

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **28 June 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

**Prosecution's Response to Defence Request for Leave to Appeal 'Decision on
Defence Request regarding the Evidentiary Regime'**

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence's Request for Leave to Appeal ("Request")¹ the "Decision on Defence request regarding the Evidentiary Regime" ("Decision")² should be rejected. The Request fails to meet the requirements for leave to appeal, which is the identification of an *appealable* issue arising from the Decision.

2. An "issue" is an identifiable subject or topic arising from the decision requiring a decision for its resolution—not merely a question over which there is disagreement or conflicting opinion.³ If the Defence misrepresents a factual finding, in order to make it a point of law,⁴ the issue cannot be said to have arisen from the decision as such and accordingly the application must be dismissed.⁵

3. The two proposed issues⁶ either do not arise from the Decision and/or merely repeat arguments previously made in the Defence Request and Observations on Trial Chamber IX's Evidentiary Regime ("Original Filing")⁷ and express the Defence's disagreement with the Decision.

4. Further, the proposed issues do not meet the remaining cumulative requirements under article 82(1)(d) of the Statute.

Submissions

Issue 1 does not arise from the Decision and in any event fails to identify an appealable issue

5. Issue 1—whether TC IX's failure to consider and adhere to the applicable Appeals Chamber's jurisprudence in the *Bemba* case, concerning the obligation to

¹ ICC-02/04-01/15-1550.

² ICC-02/04-01/15-1546.

³ ICC-01/04-168, para. 9.

⁴ See ICC-01/09-02/11-406, para. 46.

⁵ See ICC-01/05-01/13-1278, para. 9. See also ICC-02/11-01/15-117, para. 19; ICC-01/04-01/07-1732, paras. 15, 17-18; ICC-01/04-01/10-487, paras. 32-33; ICC-01/04-01/07-1088, paras. 33-35; ICC-01/04-535, paras. 26-29; ICC-01/04-01/10-106, p. 6.

⁶ Request, para. 2.

⁷ ICC-02/04-01/15-1519-Red.

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 —⁸ does not arise because it is predicted on a misinterpretation of the Decision. In any event, instead of raising an appealable issue, the Defence merely repeats previous submissions and disagrees with the Chamber's conclusion.

6. First, Issue 1 does not arise from the Decision because contrary to the Defence's assertion, the Chamber did consider the Defence's argument about the *Bemba* main case jurisprudence⁹ but rejected the Defence's interpretation of it.¹⁰ As such, no leave to appeal should be granted in relation to proposed Issue 1.

7. Second, Issue 1 is not appealable because it is merely a question on which the Defence disagrees. Specifically, the Defence's assertion that the Chamber has failed to "*adhere* to the applicable Appeals Chamber's jurisprudence in the *Bemba* [main] case"¹¹ expresses no more than a disagreement with the Chamber.

8. Contrary to the Defence's submission, the Interlocutory Decision in the *Bemba* main case expressly states that a Chamber need only "*consider* the relevance, probative value and 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."¹² It does not support the Defence's proposition that a Trial Chamber must *rule* on every item of evidence *and discuss its assessment of each item* in its judgement.¹³ The Appeals Chamber confirmed this interpretation.¹⁴

⁸ Request, para. 2.

⁹ Decision, paras. 7, 33, fn. 54.

¹⁰ Decision, para. 33.

¹¹ Request, para. 2.

¹² ICC-01/05-01/08-1386, para. 37.

¹³ Request, para. 6.

¹⁴ ICC-01/05-01/13-2275-Red, para. 594.

9. Consistent with this, the Chamber has repeatedly stated that it “will consider these standard evidentiary criteria for all items recognised as submitted during its deliberation of the judgment, but not necessarily entertain this discussion for each item in the judgment”.¹⁵

10. Finally, the Defence’s assertion that the Chamber failed to rely on or disregarded separate opinions the *Bemba* main case¹⁶ is misconceived. Whilst dissenting opinions may be jurisprudentially valuable, they are not part of the operative part of the decision or judgment. More specifically, the Majority of the *Bemba* main case did not rule on the ‘submission’ evidentiary regime because it was not an issue on appeal. Therefore, for the reasons set out above Issue 1 should be rejected.

Issue 2 fails to identify an appealable issue

11. Issue 2—whether TC IX erred in re-characterizing the Defence request under Rule 134(3) of the Rules as a motion for reconsideration—¹⁷ is not appealable because it is merely a question on which the Defence disagrees. Although it concedes that “the root of the issues is the evidentiary regime set up in the Initial Directions”,¹⁸ the Defence reiterates its submission that the Original Filing¹⁹ should have been addressed under Rule 134(4) and expresses its disagreement with the Chamber’s decision to consider it as a motion for reconsideration of the Initial Directions.²⁰ This is merely a question over which there is a disagreement, and not an identifiable subject or topic arising from the decision and requiring a decision for its resolution.²¹ For these reasons, Issue 2 should also be rejected.

¹⁵ Decision, para. 1. See further ICC-02/04-01/15-497, para. 24.

¹⁶ Request, para. 8.

¹⁷ Request, para. 2.

¹⁸ Request, para. 14. See ICC-02/04-01/15-497 (“Initial Directions”).

¹⁹ ICC-02/04-01/15-1519-Red, para. 3.

²⁰ Request, paras. 12-14.

²¹ ICC-01/04-168, para. 9.

The other cumulative article 82(1)(d) requirements are not met

12. Even accepting *arguendo* that the proposed issues arise from the decision, the Defence has failed to demonstrate that the issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Request fails to substantiate the Defence's claims that the requirements of article 82(1)(d) are met.

13. The Defence claims that Issue 1 affects the fair and expeditious conduct of the proceedings because Mr Ongwen has a fundamental right to know how each submitted item of evidence was assessed by the Chamber in coming to its verdict.²² The Defence argument is entirely speculative insofar as it assumes in advance that Chamber will not adequately explain its reasoning and thus negatively impact Mr Ongwen's ability to appeal assuming he is convicted.²³

14. The Defence's argument that the fair and expeditious conduct of the proceedings is significantly affected by Issue 2 is also based on an incorrect reading of the law,²⁴ as set out in the Decision itself. There is no basis for the suggestion that the Chamber was obligated to allow the Defence an opportunity to argue a reconsideration standard which it failed to articulate in its original request.²⁵ In any event, the Defence is not prejudiced since the Chamber considered the Defence arguments. Nor does the Decision prejudice the possibility that the Defence may seek in the future reconsideration of the Initial Directions, if justified. However, nothing in the Request suggests that there are additional facts or information which would support such request.

²² Request, paras 17-18.

²³ Request, para.18.

²⁴ Request, para. 22.

²⁵ Request, para. 22.

15. Contrary to the Defence's speculative submissions,²⁶ there is also no basis to conclude that an immediate resolution of the proposed issues by the Appeals Chamber would materially advance these proceedings. It is much more likely that appellate litigation at this late stage of proceedings will result in delays and distractions for all Parties and Participants at a crucial phase of the case. Further, the argument that immediate resolution of Issue 2 would allow the Defence to consider and address all possible "re-characterisations" of its filings and address possible alternative standards²⁷ rests on pure speculation.

16. Finally, the Defence appears to suggest that the Chamber should have granted its Original Filing based on the "interests of justice".²⁸ Aside from this requirement not being included in article 82(1)(d), the Defence fails to acknowledge that the Chamber comprehensively addressed the merits of the Defence's Original Filing.²⁹ The Chamber also comprehensively addressed any alleged prejudice. Nor does the Defence support its argument that allowing the Request would serve the "interests of justice". To the contrary, allowing an appeal at this stage would hinder the fair and expeditious conduct of the proceedings because: i) the vast majority of trial proceedings in this case have already been concluded; and ii) the evidentiary regime applied equally to the Party and Participants that have already finished presenting their cases.

²⁶ *Contra* Decision, para. 19-20, 23.

²⁷ Request, para. 23.

²⁸ Request, para. 15.

²⁹ Decision, paras. 3-7, 16-33.

Conclusion

17. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 28th June 2019
At The Hague, the Netherlands