

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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**

**Victims' Response to "Defence Request for Leave to Appeal the 'Decision on  
Defence Request regarding the 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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Victims**

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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. The Legal Representatives for Victims (“LRVs”) submit that the “Defence request for leave to appeal the ‘Decision of the Trial Chamber on the Defence Request regarding the Evidentiary Regime’”<sup>1</sup> (“Defence Request”) should be rejected for failure to meet the criteria laid out in article 82(1)(d) of the Rome Statute (“Statute”). The Defence fail to identify any appealable issues warranting certification. The issues proposed for certification may be characterized as mere disagreements with the Trial Chamber’s reasoning. Furthermore, the Defence Request does not meet the remaining cumulative requirements under article 82(1) (d) of the Statute.

## II. PROCEDURAL HISTORY

1. On 19 June 2019, Trial Chamber IX (“Chamber”) rendered its Decision on the Defence Request regarding the Evidentiary Regime” (“Decision”)<sup>2</sup> where it stated that “none of the submissions presented by the Defence justifies the exceptional measure of reconsideration.”<sup>3</sup>
2. The Defence Request was filed on 24 June 2019. The Defence identified two subjects upon which it anchors its request for leave to appeal the decision of the chamber.<sup>4</sup>

## III. SUBMISSIONS

*The Defence fails to identify any appealable issues*

3. The two issues framed by the Defence for appeal are:

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<sup>1</sup> ICC-02/04-01/15-1550.

<sup>2</sup> ICC-02/04-01/15-1546.

<sup>3</sup> Para.34, ICC-02/04-01/15-1546.

<sup>4</sup>Defence Request ICC-02/04-01/15-1550, para. 2 (A) and 2(B).

- A. Whether the Chamber'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 the Chamber erred in re-characterising the Defence Request under rule 134(3) of the Rules of Procedure and Evidence ("Rules") as a motion for reconsideration ("Issue 2").<sup>5</sup>

### ***Issue 1***

4. Article 69(4) of the Statute states as follows:

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 to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.<sup>6</sup>

5. The Statute has adopted a flexible approach. During the negotiations preceding the Rome Statute it was decided as a compromise to give some guidance, but leave details to the Statute, Rules and the Court's own jurisprudence. The adopted version of article 64<sup>7</sup> is a compromise, which *authorizes*, rather than *obliges*, a chamber "to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69."<sup>8</sup> The Chamber has no obligation to rule on the admissibility of evidence during the course of the proceedings.
6. The main contention of the Defence is that the Chamber did not consider or make any finding of the developments which took place in the appellate

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<sup>5</sup> *Ibid*, para 2(A) and (B).

<sup>6</sup> Emphasis added.

<sup>7</sup> Article 64(9) (a) of the Statute authorises the Chamber to "[R]ule on the admissibility of relevance of evidence..."

<sup>8</sup> K.Piragoff, (2008) Evidence in Commentary on the Rome Statute of the International Criminal Court, 1305–1306.

jurisprudence in the main *Bemba* case<sup>9</sup> after the rendering of *Bemba et al.*,<sup>10</sup> and nor did it take the opportunity to clarify the conflicting jurisprudence of the Appeals Chamber.<sup>11</sup>

7. As previously highlighted by the LRVs, 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.<sup>12</sup>
8. The LRVs submit that this is not an appealable issue, but rather a repetition of arguments previously raised by the Defence. The applicability of the decision in the *Bemba* main case has been considered and rightly rejected by the Chamber.<sup>13</sup> Issue 1 is a mere disagreement with the approach of the Chamber and not an issue that would affect the fair and expeditious conduct of the proceedings.<sup>14</sup>
9. Accepting *arguendo*, in order to meet the requirements under article 82(1) (d), the Defence must at the very least demonstrate an error of law that materially affected the Decision. The Defence has unequivocally failed to show that the Chamber has committed a clear error of law affecting the fairness of these proceedings.
10. In order to assess whether the Chamber erred in its decision, the Defence would be obliged to show that the error complained of invalidates the decision of the

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<sup>9</sup> *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

<sup>10</sup> Appeals Chamber, *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 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”, 8 March 2018, ICC-01/05-01/13-2275-Red and SEPARATE OPINION OF JUDGE GEOFFREY HENDERSON, 8 March 2018, ICC-01/05-01/13-2275-Anx.

<sup>11</sup> Defence Request, paras. 8 and 10.

<sup>12</sup> Victims’ Response to “Public Redacted Version of ‘Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime’”, ICC-01/04-01/15-1533, para.25.

<sup>13</sup> Decision, para. 33.

<sup>14</sup> Rome Statute, art. 82(1)(d).

Chamber and/or occasions a miscarriage of justice. The Defence has failed to do this. At this stage, Defence arguments are speculative as they assume that Mr Ongwen will be convicted and that Chamber will fail to explain its reasoning for this decision.

11. The basis of the Defence Request is simply a complaint that the Chamber has not adopted the approach outlined in the main *Bemba* case, and instead has favoured the *Bemba et al* approach as it relates to the assessment of evidence.
12. The LRVs posit that this issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings. The Defence Request has demonstrated no basis on which the evidentiary regime adopted and applied by the Chamber is impermissible pursuant to article 64 (9) of the Statute and the jurisprudence of this Court.

### *Issue 2*

13. Issue 2 concerns the complaint that made in the re-characterisation of the Defence Request under Rule 134(3) of the Rules as a motion for reconsideration for the reason that the issues raised by the Defence did not arise during the trial, but rather arose from the issuance of the Initial Directions.<sup>15</sup>
14. Similarly to Issue 1, the LRVs submit that Issue 2 fails to identify an appealable issue. The Defence is yet again expressing “its continued disappointment with several decisions rendered by the Chamber”<sup>16</sup>, as opposed presenting a subject emanating from the Decision which requires appellate resolution.
15. The Defence position that “[W]hile the root of the issues is the evidentiary regime set up in the Initial Directions, the issues that keep arising occurred

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<sup>15</sup> Defence Request, para 2(B). See ICC-02/04-01/15-497(“Initial Directions”).

<sup>16</sup> Decision, para.30.

during the trial proceedings,”<sup>17</sup> is wholly unconvincing. From any logical viewpoint, it is impossible to agree with the Defence that they did not request leave to appeal the Initial Directions as “[A]t the time, the effects of the Initial Directions were not visible.”<sup>18</sup>

16. As stated by the Chamber in its Decision, the Defence has had ample opportunity to raise any concerns it has with the evidentiary regime as laid down in the Initial Directions.<sup>19</sup>

17. *Arguendo*, even if Issue 2 does arise from the Decision, the LRVs posit that this issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings. On the contrary appellate review will result in unjustifiable delays which ultimately impact on the rights of victims to the truth, justice and reparations.

18. In conclusion, the Defence’s proposed issues do not constitute appealable issues. Given that the Article 82(1)(d) requirements are cumulative, and since failure to fulfil one of the requirements is fatal to an application for leave to appeal, the Defence Request should be rejected.

#### IV. RELIEF SOUGHT

19. The LRVs respectfully request the Chamber dismiss the Defence Request in its entirety.

Respectfully submitted,

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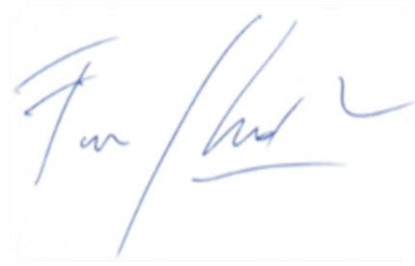
<sup>17</sup> Defence Request, para. 14.

<sup>18</sup> Defence Request, para.13.

<sup>19</sup> Decision, para. 23.

A handwritten signature in blue ink, appearing to read 'Manoba', with a stylized flourish at the end.

**Joseph A. Manoba**

A handwritten signature in blue ink, appearing to read 'Francisco Cox', with a stylized flourish at the end.

**Francisco Cox**

Dated this 28<sup>th</sup> day of June 2019

At The Hague, The Netherlands and at Santiago, Chile