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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***

Confidential

**CLRV's Response to "Defence Request and Observations
on Trial Chamber IX's Evidentiary Regime"**

Source: Office of Public Counsel for 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 Common Legal Representative of the Victims¹ (the “CLR”) opposes the Defence’s “Request and Observations on Trial Chamber IX’s Evidentiary Regime” (the “Request”).²

2. The CLR submits that the Request fails to form a proper motion since it *objects* the Trial Chamber’s (the “Chamber”) rulings setting the evidentiary regime at trial (the “Challenged Decisions”).³ In this regard, filing objections against judicial decisions is not permitted under the Rome Statute (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”). At best, the Request constitutes an application for reconsideration since the Defence is seeking a substantial modification of the evidentiary regime envisioned by the Challenged Decisions. Yet, the Defence fails to fulfil the specific requirements for reconsideration since it does neither demonstrate a clear error of reasoning allegedly committed in the Challenged Decisions nor show the necessity to reconsider said rulings in order to prevent an injustice.

II. PROCEDURAL BACKGROUND

3. On 13 July 2016, the Chamber issued the “Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”).⁴ On 1 December 2016, the Chamber issued

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime”, No. ICC-02/04-01/15-1519-Conf, 21 May 2019 (the “Request”).

³ See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX, Presiding Judge), No. ICC-02/04-01/15-497, 13 July 2016 (the “Initial Directions”) and the “Decision on Prosecution Request to Submit Interception Related Evidence (Trial Chamber IX), No. ICC-02/04-01/15-615, 1 December 2016 (the “Decision on Intercept Evidence”) (together the “Challenged Decisions”).

⁴ See the Initial Directions, *supra* note 3.

the “Decision on Prosecution Request to Submit Interception Related Evidence” (the “Decision on Intercept Evidence”).⁵ On 7 December 2016, the Defence filed a request for leave to appeal the Decision on Intercept Evidence.⁶ On 12 December 2016, the CLRV and the Prosecution opposed said request.⁷ On 20 December 2016, the Chamber rejected the Defence’s request for leave to appeal the Decision on Intercept Evidence.⁸

4. On 21 May 2019, the Defence filed the Request.⁹ On 28 May 2019, the Prosecution filed its response, asking the Chamber to dismiss the Request *in limine*.¹⁰ On 28 May 2019, the Legal Representatives of Victims responded to the Request, partially opposing it.¹¹

III. LEVEL OF CLASSIFICATION

5. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidential following the classification chosen by the Defence. However, the CLRV indicates that this submission does not contain information which should remain confidential and therefore can be reclassified as public.

⁵ See the Decision on Intercept Evidence, *supra* note 3.

⁶ See the “Defence Request for Leave to Appeal ‘Decision on Prosecution Request to Submit Interception Related Evidence’ (ICC-02/04-01/15-615)”, No. ICC-02/04-01/15-625, 7 December 2016.

⁷ See the “Response to the ‘Defence Request for Leave to Appeal Decision on Prosecution Request to Submit Interception Related Evidence (ICC-02/04-01/15-615)”, No. ICC-02/04-01/15-630; and the “Prosecution’s Response to ‘Defence Request for Leave to Appeal Decision on Prosecution Request to Submit Interception Related Evidence’ (Decision 615)”, No. ICC-02/04-01/15-631, 12 December 2016.

⁸ See the “Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted” (Trial Chamber IX), No. ICC-02/04-01/15-641, 20 December 2016.

⁹ See the Request, *supra* note 2.

¹⁰ See the “Prosecution’s Response to ‘Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime’”, No. ICC-02/04-01/15-1526-Conf, 28 May 2019 (the “Prosecution’s Response”).

¹¹ See the “Victims’ Response to ‘Public Redacted Version of ‘Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime’”, No. ICC-02/04-01/15-1533, 31 May 2019.

IV. SUBMISSIONS

A. Preliminary observations

6. In the Initial Directions, the Chamber first set the evidentiary regime at trial, stating that “[a]s a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. [...] 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. [...] The Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard admissibility criteria”.¹² Moreover, in the Decision on Intercept Evidence, the Chamber provided further clarifications concerning the evidentiary regime at trial.¹³

7. Nonetheless, the Defence “[objects to the Chamber’s approach] to defer its assessment of relevance, probative value and potential prejudice of each item of evidence submitted into evidence until deliberating its judgment”.¹⁴ The Defence “[also objects to the fact that the Chamber] does so without the fundamental guarantee of discussing the assessment of standard evidentiary criteria for each item in its final judgment, rendering [this] approach to evaluation of evidence opaque and erroneous as a matter of law.”¹⁵

8. The CLRV firstly notes that no statutory provisions of the Court allows the parties or participants to submit “objections” directed against interlocutory decisions issued by the Chamber. In this regard, Pre-Trial Chamber II held that “[p]articipants in proceedings before the Court must comply with the procedures provided for in the Statute and the Rules when making submissions to the Chamber. They cannot freely choose the form in which they present their views to the Chamber. Compliance with procedural requirements

¹² See the Initial Directions, *supra* note 3, paras. 24-26.

¹³ See the Decision on Intercept Evidence, *supra* note 3, paras. 4-13.

¹⁴ See the Request, *supra* note 2, para. 2.

¹⁵ *Idem*.

is necessary, in order to preserve the integrity and transparency of Court proceedings.”¹⁶ As such, the “objection” raised by the Defence is a fictitious remedy, not found among the proper procedural avenues for challenging judicial decisions provided in the statutory instruments of the Court.

9. Secondly, while being framed as a “Request and Observations”, what is essentially sought by the Defence is a re-litigation and revision *en bloc* of numerous rulings of the Chamber in the matter. However, as held by Pre-Trial Chamber II, “[r]eview of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules. [For example] rule 118, sub-rule 2, of the Rules, allowing the person concerned or the Prosecutor to request the Pre-Trial Chamber to review its ruling on the release or detention of such person [etc.] Outside such specific instances, the only remedy of a general nature is the interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1 (d) of the Statute”.¹⁷

10. As mentioned above, the regime on the admissibility of evidence was firstly set out in the Initial Directions whose time limit for lodging an appeal has long passed. Having chosen not to request leave to appeal the Initial Directions, the Defence cannot now seek the overhaul of the evidentiary regime at trial after close to three full years the expiration of the applicable deadline.¹⁸ While the Defence did seek leave to appeal the Decision on Intercept Evidence, it did so in relation to the single issue of “the scope of ‘procedural objections’ required to be examined pursuant to submission under Article 69(3)”,¹⁹ not challenging the main rulings which clarified the

¹⁶ See the “Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification” (Pre-Trial Chamber II), No. ICC-02/04-01/15-37, 28 October 2005, para. 13.

¹⁷ *Idem*, para. 18.

¹⁸ See the “Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence” (Trial Chamber IX), No. ICC-02/04-01/15-535, 09 September 2016, para. 16.

¹⁹ See the “Defence Request for Leave to Appeal ‘Decision on Prosecution Request to Submit Interception Related Evidence’ (ICC-02/04-01/15-615)”, No. ICC-02/04-01/15-625, 7 December 2016, para. 2. This request was eventually rejected. See the “Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted” (Trial Chamber IX), No. ICC-02/04-01/15-641, 20 December 2016, paras. 8-9.

evidentiary regime set out in the Initial Directions. Moreover, since the issuance of said Directions, the Chamber rendered numerous rulings and consistently restated the regime on the admissibility of evidence, either documentary or testimonial.²⁰

11. There is no showing to the effect that the Defence was unaware of the legal and practical implications of these rulings whose genesis goes back to 2016. Consequently, the Defence's present attempt to convert potential appellate issues into something else, such as "*objections*", should be characterised as frivolous, particularly where appropriate recourse was "*through the appellate process*".²¹ Therefore, the CLRV also agrees with the Prosecution that the Request is untimely and without any justification.²² Moreover, the Defence's invitation to treat its Request as a motion raising "*issues*" that arose "*during the course of the trial*"²³ must be rejected. As recalled above, the evidentiary regime at trial was set out by the Initial Directions well in advance of the commencement of the trial and thus cannot possibly constitute an issue which rose during the trial. As a result, the Request should be dismissed *in limine*, without addressing the Defence's arguments on the merits.

12. *Arguendo*, even if the Chamber is minded to address the substantive arguments raised by the Defence, the CLRV posits that the Request constitutes, at

²⁰ See the "Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c)" (Trial Chamber IX), No. ICC-02/04-01/15-600, 22 November 2016, para. 34; the "Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules" (Trial Chamber IX), No. ICC-02/04-01/15-596-Red, 18 November 2016, para. 7; the "Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute" (Trial Chamber IX), No. ICC-02/04-01/15-520, 10 August 2016, para. 7; the "Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-902, 28 June 2017, paras. 6-7; and the "Decision on the Common Legal Representatives Request to Recognise One Item as Formally Submitted (Trial Chamber IX)", No. ICC-02/04-01/15-1224, 10 April 2018, para. 1. For submission of material following the witness testimonies, see for example the emails sent by the Chamber on 27 January 2017 at 09:52 and 27 March 2018 at 09:54.

²¹ See the "Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" (Presidency), No. ICC-01/05-01/13-511-Anx, 23 June 2014, para. 41.

²² See the Prosecution's Response, *supra* note 10, paras. 1 and 23-28.

²³ See the Request, *supra* note 2, para. 3.

best, a request for reconsideration of the Challenged Decisions since the Defence is seeking a significant modification of the evidentiary regime at trial. In this regard, the CLRV recalls that the Chamber has consistently ruled that *“reconsideration is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”*.²⁴ Additionally, *“new facts and arguments arising since the decision was rendered may be relevant to this assessment”*.²⁵ Nonetheless, as shown below, the CLRV submits that none of the arguments raised by the Defence demonstrates a clear error of reasoning nor do they show that it is necessary to reconsider the Challenged Decisions in order to prevent an injustice. Neither does the Defence present any new facts and new arguments warranting the reconsideration of the Challenged Decisions.

B. Merits of the Request

13. The Defence submits, firstly, that the holistic evaluation of evidence does not preclude the Chamber from evidential rulings at the point of submission or during the trial, but eventually admits that the evidentiary regime at trial complies with the approach confirmed by the Appeals Chamber in *Bemba et al case*.²⁶ Indeed, the Appeals Chamber held that:

“Upon the submission of an item of evidence by a party, a trial chamber has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as ‘submitted’ within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its

²⁴ See the “Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance” (Trial Chamber IX), No. ICC-02/04-01/15-468, 15 June 2016, para. 4. See also the “Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence” (Trial Chamber IX), No. ICC-02/04-01/15-711, 23 February 2017, para. 4; and the “Decision on Defence Request for Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim Participation” (Trial Chamber IX), No. ICC-02/04-01/15-1152, 26 January 2018, para. 6.

²⁵ See the “Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance”, *supra* note 24, para. 4.

²⁶ See the Request, *supra* note 2, paras. 8-9.

relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused. Under the latter approach, no separate ruling on the admissibility of all evidence is required".²⁷

14. Thus, there is nothing to show that the evidentiary regime at trial established by the Challenged Decisions, which admittedly followed the Appeals Chamber's ruling on the matter, contains a clear error of reasoning or warrants a reconsideration in order to prevent an injustice.

15. Secondly, the Defence argues that the evidentiary regime at trial set out by the Challenged Decisions results in Mr Ongwen suffering prejudice. The Defence avers that the evidentiary rulings at the point of submission or during the trial do not prevent the Chamber from accurate assessment of the evidence.²⁸ Yet, the Defence simply states that it is in disagreement with numerous decisions of the Chamber without demonstrating exactly how the evidentiary regime at trial is erroneous or causes prejudice to the Accused. Then the Defence adds that the evidentiary regime at trial does not save significant amount of time.²⁹ Yet again, the Defence fails to offer any convincing alternative solution.

16. In this regard, the Trial Chamber in the *Gbagbo case*, which adopted a similar approach as to the admissibility of evidence, explained that: (i) it is only at the end of the trial, once the submission of the evidence will have been completed, that the Chamber will be in the best position to meaningfully assess each item of evidence. A determination on the admissibility or the relevance of a given item of evidence upon its submission would unduly restrict the Chamber's power to assess that particular piece of evidence in light of all the others pieces not yet submitted and to amend its assessment if and as required; (ii) deferring the Chamber's determination of all of the

²⁷ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 08 March 2018, para. 8.

²⁸ See the Request, *supra* note 2, paras. 17-19.

²⁹ *Idem*, para. 20.

issues concerning the evidence admissibility will prevent multiple determinations on the same items of evidence made at different stages of the trial. Intermediate rulings on the evidence, based on a partial knowledge of the case, might become the subject matter of additional and disruptive interlocutory litigation. Accordingly, deferral will prevent the need for multiple - and possibly contradictory - rulings on the same items of evidence and thus contribute to the expeditiousness of the trial; and (iii) such deferral as a general rule will also ensure that all the evidence submitted will be subjected to a uniform treatment; contributing to the overall certainty and fairness of the proceedings as a whole.³⁰ As a result, the CLRV submits that the Defence fails again to establish a clear error of reasoning or the necessity to reconsider the Challenged Decisions in order to prevent an injustice.

17. Moreover, the Defence further argues that the lack of evidentiary rulings creates uncertainty and places an impermissible burden on the Defence since it must guess or work on the assumption that thousands of items submitted by the Prosecution will be admitted and considered for the purposes of article 74 of the Statute.³¹

18. In this regard, the Appeals Chamber held that it is not unusual that the Defence does not know on which evidence the Chamber will eventually rely and which evidence will be ruled inadmissible and thus, irrespective of the approach the Trial Chamber takes to the admission of evidence, the Accused must expect that all the evidence presented by the Prosecution might be used against him or her and prepare his or her defence accordingly.³² Surely, the Accused' rights are not violated because he had to conduct his defence in the expectation that all evidence submitted

³⁰ See the "Decision on the submission and admission of evidence" (Trial Chamber I), No. ICC-02/11-01/15-405, 29 January 2016, paras. 13-15.

³¹ See the Request, *supra* note 2, paras. 21-22.

³² See the Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 03 May 2011, para. 67.

in the proceedings could constitute the basis for the Chamber's eventual decision on his guilt or innocence.³³ Indeed, the expectation that all evidence submitted could be considered for the purpose of the Chamber's decision under article 74(2) arises directly from the Court's own legal instruments which accept that there is no inherent incompatibility between fair trial rights and an assessment of the relevance and probative value of the evidence at the end of the proceedings in light of all evidence submitted.³⁴

19. In relation to the Defence's argument that the evidentiary regime at trial must be adversarial,³⁵ the CLRV submits that the Request fails to show why the trial proceedings and the relevant evidentiary regime governing the admissibility of evidence must only be adversarial in nature.

20. Rather, the Appeals Chamber already held that (i) article 69(4) of the Statute does not oblige a Chamber to rule on the relevance or admissibility of each item of evidence submitted by the parties but is permissive in nature. The statutory provisions of the Court provide a Chamber with the general "power", "discretion" or "authority" to rule on the relevance or admissibility of evidence, rather than with a duty to do so; and (ii) the interpretation of article 69(4) of the Statute as not containing a mandatory test for an item of evidence to be admissible at trial is also confirmed by its drafting history. The final formulation of article 69 was indeed the result of a compromise between common law systems (adversarial, which tend to exclude irrelevant or inherently unreliable evidence) and civil law systems (inquisitorial, in which all evidence is generally admitted and its relevance and probative value are considered freely together with the weight of the evidence). While article 69 adopts presumptively the civil law procedure of general

³³ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", *supra* note 27, para. 607.

³⁴ *Idem*.

³⁵ See the Request, *supra* note 2, paras. 27-35.

admissibility and free evaluation of evidence, it also incorporates some common law concepts, permitting the Chamber to rule on the relevance or admissibility of any evidence before considering the question of weight. Thus, the formulation of article 69(4) of the Statute – as well as the related provisions in the Rules – was the result of a compromise creating a hybrid system which permits consideration by a Chamber of the relevance and/or probative value of evidence as part of the eventual evaluation of the guilt or innocence of the Accused.³⁶

21. The Defence further argues that the Chamber is required to discuss or explicitly articulate its assessment of standard evidentiary criteria for each item formally submitted into evidence in its judgment under article 74 of the Statute since Mr Ongwen has the right to a reasoned statement that indicates the *rationale* behind the Chamber's judgment.³⁷ Yet, the CLRV recalls that the Appeals Chamber has already pronounced itself on the matter, ruling that in order to fulfil its obligation to provide a reasoned opinion under article 74(5) of the Statute, the Chamber is not required to address all the arguments raised by the parties, *or every item of evidence relevant to a particular factual finding*, provided that it indicates with sufficient clarity the basis for its decision.³⁸ In addition, the Appeals Chamber underlined that it must be presumed that the Trial Chamber evaluated all the evidence before it as long as there is no indication that it completely disregarded any particular piece of evidence.³⁹

22. Lastly, the Defence avers that the evidentiary regime set out by the Challenged Decisions leads to legal uncertainty in the trial proceedings, violating Mr

³⁶ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", *supra* note 27, paras. 585- 592.

³⁷ See the Request, *supra* note 2, para. 38.

³⁸ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", *supra* note 27, para. 105.

³⁹ *Idem*.

Ongwen's fair trial rights.⁴⁰ In this regard, the CLRV again recalls that the Appeals Chamber has already held that, as long as the Trial Chamber clearly indicated at the commencement of the trial proceedings that no ruling on the relevance or admissibility of the submitted evidence would be rendered other than in the context of the potential applicability of an exclusionary rule, there can be no uncertainty as to the status of the evidence submitted by the parties.⁴¹ In sum, the Defence's arguments appear meritless and show neither a clear error of reasoning in the Challenged Decisions nor any necessity to reconsider them in order to prevent an injustice.

V. CONCLUSION

23. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.



Paolina Massidda
Principal Counsel

Dated this 3rd day of June 2019

At The Hague, The Netherlands

⁴⁰ See the Request, *supra* note 2, paras. 44-54.

⁴¹ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", *supra* note 27, para. 610.