

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **31 May 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

**Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on
Defence Third Request to Add 12 Items to its List of Evidence**

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 Verril

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence respectfully seeks reconsideration of Judge Bertram Schmitt's, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'TC IX', respectively), *Decision on Defence Third Request to Add 12 Items to its List of Evidence* ('Decision').¹ The Defence submits this motion for reconsideration in relation to the Decision rejecting the Defence request for items UGA-D26-0015-1212, UGA-D26-0018-3999, and UGA-D26-0018-4000 ('items 1212, 3999, and 4000 hereafter') to be added to the Defence list of evidence ('LoE'). Reconsideration is sought on the basis that the Decision, with regards to these 3 items, amounts to an error of reasoning by the Single Judge. This error allegedly arose from a lack of persuasive reasons in the submissions of the Defence's Initial Request ('Initial Request'),² as to why these items should be added to the LoE. Reconsideration of the Decision is of crucial importance considering the fairness and expeditiousness of proceedings established under Article 64(2) of the Rome Statute ('Statute').³
2. Furthermore, with regards to item 1212, following the Single Judge's previous interpretation of the addition of new items to the Defence LoE in the *Decision on Defence Request to Add 14 Items to its List of Evidence* ('Decision 1314'),⁴ the Defence submits that the Single Judge has erred in rejecting this item on the basis that the transcript of the corresponding hearing date is part of the official record.⁵ The Defence will also explain why items 3999 and 4000 should be added to the Defence LoE in response to the Single Judge's rejection of the request concerning these items "given the lack of indication for which reason the addition of these items to the Defence list of evidence would be warranted".⁶
3. Therefore, the Defence submits that these items are significant to the proceedings in light of the charges brought against Mr Ongwen. In this respect, the Defence will justify these items' "prospective significance"⁷ and will clarify the "intended purpose"⁸ of said items.

¹ ICC-02/04-01/15-1513.

² ICC-02/04-01/15-1523 (Decision on Request 1513), paras 9-10.

³ Article 64(2) of the Statute.

⁴ ICC-02/04-01/15-1314 (Decision on Request 1299).

⁵ ICC-02/04-01/15-1523 (Decision on Request 1513), para. 10.

⁶ ICC-02/04-01/15-1523 (Decision on Request 1513), para. 9.

⁷ ICC-02/04-01/15-610, para. 10; ICC-02/04-01/15-1314, para. 7.

⁸ ICC-02/04-01/15-610, para. 10; ICC-02/04-01/15-1314, para. 7.

4. In the alternative, the Defence seeks leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute. Consequently, the Defence also includes, by reference, the jurisprudence of the Appeals Chamber with regard to seeking leave to appeal as specified in prior requests.⁹ The Defence also notes Articles 64(6)(d), 64(6)(f) and 69(3) of the Statute in line with its Initial Request.

II. THE APPLICABILITY OF A MOTION FOR RECONSIDERATION

5. The extraordinary remedy of reconsideration is applicable where a “clear error of reasoning has been demonstrated or if it is necessary [...] to prevent an injustice.”¹⁰ In *Bemba et al.*, the Trial Chamber asserted that “[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment.”¹¹ On the contrary, reconsideration may be denied if the new argument was “within the Chamber’s contemplation at the time of issuing the Decision.”¹²
6. The current request is supported by new arguments that cannot be seen to have been contemplated by the Chamber in delivering the impugned Decision. In other cases, the Prosecution has also sought reconsideration on the grounds that the Trial Chamber “wrongly construed”¹³ or “misunderstood”¹⁴ a submission which led to “manifestly unsound and unsatisfactory consequences”.¹⁵
7. Notably, the very first ICC decision that established the possibility of reconsideration occurred in a situation where the Defence had “made a straightforward mistake about something that at the relevant time was ‘known’ by everyone concerned.”¹⁶ Fittingly, reconsideration is an established remedial mechanism that can be employed to prevent an injustice, whether arising from the error of a party for having failed to present an argument or fact; from an issue that only becomes evident after a decision is delivered; or from any misunderstanding or uncertainty that may have stemmed from the party’s submissions. All three of these aspects may apply simultaneously.

⁹ ICC-02/04-01/15-1334-Red, paras 4 to 10.

¹⁰ ICC-01/04-02/06-611, 27 May 2015, para. 12; ICC-01/04-02/06-605, para. 7.

¹¹ ICC-01/05-01/13-1282 para. 8; ICC-01/09-01/11-1813 para. 19; ICC-01/09-02/11-863, para.11.

¹² ICC-01/09-01/11-1813, para. 21; ICC-01/05-01/13-1282 para. 9.

¹³ ICC-01/04-02/06-460, para. 2.

¹⁴ ICC-01/04-02/06-519, paras. 8- 9.

¹⁵ ICC-01/04-02/06-460, para. 2.

¹⁶ ICC-01/04-01/06-2705, para. 10.

8. In this instance, the Defence accepts any responsibility that may be attributed to it for not having previously adduced some of the particular arguments discussed below regarding the intended purpose and prospective significance of items 1212, 3999 and 4000. Nonetheless, any such responsibility does not obstruct reconsideration. In contrast, the aim of reconsideration is specifically to ensure that an accused is not irredeemably prejudiced when an error originating from the Defence's submissions becomes evident and will critically affect the course of proceedings.

III. SUBMISSIONS REGARDING RECONSIDERATION

A. Item UGA-D26-0015-1212

9. Firstly, the Defence requests reconsideration on the basis that the Single Judge erred in not adding item 1212 to the LoE on the ground that it completes the record of evidence. On 24 July 2018, in the Single Judge's Decision 1314,¹⁷ he highlighted the following:

In principle, recognising the formal submission of audio-visual materials automatically includes the formal submission of any associated transcripts or translations duly disclosed, and vice versa. Similarly, if a document has been recognised as formally submitted, it generally includes both the original and translated version. This is the case irrespective of whether all versions of the documents/audio-visual material were included on the list of evidence or formally submitted. This is solely to ensure the logical completeness of the evidence record.¹⁸

10. In light of this, item 1212 should be added to the LoE as the Single Judge's reasoning in the impugned Decision is inconsistent with the correct reasoning provided in Decision 1314. As the Single Judge notes in the impugned Decision that "the transcript [is] the official record of these proceedings",¹⁹ this official record should automatically include the formal submission of item 1212 as an associated audio-visual material.
11. The expression 'in principle' above, indicates that the inclusion of corresponding and associated materials may not always have to take place. However, the Defence submits that this should only be the case where that material is prejudicial to the other parties and participants which does not apply to item 1212. All corresponding and associated materials should be *prima facie* recognised as part of the evidentiary record.

¹⁷ ICC-02/04-01/15-1314 (Decision 1314).

¹⁸ ICC-02/04-01/15-1314 (Decision on Request 1299), para. 8.

¹⁹ ICC-02/04-01/15-1523 (Decision on Request 1513), para 10.

12. Secondly, the Defence submits that item 1212 is relevant evidence on its own merit, aside from corresponding to the official record of proceedings. This is because audio-visual material can capture the wider context of what is being said or done compared to the written word on its own. Therefore, the intended purpose of this item is that it complements the official record and shows a different aspect of the hearing that cannot be captured solely from the associated written transcript(s). Subsequently, item 1212 is especially relevant as evidence which captures, in its entire context, one of the most significant moments in the whole trial. Indeed, this item is highly relevant to the charges as it depicts the key moment where Mr Ongwen enters his not guilty plea in response to said charges.
13. Thirdly, with regards to item 1212, the Single Judge states that he “sees, *at this stage*, no reason to add the video recording of the hearing to the Defence list of evidence in order to, as indicated by the Defence, ‘demonstrate the non-guilty plea entered by Mr Ongwen’”.²⁰ The expression ‘at this stage’ undoubtedly proposes that this item could be added to the LoE in future. For this reason, the Defence submits that to ensure the expeditiousness of the proceedings this item should be added to the LoE immediately. Accordingly, it would make no sense to re-litigate this issue at a later date, especially when adding this item does not have any prejudicial effect and completes the record of evidence as stated above. The mere fact that the Single Judge would still consider adding it at a later date demonstrates that the item is not prejudicial and is prospectively significant to the proceedings.

B. Items UGA-D26-0018-3999 and UGA-D26-0018-4000

14. The Defence submits that the Single Judge should reconsider adding item 4000 to the LoE because it contains pertinent out of court public statements made by witness P-0235 who has testified in this case. As item 3999 refers directly to the context and content of item 4000 they should both be added to the LoE together. The contents of these items concern the nature of the relations between the witness and Mr Ongwen. The nature of said relations is of significant relevance to the charges and defences presented in this case. Additionally, the content of these items relates to the children Mr Ongwen had with this witness during their life in the LRA. The evidence concerning these children is relevant to the charges in this case and has been adduced during the trial. The statements made by the witness are relevant in order to assist the court to fully understand the nature of the relations between the accused and the witness. Consequently,

²⁰ ICC-02/04-01/15-1523 (Decision on Request 1513), para. 10.

the intended purpose of adding items 3999 and 4000 is that they will critically assist the court to ascertain the state of mind of the witness as well as that of Mr Ongwen and their children. In consideration of the content of these items, it would affect the fairness of proceedings under Article 64(2) of the Statute if these items were not added to the LoE.

15. Furthermore, these items should be added to the LoE even if they are considered to contain information of only prospective significance at this time. Again, these items are important because they concern the nature of the relations between the witness and Mr Ongwen, which is highly relevant when considered in the context of the charges against him. The fact that 'significance' need only be potential in nature and not already clearly defined means that a low threshold for the addition of evidence to the LoE should be applied. This is required in order to ensure that a party is not unduly burdened by having to provide specific details of its case too far in advance of their intended application, which from a Defence point of view, would adversely affect the fair trial rights of an accused.

IV. SUBMISSIONS REGARDING LEAVE TO APPEAL

16. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

Involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²¹

17. The substance of the appealable issue herein is whether the Single Judge has erred in his reasoning by not allowing the Defence to add items 1212, 3999, and 4000 to the LoE thereby violating his obligations under Article 64(2) of the Statute to “ensure that a trial is fair [...] and is conducted with full respect for the right of the accused”.²² The Defence submits that the issue satisfies the legal criteria under Article 82(1)(d) of the Statute for the following reasons: Firstly, the resolution of this issue is crucial in order to settle the matter raised in the Initial Request, namely to add items to the Defence LoE which are materially relevant to the outcome of this trial. Therefore, the Defence submits, that in the absence of reconsideration, a speedy resolution by the Appeals Chamber would materially advance the proceedings.

²¹ Article 82(1)(d) of the Statute.

²² Article 64(2) of the Statute.

18. Secondly, having defined the issue above, the Defence submits that it substantially affects the fair and expeditious conduct of the proceedings, and the outcome of the trial. Ultimately in fact, the crux of the issue is both fairness and expeditiousness. Taking into consideration what has been discussed above regarding reconsideration, if these items are not added to the LoE at present, another request would likely be required further down the line which would severely diminish the expeditiousness of these proceedings for no good reason, especially when the items in question do not prejudice any party or participant in this trial. Certainly, a decision by the Appeals Chamber on the issue in question would be justified as the Defence would likely have to make this additional request in order to make the case for the Defence to the best of its ability, as is its duty to Mr Ongwen.
19. The intended purpose and prospective significance of these items has also been explained above with regard to reconsideration. Therefore, in the Defence's view, failing to add these items to the Defence's LoE would not be in the interests of fairness as they possess probative value in light of the charges against Mr Ongwen. Furthermore, the merit in adding these items to the LoE undeniably outweighs their non-existent prejudice, particularly considering the low threshold for adding items to the LoE. The failure to resolve this fair trial matter by adding these items to the LoE would have a considerable and disproportionately negative effect on the outcome of the trial.

V. CONCLUSION

20. In summary, the issues arising from the Decision justify reconsideration or, in the alternative, leave to appeal. In light of the intended purpose and prospective significance of item 1212, this should simply be added to the LoE because it completes the record of evidence and demonstrates the not guilty plea of Mr Ongwen in its full context as a key moment in the trial. Moreover, items 3999 and 4000 should be added to the LoE because they provide crucial information about the nature of the relations between witness P-0235 and Mr Ongwen which began during his time in the LRA. If this was denied, it would affect the fairness of the trial as this information is undeniably of prospective significance, but also in the Defence's view, of current significance to Mr Ongwen's Defence.
21. In the alternative, the Defence submits that the legal criteria for leave to appeal under Article 82(1)(d) has been met. A failure to add these items would adversely affect the expeditiousness of the trial as the Defence would likely have to request that they be added again at a later date

as they do not cause prejudice to the other parties and participants. Moreover, a failure to add these items to the LoE would also adversely affect the fairness of the trial as their evidential value substantially outweighs this non-existent prejudicial affect. For these reasons, a speedy resolution of this issue by the Appeals Chamber would materially advance the proceedings allowing the Defence to effectively fulfil its duty to Mr Ongwen.

VI. RELIEF SOUGHT

22. For the reasons stated above, the Defence requests that the Single Judge:

A) **RECONSIDER** the impugned Decision; and forthwith

B) **ALLOW** the Defence to add items UGA-D26-0015-1212, UGA-D26-0018-4000, UGA-D26-0018-3999 to its LoE.

C) **ALTERNATIVELY**, the Defence requests that leave is granted by TC IX to appeal the impugned Decision.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 31st day of May, 2019

At The Hague, Netherlands