexual relations’ within the Lord’s Resistance Army.⁸ Additionally, the Defence submits that the Impugned Decision violates Mr Ongwen’s fair trial rights with what it describes is a ‘push to finish the presentation of Defence evidence this year’.⁹

4. Alternatively to its request for reconsideration, the Defence requests leave to appeal the Impugned Decision, identifying two issues: (a) whether the Chamber’s denial of the Defence Initial Request to add D-158 to the witness list violates Mr Ongwen’s fair trial rights under Article 67(1)(e) of the Statute; and (b) whether the Chamber properly applied the legal standard for expert evidence.¹⁰
5. In relation to the first issue, the Defence argues that it was ‘unfair and unjust’ for the Chamber to have admitted the expert witness proposed by the CLRV while it rejected the Defence’s proposed expert D-158. It contends that in light of the criminal allegations concerning sexual and gender based crimes against Mr Ongwen, the decision is ‘grossly prejudicial’.¹¹ The Defence also submits that the Impugned Decision ‘is based on an incorrect assumption that all experts in the Defence case are fungible’.¹² It further argues that while the Office of the Prosecutor (the ‘Prosecution’) has been investigating the issue of sexual and gender based crimes since 2005, ‘the Defence has not had equal and adequate time to investigate these charges’.¹³ As regards the second issue, the Defence contends that the Impugned Decision ‘focuses only on the lateness of the Initial Request’ and not on the criteria applicable to expert testimony.¹⁴
6. According to the Defence, the two issues significantly affect the fair and expeditious conduct of proceedings. It also argues that the second issue will significantly affect the outcome of the trial. The Defence further submits that an immediate resolution by the Appeals Chamber will materially advance the proceedings as it would clarify whether the

⁸ Request, ICC-02/04-01/15-1567-Red, para. 9.

⁹ Request, ICC-02/04-01/15-1567-Red, para. 18.

¹⁰ Request, ICC-02/04-01/15-1567-Red, para. 19.

¹¹ Request, ICC-02/04-01/15-1567-Red, para. 21.

¹² Request, ICC-02/04-01/15-1567-Red, para. 18.

¹² Request, ICC-02/04-01/15-1567-Red, para. 23.

¹³ Request, ICC-02/04-01/15-1567-Red, para. 25.

¹⁴ Request, ICC-02/04-01/15-1567-Red, paras 26-28.

Impugned Decision violated Mr Ongwen's fair trial rights and witness D-158 should be added to the Defence's list of witness.¹⁵

7. In their responses, the CLRV and the Prosecution submit that the Request should be rejected as neither the criteria for reconsideration nor for granting leave to appeal have been met.¹⁶ They both submit the Request fails to demonstrate a clear error of reasoning or if reconsideration is necessary to prevent an injustice.¹⁷ In relation to the request for leave to appeal, the CLRV submits that the issues do not arise from the Impugned Decision and misrepresent the nature of the Chamber's decisions.¹⁸ According to the Prosecution, the issues identified do not arise from the decision, nor do they have an impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and immediate resolution by the Appeals Chamber would not materially advance the proceedings.¹⁹

II. Analysis

8. At the outset, the Chamber recalls its prior decisions setting out the criteria for reconsideration,²⁰ as well as the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.²¹

¹⁵ Request, ICC-02/04-01/15-1567-Red, paras 29-31.

¹⁶ CLRV'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'", 27 August 2019, ICC-02/04-01/15-1573-Conf (the 'CLRV Response'); 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'", 29 August 2019, ICC-02/04-01/15-1575 (the 'Prosecution Response').

¹⁷ CLRV Response, ICC-02/04-01/15-1573-Conf, para. 2; Prosecution Response, ICC-02/04-01/15-1575, para. 2.

¹⁸ CLRV Response, ICC-02/04-01/15-1573-Conf, para. 3.

¹⁹ Prosecution Response, ICC-02/04-01/15-1575, para. 2.

²⁰ Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4; Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence, 23 February 2017, ICC-02/04-01/15-711, para. 4; Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives, 26 March 2018, ICC-02/04-01/15-1210, para. 6; Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259, para. 12; 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, 20 June 2019, ICC-02/04-01/15-1547, paras 7-12.

²¹ 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.

i) *Request for reconsideration*

9. The Defence requests the Chamber to reconsider the Impugned Decision in part, namely the decision rejecting the late addition of expert witness D-158 to the defence list of witnesses. The Chamber is of the view that the Defence has not demonstrated in which way the exceptional remedy of reconsideration would be justified.
10. The Defence focuses its Request on the argument that the Chamber has applied a ‘double standard’, when it used ‘different reasoning within the same case and to the same identical request’.²² The Defence argues that just as the Chamber authorised an expert on sexual and gender based crimes upon the request of the CLRV, it should have authorised the testimony of D-158. This argument, which the Defence acknowledges it ‘neglected to point out’ in the Initial Request, is unfounded.
11. The reasoning of the Chamber’s previous decision authorising another expert witness of the CLRV on sexual and gender based crimes is not directly applicable to the case at hand. As correctly noted by the CLRV, the two decisions compared by the Defence ‘contain fundamentally different rulings made in vastly different contexts’.²³ The Defence fails to recognise that the Initial Request was filed at a very late stage of the trial proceedings. Despite the Chamber’s clear instructions, the Defence did not provide any explanation for this undue delay.²⁴ Consequently, the Impugned Decision is based on the belated nature of the Initial Request, which the Chamber had previously indicated would only be granted ‘in exceptional circumstances and with sufficient cause’.²⁵
12. In its Request, the Defence uses other arguments related to the suggested expertise of D-158 and the proportion of charges of sexual and gender based crimes against the accused which are merely repetitive of arguments already raised in the Initial Request²⁶ and

²² Request, ICC-02/04-01/15-1567-Red, para. 12.

²³ CLRV Response, ICC-02/04-01/15-1573-Conf, para. 13.

²⁴ In fact, in its Request the Defence simply reiterates that ‘it has been difficult to identify an expert witness’ but considers it ‘inappropriate to provide more details about this in a filing’. See, Request, ICC-02/04-01/15-1567-Red, para. 15.

²⁵ Impugned Decision, ICC-02/04-01/15-1565, para. 13, *referring to* Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion, 16 November 2017, ICC-02/04-01/15-1074.

²⁶ Request, ICC-02/04-01/15-1567-Red, paras 9-11. See, Initial Request, ICC-02/04-01/15-1559-Red, paras 4, 6, 20 and 21. In paragraph 20 of the Initial Request the Defence had already stated: ‘SGBC comprises 25.7% of the charges. While a lot has been said about the manner of wife distribution by different fact witnesses, the links

considered by the Chamber in the Impugned Decision. The Defence misrepresents the Impugned Decision, which took into consideration the nature of the expected testimony, not in itself, but in light of the advanced stage of the proceedings and the evidence provided by other witnesses already called and questioned by the Defence.²⁷ Other arguments raised by the Defence, such as the inequality between the Defence and Prosecution investigations,²⁸ are not new, have been discussed at length in this trial, and fail to substantiate the Request.

13. Although the Defence avers that the Impugned Decision is grossly prejudicial, it fails to specify how it is flawed. The Defence also fails to present persuasive arguments that the exceptional avenue of reconsideration is necessary to prevent an injustice. Most significantly, the Defence seems to disregard the Prosecution's undertaking not to oppose the submission of existing academic work authored by D-158 and subsequent determination by the Chamber in the Impugned Decision that the 'Defence can submit any existing academic work of D-158 if it wishes to do so'.²⁹

ii) Request for leave to appeal

14. Turning to the alternative request for leave to appeal the Impugned Decision, the Chamber considers that the Defence presents no appealable issue arising from the Impugned Decision.
15. As regards the first issue, the Chamber considers that it is not sufficiently discrete to be identified as an appealable issue arising from the Impugned Decision. The mere allegation that this issue is 'essential to implement Mr Ongwen's fair trial rights' under Article 67(1)(b) and (e) of the Statute is too general in nature.
16. In relation to the second issue, the Defence's Request is based on a misconception of the Impugned Decision, which did not make a determination on the criteria to determine the expertise of D-158, but on the untimely request to add this expert to the list of witnesses.

between the person, position, manner and control needs to be put in context by a person with extensive research in this specific area [footnotes omitted].'

²⁷ Impugned Decision, ICC-02/04-01/15-1565, paras 16-19.

²⁸ Request, ICC-02/04-01/15-1567-Red, para. 16.

²⁹ Impugned Decision, ICC-02/04-01/15-1565, paras 8 and 22.

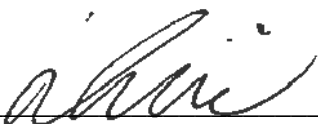
17. In addition, the Defence has failed to show how any of the criteria under Article 82(1)(d) of the Statute are met. The Defence's indication that the two identified issues significantly affect the fair and expeditious conduct of the proceedings and that an immediate resolution by the Appeals Chamber would 'clarify' whether the Impugned Decision violated Mr Ongwen's rights are equally insufficient to meet the requirements under Article 82(1)(d) of the Statute.³⁰
18. Accordingly, the request for leave to appeal the Impugned Decision, submitted in the alternative, is also rejected.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

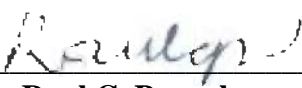
ORDERS the Registry to reclassify the CLRV Response (ICC-02/04-01/15-1573-Conf) as 'public'; and

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 6 September 2019

At The Hague, The Netherlands

³⁰ Request, ICC-02/04-01/15-1567-Red, paras 29-30.