

**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

Victims' Response to "Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'"

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Legal Representatives for Victims (“LRVs”) respectfully request that Trial Chamber IX (“Chamber”) dismiss the Defence Request *in limine*.¹ The Defence Request is made out of time and no justification for this has been given. In any event, even if the Chamber is willing to consider the merits of the Defence Request, it should be dismissed. There is no violation of the accused’s fair trial rights.
2. In the alternative, if the Chamber considers that there is merit in the Defence Request, the LRVs submit the only relief proposed by the Defence which does not cause unjustifiable prejudice would be if the Chambers sees fit to provide guidance on Defence request (C) in light of the conflicting Appeal Chamber jurisprudence on the issue.

II. PROCEDURAL HISTORY

3. On 13 July 2016, the Chamber issued its ‘Initial Directions on the Conduct of the Proceedings’, whereby it deferred its assessment of the admissibility of each item of evidence submitted into evidence until deliberating its judgment.²
4. On 21 May 2019, the Defence filed its Public Redacted Version of ‘Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime’,³ whereby it requested the Chamber to: (A) rule on the admissibility and/or relevance of all items that the Prosecution and LRVs submitted into evidence through ‘bar table’ or other motions, and provide a reasoned statement for these rulings now or before closing briefs; (B) rule on the admissibility and/or relevance of all items that the Prosecution, LRVs, and Defence submitted into evidence (and those to be submitted) by email after the conclusion of the examination of the relevant witness, and provide a reasoned statement for these rulings now or before closing

¹ Public Redacted Version of ‘Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime’, 21 May 2019, (“Defence Request”), ICC-02/04-01/15-1519-Red, p.20.

² ICC-02/04-01/15-497.

³ ICC-02/04-01/15-1519.

briefs; or in the alternative (C) confirm that the evidential rulings for all items submitted into evidence and their assessment will be discussed in the judgment itself or in a separate annex to the judgment.⁴

III. SUBMISSIONS

The Defence Request should be rejected in limine

5. The Defence Request raises a fundamentally procedural issue – an issue “concerning the conduct of the proceedings”. Motions in respect of such issues are governed by rule 134 of the Rules of Procedure and Evidence (“RPE”). In particular, sub-rules (1) and (2) ensure that where a procedural issues have arisen before trial the participants may file motions in respect of such issues up until the commencement of trial without leave; but that that after that time they may do so only with the leave of the Trial Chamber. As the Chamber has previously ruled in response to the series of motions filed by the Defence alleging defects in the Confirmation Decision, [rule 134(2) RPE] “precludes parties from raising such challenges for the first time during trial when they had a reasonable opportunity to do so earlier.”⁵
6. The evidentiary regime for this trial was set in the Chamber’s ‘Initial Directions on the Conduct of the Proceedings’, prior to the commencement of trial. It has not been changed since the start of trial either by any express ruling or by practice in its application. It is therefore entirely clear that the issue which the Defence Request addresses is an issue which arose prior to the commencement of trial. According to rule 134(2), leave of the Chamber is required to raise this issue now.
7. The LRVs respectfully request the Chamber to decline to grant such leave. The Defence has given no justification for the untimeliness of the Defence Request. A

⁴ Defence Request, p.20.

⁵ Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476, 7 March 2019, para. 14.

justification should be required as an absolute minimum in order for the Chamber to grant leave to such a request.

8. Even if a reasonable justification had been given by the Defence, such a justification must be weighed carefully by the Chamber before leave is granted to raise a fundamental procedural issue so late in the proceedings. In this instance, there are compelling additional reasons for refusing leave: The first is that, as pointed out by the Prosecution in its response to the Defence Request,⁶ the Defence in fact *requested* the evidentiary regime which was established by the Chamber and has been used throughout trial. The second is that allowing the Defence to raise fundamental issues relating to the conduct of proceedings so late in the trial (after the closure of the Prosecution case and the victims' cases) would be fundamentally unfair to the victims.
9. Finally, LRVs note the arguments raised by the Defence relating to the rights of the accused. For the sake of completeness, they submit that enforcement by the Chamber of the time-limit contained in rule 134(2) can in no way be said to constitute a violation of the accused's right to a fair trial or to have his objections determined by a Court. The accused had such opportunity before trial – within the timeframe permitted by the Rules – and failed to avail himself of it.
10. For these reasons the LRVs request that the Chamber dismiss the Defence Request *in limine*.

Alternatively, in any event, the Defence Request should be rejected on its merits

11. Even if the Chamber is willing to grant leave and consider the Defence Request at this stage of the proceedings, the LRVs submit that the Request should be rejected on its merits. The Request has demonstrated no basis on which the evidentiary regime adopted and applied by the chamber is impermissible. The Defence

⁶ Prosecution's Response to "Defence Request and Observations on Trial Chamber IX's Evidentiary Regime", ICC-02/04-01/15-1526-Conf, 28 May 2019

Request argues that the evidentiary regime causes prejudice to the accused, that it violates his rights under article 67(1), that the approach is inherently precluded by the adversarial nature of the proceedings, and that it is contrary to article 74. None of these arguments can be sustained:

(i) *Alleged prejudice to the accused*

12. The Defence Requests provide no authority for why a Chamber should be required or convinced to modify the rules for the conduct of proceedings part way through because those rules “prejudice” the defence. Rather than claiming a vague concept of prejudice, in order to require the modification of the procedural rule for trial, the LRVs submit that the Defence would be required to show that those rules are inconsistent with the Statute or RPE.

13. In any event, the Defence Request does not demonstrate that the evidentiary regime causes Mr Ongwen to suffer prejudice.

(ii) *Rights of the accused*

14. In *Bemba*, the Appeals Chamber, found that while a chamber “may rule on the relevance and/or admissibility when evidence is submitted [...] and then determine the weight to be attached to the evidence at the end of the trial”, a chamber may also “defer its consideration of [the relevance, probative value and potential prejudice] until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person”.⁷

15. The Appeals Chamber went on to clarify that “[i]rrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and

⁷ Para. 37, ICC-01/05-01/08-1386.

the potential prejudice of each item of evidence *at some point* in the proceedings-when evidence is submitted, during the trial or at the end of the trial.”⁸

16. Thus what is key is that the consideration of the relevance, probative value and the potential prejudice of each item of evidence must be made at some point in the proceedings. The most logical point for such an evaluation is at judgment. Defence arguments to the contrary are not persuasive.
17. In demonstrating the prejudice suffered by the Accused, the Defence argues that certain evidential items fall outside the temporal jurisdiction of the *Ongwen* case, have no evidential purpose and/or lack reliability and authenticity. The Defence fails to appreciate the distinction between items that have been *submitted* and not *admitted* into evidence.⁹
18. The decision to carry out an evaluation of the evidence and formally admit evidence lies with the Chamber, as such the Defence cannot complain about items that it feels should not have been submitted to the ‘bar table.’
19. Defence arguments regarding the difficulty it has in preparing its case as a result of the evidentiary regime implemented by the Chamber are not well substantiated.¹⁰ Indeed, the Defence has had sufficient opportunity to challenge each witness presented by both the Prosecution and the LRVs.
20. Furthermore, in terms of fair trial rights, there is no right to a particular form of treatment or analysis of the evidence under the Rome Statute or international human rights law. This was established for the first time in 1988, in the *Schenk Case* before the European Court of Human Rights (“ECtHR”).
21. The ECtHR stated that “[W]hile Article 6 (art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence

⁸ Emphasis added, para. 37, ICC-01/05-01/08-1386.

⁹ Para. 19, Defence Request.

¹⁰ Paras. 22-24, Defence Request.

as such...”¹¹ This continues to remain the standard implemented by the ECtHR to date.

22. In *Van Mechelen and Other*, the ECHR determined that admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them. Therefore, implying that there is no human right standard as to the treatment of evidence by a tribunal. The ECHR determined its role was “not to give a ruling as to whether treatment of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which the evidence was taken were fair.”¹²

23. Lastly, the LRVs submit that there are differing systems pertaining to the treatment of evidence. However, the drafters of the Rome Statute gave the Chambers discretion on which evidentiary regime to adopt which has resulted in a civil law holistic assessment of the evidence.

24. The Defence relies on dissenting opinion of Judge Henderson in the *Bemba et al* case to argue that “evidential rulings at the point of submission or during the trial do not preclude a holistic assessment of the evidence on the case record.”¹³

25. The LRVs submit that while separate opinions and dissenting opinions may be jurisprudentially respected, and are formally part of a decision or judgment to which they are appended they are not part of the operative part of the decision or judgment.¹⁴ Therefore, the Defence’s overreliance on Judge Henderson’s separate opinion is misplaced.

¹¹ *Schenk v. Switzerland*, 13 EHRR 242. Para. 46

¹² *Van Mechelen and Others v. The Netherlands*, 55/1996/674/861-864, Council of Europe: European Court of Human Rights, 23 April 1997, available at: <https://www.refworld.org/cases,ECHR,3ae6b6778.html> [accessed 27 May 2019], para. 50

¹³ Defence Request, para. 10, see also Judge Henderson Separate Opinion on Art 70 Judgment, para. 41.

¹⁴ Decision on interlocutory appeals against Trial Chambers decision refusing to subpoena the President of Sierra Leone, SCSL-04-14-0688, para. 41 (noting that “[i]t must be emphasised [] that the operative portion of a judgement or decision is that of the majority” and stating that “[n]o appeal may arise from a concurring or dissenting opinion.”)

Conflicting jurisprudence on the interpretation of Article 74 (5) concerning the assessment of all items of evidence in the judgement decision

26. The Chamber has laid out the evidentiary regime in this case as follows:

“The Chamber will consider the relevance, probative value and potential prejudice of *each item of evidence submitted* when deliberating the judgment, though it *may not* necessarily discuss these aspects for every item submitted in the judgment itself.”¹⁵

27. Article 74(5) of the Statute states that the judgment “shall be in writing and shall contain a full and reasoned statement on the Trial Chamber’s findings on the evidence and conclusions.”¹⁶

28. Article 69 (4) of the Statute stipulates:

“The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.

29. The Appeals Chamber in *Bemba et al*, has held that “this provision – rather than obliging a trial chamber to rule on the relevance or admissibility of each item of evidence submitted by the parties – is permissive in nature in that it allows a trial chamber to do so.”¹⁷

30. The Appeals Chamber in *Bemba et al*, further held that consideration by a trial chamber of the relevance and/or probative value of an item of evidence within the context of a possible ruling on its relevance or admissibility rendered separately from its assessment as part of the eventual evaluation of the guilt or innocence of the accused is, in principle, permitted, but is not mandatory.¹⁸

¹⁵ Emphasis added, ICC-02/04-01/15-497, para. 24

¹⁶ Article 74(5), Rome Statute of the International Criminal Court.

¹⁷ Para. 585, ICC-01/05-01/13-2275-Red, *Bemba et al*.

¹⁸ Para. 592, ICC-01/05-01/13-2275-Red, *Bemba et al*.

31. However, as alluded to in the previous section, the *Bemba* Appeals Chamber was clear that irrespective of the approach a particular Trial Chamber implements, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence *at some point* in the proceedings.¹⁹
32. The LRVs consider that guidance of the Trial Chamber concerning the Defence request for confirmation of whether the evidential rulings for all items submitted into evidence will be discussed in the judgment may be assist the proceedings in light of the conflicting positions in the decisions of the respective Appeal Chambers cited above.
33. Victims also have an interest in knowing how the evidence was assessed by the Chamber in arriving at their determination. Particularly, victims may have an interest in knowing how the testimonies of other victims that personally testified before the Chamber were considered and how they factored in the deliberation of the judgement.

IV. RELIEF SOUGHT

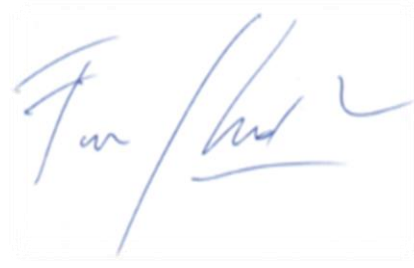
34. The LRVs respectfully request the Chamber dismiss the Defence Requests (A) and (B).
35. The LRVs request the Chamber, should it see fit, to provide guidance on Defence request (C).

Respectfully submitted,

¹⁹ Para. 37, ICC-01/05-01/08-1386.



Joseph A. Manoba



Francisco Cox

Dated this 31st day of May 2019

At Kampala, Uganda and The Hague, The Netherlands