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**International
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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***

PUBLIC

**Defence Request for Leave to Appeal the ‘Decision on Defence Request regarding the
Evidentiary Regime’**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal Trial Chamber IX's ('TC IX') 'Decision on Defence Request regarding the Evidentiary Regime' ('Decision').¹

II. APPELATE ISSUES

2. The appellate issues arising out of the Decision are:
 - A. Whether TC IX's failure to consider and adhere to the applicable Appeals Chamber's jurisprudence in the *Bemba* case, concerning the obligation to provide a full and reasoned statement of findings on each item of evidence submitted into evidence under Article 74(5) of the Statute, amounted to an error of law that materially affected the Decision ('**Issue 1**').
 - B. Whether TC IX erred in re-characterizing the Defence request under Rule 134(3) of the Rules as a motion for reconsideration ('**Issue 2**').

III. SUBMISSIONS

3. The Defence notes Articles 21, 64(2), 67(1), 69(4), 74(5) and 83(4) of the Statute and Rule 64(2) of the Rules of Procedure and Evidence ('Rules'). The Defence also incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in its prior requests.²

A. Issue 1

4. In rejecting the Defence request to confirm that the evidential rulings for all items submitted into evidence and their assessment will be discussed in the judgment,³ TC IX held that there has been only one decision, the *Bemba et al.* Appeal Judgment which confirmed the lawfulness of the type of evidentiary regime used by TC IX and which has never been

¹ *Ongwen*, Decision on Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1546, 19 June 2019 ('**Decision**').

² *Ongwen*, Public Redacted Version of Defence Request for Leave to Appeal "Decision on Defence Request for Amendment of the Seating Schedule", ICC-02/04-01/15-1334-Red, 1 October 2018, paras 4-10.

³ *Ongwen*, Defence Request and Observations on Trial Chamber IX's Evidentiary Regime, ICC-02/04-01/15-1519, 21 May 2019 ('**Defence Request**'), para. 55, point C; see also, paras 42 (footnote 64), 43 and 54.

reversed.⁴ In effect, TC IX maintains its approach that it is not required to provide a full and reasoned statement detailing the results of its evidentiary rulings for all items of evidence submitted.⁵

5. While TC IX notes Judge Henderson's disagreement with the majority of the *Bemba et al.* Appeals Chamber and the "difference of opinion in the decisions by the Court" when summing up the Defence's arguments,⁶ TC IX makes no other mention in its analysis of these differing opinions nor the *Bemba* Interlocutory Decision.⁷
6. In contrast, in the *Bemba* Interlocutory Decision, the Appeals Chamber unequivocally held that irrespective of which evidentiary regime the Trial Chamber chooses, it is still obliged to make evidentiary rulings of every item of evidence, either at the time of submission, during the trial or in its judgment.⁸ Moreover, TC IX did not consider that it was the evidentiary regime of Trial Chamber III in the *Bemba* case through which it submitted every item of evidence without delivering any reasons for its evidentiary rulings that led to the *Bemba* Interlocutory Decision.⁹
7. Even if the *Bemba et al.* Appeal Judgment came after the *Bemba* Interlocutory Decision, the distinct context and circumstances of these two cases must be taken into consideration. While the *Bemba et al.* case involved offences against the administration of justice under Article 70 of the Statute, the *Bemba* case – similar to the *Ongwen* case – dealt with Article 5 crimes. TC IX should also take into consideration that Judge Morrison, who also formed part of the majority in the *Bemba et al.* Appeal Judgment, later stated in a joint separate opinion with

⁴ Decision, para. 33; see also *Bemba et al.*, Public Redacted 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", ICC-01/05-01/13-2275-Red, 8 March 2018 (*'Bemba et al. Appeal Judgment'*).

⁵ *Ongwen*, Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, 13 July 2016 (*'Initial Directions'*), para. 24: "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"; see also *Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615, 1 December 2016 (*'Intercepts Decision'*), para. 13.

⁶ Decision, para. 7.

⁷ *Bemba*, 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", ICC-01/05-01/08-1386 OA 5 OA 6, 3 May 2011 (*'Bemba Interlocutory Decision'*), para. 37.

⁸ *Bemba* Interlocutory Decision, para. 37.

⁹ *Bemba et al.* Separate Opinion of Judge Geoffrey Henderson, ICC-01/05-01/13-2275-Anx, 8 March 2018, para. 55.

Judge Van den Wyngaert that it is inappropriate to employ a similar evidentiary regime as used in the *Bemba et al.* case for cases under Article 5 of the Statute.¹⁰

8. Furthermore, TC IX did not consider nor make any finding of the developments which took place in the appellate jurisprudence since the rendering of the *Bemba et al.* Appeal Judgment. TC IX disregarded important appellate jurisprudential arguments by not considering the separate opinions of three appellate judges assigned to the *Bemba* case.¹¹ *First*, Article 83(4) of the Statute is clear that all opinions regardless if they form the opinions of the minority or of the majority view, are part of the Appeals Chamber's judgment.¹² *Second*, the Defence underlines that the views of appellate judges who are part of the highest and last instance Chambers of this Court should be considered and adhered to by Pre-Trial and Trial Chambers.¹³
9. Three out of the five appellate judges that formed the bench in the *Bemba* Appeal Judgment wrote opinions disagreeing with the *Bemba et al.* Appeal Judgment and maintained that the

¹⁰ *Bemba*, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, 8 June 2018 ('**Separate Opinion of Judge Van den Wyngaert and Judge Morrison**'), para. 18; see also, *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red, 8 June 2018 ('**Bemba Appeal Judgment**').

¹¹ Although this was in the context of TC IX re-characterizing the Defence request and looking at its arguments through the angle of a motion for reconsideration, in the same paragraph TC IX discusses the holdings of the Appeals Chamber in the *Bemba et al.* case, where it concluded that the "finding has never been reversed" and that "there are no jurisprudential arguments constituting a reason for reconsideration", para. 33 of the Decision. Due to the absence of any other reason offered, the Defence understands through this statement that TC IX did not consider the opinions of Judges Eboe-Osui, Van den Wyngaert and Morrison due to a similar reason.

¹² This interpretation has been used by the OTP during the hearing on Mr Bemba's claim for compensation, at lines 24-25 on page 23, and line 1 on page 24, in ICC-01/05-01/08-T-376-ENG, 9 May 2019. Although the OTP referred to Article 74(5) of the Statute, given that it is referring to the minority dissent in the *Bemba* Appeal Judgment, the Defence believes that this interpretation logically applies to Article 83(4) of the Statute as well. Additionally, although Article 21(2) of the Statute implicitly confirms that there is no doctrine of *stare decisis* at the ICC, "previous decisions" under Article 21(2) include separate and dissenting opinions as these "enrich the **emerging jurisprudence** of the Court and [...] contribute to the development of the law generally", see Christopher Staker and Franziska Eckelmans, "Proceedings on appeal: Article 83" in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (Beck et al., 3rd ed., 2016), ('**Staker and Eckelmans**'), page 1973, at 16.

¹³ Staker and Eckelmans, page 1973, at 17: They interpret Article 83(4) of the Statute as "mak[ing] it abundantly clear that **reasoning** of an Appeals Chamber judgment is an important part of the Court's administration of justice". Similarly, although there is no doctrine of *stare decisis* at the Extraordinary Chambers in the Courts of Cambodia, the International Co-Investigative Judge Bohlander found that "it would nonetheless be undesirable from the point of view of clarity and uniformity of the law in a legal environment as closed as that of the ECCC for judges lower in the hierarchy to disregard the SCC case law unless there were exceptional circumstances", see *Im Chaem*, Closing Order (Reasons), Case File No: 004/1/07-09-2009-ECCC-OCIJ, 10 July 2017, para. 10; and *Meas Muth*, Closing Order, Case File No: 003/07-09-2009-ECCC-OCIJ, 28 November 2018, para. 37.

Bemba Interlocutory Decision is the correct approach.¹⁴ The Defence submits that this specific point was addressed in the appellate judges' separate opinions and not in the main body of the *Bemba* Appeal Judgment because a) the issue did not formally arise out of Trial Chamber III's conviction decision,¹⁵ and b) the obligation for Trial Chamber III to provide the results of evidential rulings for all items was already clarified and decided in the *Bemba* Interlocutory Decision and thus was *res judicata*.¹⁶

10. The *Bemba et al.* Appeal Judgment and the *Bemba* Interlocutory Decision resulted in a conflict regarding the interpretation of Article 74(5) of the Statute; this was equally highlighted by the Legal Representatives of the Victims ('LRVs').¹⁷ TC IX's Decision evades the conflict by ignoring the *Bemba* Interlocutory Decision and stating erroneously that the *Bemba et al.* Appeal Judgment is the only appellate jurisprudence on the impugned evidentiary regime. The Defence and LRVs provided TC IX a unique opportunity to make its evidentiary rulings approach consistent with its statutory obligations under Article 74(5) of the Statute. However, given that TC IX missed the opportunity by rejecting the Defence and LRVs requests, the remaining body that is in the best position to clarify the conflicting jurisprudence is the Appeals Chamber.

B. Issue 2

11. TC IX re-characterized the Defence request under Rule 134(3) of the Rules as a motion for reconsideration for the reason that, according to TC IX, the issues raised by the Defence did not arise during the trial, but rather arose from the issuance of the Initial Directions.¹⁸
12. As mentioned by TC IX, the Defence in the 'Joint Prosecution and Defence submission on the conduct of proceedings' made proposals on the 'submission approach' of evidence.¹⁹ That said, it is important to highlight that the joint submissions were filed prior to the

¹⁴ Judge Van den Wyngaert and Judge Morrison consider it to be the correct approach only for Article 5 cases and not for Article 70 cases, see Separate Opinion of Judge Van den Wyngaert and Judge Morrison, paras 17-18; and *Bemba*, Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3, 14 June 2018 ('**Separate Opinion of Judge Eboe-Osuji**'), paras 296-297.

¹⁵ Separate Opinion of Judge Van den Wyngaert and Judge Morrison, para. 17.

¹⁶ Staker and Eckelmans, page 1935, at 45: "Where leave to appeal has been granted and the Appeals Chamber decided the appeal on the merits, this matter should be considered *res judicata* and preclude the parties from raising it again in a final appeal".

¹⁷ *Ongwen*, Victims' Response to "Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'", ICC-02/04-01/15-1533, 31 May 2019 ('**LRVs Response**'), paras. 26-32.

¹⁸ Decision, para. 17.

¹⁹ Decision, para. 23.

commencement of the trial,²⁰ as did the Initial Directions of TC IX.²¹ At that time, the issues which have subsequently arisen and continue to arise²² during the course of the trial due to TC IX's evidentiary regime were not known to the Defence. It is for that reason that the Defence did not request a motion for reconsideration, but accordingly, requested TC IX to rule on the issues which it identified in its Defence Request under Rule 134(3) of the Rules.

13. TC IX also noted that "[t]he Defence did not request leave to appeal the Initial Directions in order to allege that it considers the Evidentiary Regime to be unfair".²³ At the time, the effects of the Initial Directions were not visible. While the Initial Directions is the source of the continuing fair trial violations and the prejudice highlighted in the Defence Request,²⁴ the extent of the prejudice could not reasonably have been established at the time the evidentiary regime was created. The Decision failed to appreciate this fact and the extent of the prejudice highlighted in the Defence Request.
14. While the root of the issues is the evidentiary regime set up in the Initial Directions, the issues that keep arising occurred during the trial proceedings. It is for this reason that a leave to appeal was not possible at the time, as the Defence could not demonstrate specifically how the evidentiary regime would affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
15. Even if TC IX rejected the Defence's request based on Rule 134(3) of the Rules, it was incorrect not to consider the Defence Request in the interests of justice. Article 64(2) of the Statute makes TC IX the guarantor of a fair and expeditious trial; the issues raised by the Defence and the remedies requested in its Defence Request regarding the evidentiary regime clearly concern issues regarding a fair trial, in particular, Mr Ongwen's rights under Article 67(1) of the Statute.

²⁰ *Ongwen*, Joint Prosecution and Defence submissions on the conduct of proceedings, ICC-02/04-01/15-486, 30 June 2016, paras 50-51.

²¹ Initial Directions.

²² TC IX stated in para. 27 of the Decision that "despite the opposition to these decisions [referring to the decisions regarding evidence that falls outside of the temporal scope] the Defence has followed these rulings itself and elicited ample testimony which falls outside of the temporal scope of the charges". The fact that the Defence complied with the decisions of TC IX does not mean that it agrees with the rulings nor that it minimizes the impact of the prejudice it continues to suffer due to these decisions.

²³ Decision, para. 23.

²⁴ Defence Request.

C. Issues 1-2 satisfy the legal criteria under Article 82(1)(d) of the Statute

1. Issue 1 satisfies the legal criteria under Article 82(1)(d) of the Statute

16. *First*, the resolution of Issue 1 is essential for the determination of the matters raised in the Defence Request, *i.e.* TC IX's obligation pursuant to Article 74(5) of the Statute to discuss its evidentiary rulings for each item of evidence submitted.
17. *Second*, the Defence submits that Issue 1 significantly affects the fair and expeditious conduct of the proceedings, and will significantly affect the outcome of the trial. This is because Mr Ongwen has the fundamental right to know the reasons for TC IX's decision on his guilt or innocence. In this regard, the Defence also supports the LRVs' 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".²⁵ Indeed, in order to maintain the trial as fair and expeditious, it is also essential for the Defence to know how every item submitted into evidence was assessed by TC IX in arriving at its final determination in the judgment.
18. Moreover, if TC IX does not discuss the results of its evidentiary rulings in its judgment, it can significantly hamper Mr Ongwen's ability, should he wish to exercise his right to appeal under Article 81 of the Statute. This is because without such a discussion, he could be prevented from establishing on appeal that TC IX potentially erred by providing (or not) regard to specific items of evidence which led to an erroneous basis for his conviction.²⁶
19. *Third*, the Defence is of the view that an immediate resolution of Issue 1 by the Appeals Chamber will materially advance the proceedings. This is because, as mentioned by TC IX, "a substantial part of the trial [is] already [...] over".²⁷ Thus an immediate resolution by the Appeals Chamber would clarify whether TC IX is obliged to include the results of its evidentiary rulings for each item of evidence submitted into evidence before TC IX renders its trial judgment. Furthermore, the Appeals Chamber is better placed to resolve the conflicting

²⁵ LRVs Response, para. 33.

²⁶ Separate Opinion of Judge Eboe-Osuji, para. 305.

²⁷ Decision, para. 24.

positions taken by different panels of the Appeals Chamber in the interpretation of Article 74(5) of the Statute.²⁸

20. Put differently, if TC IX is wrong and it proceeds to issue a trial judgment without providing a full and reasoned statement of findings on each item submitted into evidence as required under Article 74(5) of the Statute, then this will eventually have an immense impact on the outcome of the *Ongwen* case and possibly the development of the future jurisprudence of this Court.

2. Issue 2 satisfies the legal criteria under Article 82(1)(d) of the Statute

21. *First*, the resolution of Issue 2 is essential for the determination of the matters raised in the Defence Request, *i.e.* the prejudicial effects of TC IX's evidentiary regime on Mr Ongwen during the trial.
22. *Second*, the Defence submits that Issue 2 significantly affects the fair and expeditious conduct of the proceedings. By re-characterizing the Defence request made pursuant to Rule 134(3) of the Rules as a motion for reconsideration, the TC applied a higher standard which is an "exceptional measure"²⁹ rather than the lower threshold in Rule 134(3) of the Rules being the need to demonstrate that the issue(s) "arise during the course of the trial". Given that the Defence request was drafted pursuant to Rule 134(3), it was not drafted in such a way to justify nor meet the threshold of a motion for reconsideration. Alternatively, once TC IX re-characterized the request as a motion for reconsideration, the Defence should have been given an opportunity to re-draft its request to meet the high threshold of reconsideration.
23. *Third*, immediate resolution by the Appeals Chamber will materially advance the proceedings, as it would clarify whether Trial Chambers are able to re-characterize requests made under a provision of a lower threshold to one with a higher threshold without providing the party the opportunity to file further submissions to meet the higher threshold. Given that motions will be filed in the future by the Defence, it would advance the proceedings if the Defence knew whether it needed to consider all of the possible re-characterizations TC IX can make to its requests and alternatively try and meet those thresholds.

²⁸ *Bemba* Interlocutory Decision and *Bemba et al.* Appeal Judgment.

²⁹ Decision, para. 34.

IV. REMEDY SOUGHT

24. For the reasons stated above, the Defence requests that leave is granted by TC IX to appeal Issues 1-2 cited above.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 24th day of June, 2019

At Brussels, Belgium