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**International
Criminal
Court**

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Date: **19 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

Decision on Defence Request regarding the Evidentiary Regime

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and 67(1) of the Rome Statute ('Statute'), Rule 134 of the Rules of Procedure and Evidence ('Rules') and Regulation 23bis of the Regulations of the Court issues the following 'Decision on Defence Request regarding the Evidentiary Regime'.

I. Procedural history and submissions

1. On 13 July 2016, the Presiding Judge issued the 'Initial Directions on the Conduct of the Proceedings' ('Initial Directions').¹ Therein, the approach regarding evidence in this case was laid out. As has been done in other cases before this Court, items of evidence will be recognised as formally submitted during the trial and consideration of their relevance, probative value, and potential prejudice will be deferred until the judgment. The Chamber 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.² Should procedural bars prevent the admission of evidence, the Chamber will rule on them upfront and the Chamber retained the discretion to make earlier rulings on admissibility related issues, if appropriate³ (in its entirety hereafter: 'Evidentiary Regime'⁴).
2. On 21 May 2019, the Defence filed a motion containing 'observations' and requests pertaining to the Evidentiary Regime ('Request').⁵
3. It requests that the Chamber rule on the admissibility and/or relevance of all items submitted (either via a witness or through a bar table motion) into evidence by the parties and participants.⁶ Alternatively, it requests that the Chamber confirm that there will be a ruling on each piece of evidence and a discussion of its assessment in the judgment or an annex to the judgment.⁷

¹ Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497.

² Initial Directions, ICC-02/04-01/15-497, para. 24.

³ Initial Directions, ICC-02/04-01/15-497, para. 26.

⁴ This includes the further explanations provided in: Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615, paras 5-15.

⁵ Defence Request and Observations on Trial Chamber IX's Evidentiary Regime, ICC-02/04-01/15-1519-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-1519-Red.

⁶ Request, ICC-02/04-01/15-1519-Red, paras 55 A) and 55 B).

⁷ Request, ICC-02/04-01/15-1519-Red, para. 55 C).

4. The Defence presents three main arguments in support of its Request: (i) that a holistic evaluation of evidence does not prevent evidential rulings at the point of submission; (ii) that the Evidentiary Regime results in a prejudice to the accused; and (iii) that it results in legal uncertainty.⁸
5. Regarding the first argument invoked by the Defence, it submits that a holistic assessment of all items of evidence does not preclude the Chamber ruling on the admissibility of those items at the point of submission or during the trial.⁹
6. In respect of the second argument, the Defence repeats that the Chamber can still rule on the admissibility of evidence and assess the evidence¹⁰ and avers that the Chamber has applied the Evidentiary Regime up to now to the detriment of the accused.¹¹ Further, according to the Defence, the current system of evidence violates Articles 67(1)(b),(c) and (e) of the Statute, since the Defence is not capable to prepare its case.¹² An admissibility assessment is, pursuant to the Defence, also necessary so that the Chamber ‘screen itself from considering materials inappropriately’.¹³ Lastly, the Defence submits that Article 74 of the Statute requires the Chamber to provide an explicit decision on each item of evidence submitted.¹⁴
7. Concerning the third argument, the Defence submits that the Evidentiary Regime ‘amounts to confusion and legal uncertainty in the trial proceedings’.¹⁵ It argues that the evidentiary approach pursued has been met with a difference of opinion in the decisions by the Court. Accordingly, pursuant to the Defence, this ‘leads to uncertainty regarding which evidentiary regime applies at the Court’.¹⁶ It avers that ‘the holding of the Appeals Chamber in the *Bemba et al.* case is not applicable to Article 5 cases, thus TC IX must follow the holding of the Appeals Chamber in the *Bemba* main case.’¹⁷

⁸ Request, ICC-02/04-01/15-1519-Red, para. 7.

⁹ Request, ICC-02/04-01/15-1519-Red, paras 11-13.

¹⁰ Request, ICC-02/04-01/15-1519-Red, title i) after para. 16.

¹¹ Request, ICC-02/04-01/15-1519-Red, paras 17-19.

¹² Request, ICC-02/04-01/15-1519-Red, paras 20-26.

¹³ Request, ICC-02/04-01/15-1519-Red, title ii) after para 26 and paras 27-26.

¹⁴ Request, ICC-02/04-01/15-1519-Red, paras 36-43.

¹⁵ Request, ICC-02/04-01/15-1519-Red, para. 44.

¹⁶ Request, ICC-02/04-01/15-1519-Red, para. 53.

¹⁷ Request, ICC-02/04-01/15-1519-Red, para. 54 (footnote omitted).

8. Regarding the timing of the Request, the Defence submits that it is timely pursuant to Rule 134(3) of the Rules.¹⁸
9. On 28 May 2019, the Office of the Prosecutor ('Prosecution') filed its response, submitting that the Request should be rejected ('Response').¹⁹
10. The Prosecution submits that the Request should be dismissed *in limine* since the Defence itself requested that the Evidentiary Regime be applied in this case.²⁰ It further argues that the Request is out of time since it falls under Rule 134(2) and not 134(3) of the Rules.²¹ Lastly, it submits that the alternative relief requested is untimely, since the Chamber did not deliver its judgement yet. Accordingly, a guarantee to discuss each item of evidence in the judgment or an annex is premature.²²
11. On 31 May 2019, the Legal Representatives of Victims ('Legal Representatives') filed its response.²³
12. The Legal Representatives submit that the first and second part of the Request should be rejected *in limine* as well as on its merits since it is untimely²⁴ and the Evidentiary Regime does not cause prejudice²⁵ to or violate the rights of the accused.²⁶
13. With regard to the third part of the Request,²⁷ the Legal Representatives submit that 'in light of the conflicting positions in the decision of the respective Appeals Chambers' this part should be granted 'should [the Chamber] see fit'.²⁸
14. On 3 June 2019, the Common Legal Representatives of Victims ('Common Legal Representative', together with the Legal Representatives: 'Victim Representatives') filed its response, submitting that the Request should be rejected *in limine*.²⁹

¹⁸ Request, ICC-02/04-01/15-1519-Red, para. 3.

¹⁹ Prosecution's Response to "Defence Request and Observations on Trial Chamber IX's Evidentiary Regime", ICC-02/04-01/15-1526-Conf.

²⁰ Prosecution Response, ICC-02/04-01/15-1526-Conf, paras 3-17.

²¹ Prosecution Response, ICC-02/04-01/15-1526-Conf, paras 23-28.

²² Prosecution Response, ICC-02/04-01/15-1526-Conf, paras 18-21.

²³ Victims' Response to "Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'", ICC-02/04-01/15-1533 ('LRV Response').

²⁴ LRV Response, ICC-02/04-01/151533, paras 5-10.

²⁵ LRV Response, ICC-02/04-01/151533, paras 12-13.

²⁶ LRV Response, ICC-02/04-01/151533, paras 14-23.

²⁷ Request, ICC-02/04-01/15-1519-Red, para. 55 C).

²⁸ LRV Response, ICC-02/04-01/151533, paras 32-33 and 35.

15. According to the Common Legal Representative, the Request, as framed by the Defence, does not comply with the statutory framework, since the Rome Statute does not know ‘objections’ and the Defence merely aims to re-litigate numerous decisions of the Chamber.³⁰ Should the Chamber consider the Request on its merits, the Common Legal Representative submits it fails to show the necessary requirements for reconsideration.³¹

II. Analysis

16. The Chamber must first decide on the nature of the relief sought. The Chamber notes the language used in the Request,³² which was criticised by the Common Legal Representative for Victims.³³ It finds that the wording used throughout the Request is indeed vague and lacks precision. However, in the last section entitled ‘relief sought’³⁴ the Defence formulates a concise request and the Chamber will accordingly rule on this specific relief sought.
17. The Chamber notes the Defence’s argument regarding the timeliness of the Request and the contention that Rule 134(3) of the Rules applies, since the underlying issues arose, and continues to arise, during the course of the trial. The Chamber finds this reasoning unconvincing. First, the Defence confuses the objection against an ‘issue’ with the objection against the effects resulting from this issue. The issue did not arise during the trial but with the issuance of the Initial Directions, since the Defence objects to the Evidentiary Regime established by the Chamber and its application throughout the case.
18. But more importantly, the Defence’s reliance on Rule 134 of the Rules is misplaced since it omits the key fact that they attempt to revisit a settled issue. In the case at hand, the Defence objects to the Evidentiary Regime, an issue which has already been ruled upon (in the Initial Directions) and which has been further explained and re-affirmed by the Chamber through numerous subsequent decisions.³⁵ The Defence does not wish the

²⁹ CLRV’s Response to “Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime”, ICC-02/04-01/15-1538-Conf (‘CLRV Response’).

³⁰ CLRV Response, ICC-02/04-01/15-1538-Conf, paras 7-11.

³¹ CLRV Response, ICC-02/04-01/15-1538-Conf, paras 13-22.

³² *E.g.*: Request, ICC-02/04-01/15-1519-Conf, para. 2 : ‘The Defence hereby objects to this approach...’.

³³ CLRV Response, ICC-02/04-01/15-1538-Conf, paras 7-8.

³⁴ Request, ICC-02/04-01/15-1519-Red, para. 55.

³⁵ Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520; Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Conf, a public-redacted version

Chamber to merely rule on a specific subject matter, but to alter one of its previous decisions: the decision(s) establishing the Evidentiary Regime. This is the case for all three parts of the Defence request, since the ‘alternative request’³⁶ is also aimed at an alteration of the Evidentiary Regime.

19. Accordingly, the Chamber considers that the issue at hand is not whether the Request is timely under Rule 134 of the Rules but whether the Defence can still attack part of the Initial Directions establishing the Evidentiary Regime. This is also consistent with prior rulings by the Chamber where it held that any objection to the Evidence Regime relates to the Initial Directions and not the subsequent decisions applying this regime.³⁷
20. Since the Initial Directions were issued almost three years ago, in July 2016, the only manner to interpret the Request is as a motion for reconsideration.
21. The Chamber recalls its prior decisions on reconsideration, finding that it is an exceptional measure 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. New facts and arguments arising subsequently to the issuance of the decision may be relevant to this assessment.³⁸
22. The Chamber will not repeat its explanation or motivation for establishing the Evidentiary Regime, as this has been previously done. It will limit itself to the relief sought and accordingly assess whether the Defence presents a clear error of reasoning in the set-up of the Evidentiary Regime or whether reconsideration is necessary to prevent an injustice.

was filed on the same day, ICC-02/04-01/15-596-Red; 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), 22 November 2016, ICC-02/04-01/15-600; Decision on Prosecution Request to Submit Interception Related Evidence, 1 December 2016, ICC-02/04-01/15-615; Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion, 16 November 2017, ICC-02/04-01/15-1074.

³⁶ Request, ICC-02/04-01/15-1519-Conf, para. 55 C).

³⁷ *See*, Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, 9 September 2016, ICC-02/04-01/15-535, paras 15-16.

³⁸ Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4; Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence, 23 February 2017, ICC-02/04-01/15-711, para. 4; Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives, 26 March 2018, ICC-02/04-01/15-1210, para. 6; Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259, para. 12.

23. The Chamber notes that no reason is provided as to the timing of the Request. The Defence did not request leave to appeal the Initial Directions in order to allege that it considers the Evidentiary Regime to be unfair. To the contrary, the Defence actively submitted that the Evidentiary Regime should be adopted by the Chamber. All proposals made in the ‘Joint Prosecution and Defence submission on the conduct of proceedings’ on the admission of evidence made by the Defence were included in the Evidentiary Regime, including a proposal which was made solely by the Defence and not supported by the Prosecution.³⁹ Both parties made reference to the evidentiary system established by Trial Chamber VII, which is in essence the same as the Evidentiary Regime in this case.⁴⁰
24. The Defence does not cite to any new facts which justify reconsideration at this point in the procedure. The Prosecution and the Victim Representatives have presented all their evidence and the Chamber has heard approximately half of the witnesses the Defence wishes to call *viva voce*. The Defence does not explain why it changed its opinion about the Evidentiary Regime with a substantial part of the trial already being over and why it now considers a system it has initially advocated for as being prejudicial to the accused.
25. The submissions made by the Defence which argue that a holistic evaluation of the evidence at the end of the trial does not preclude evidential rulings at the point of submission or during trial are not pertinent for the purpose of the Request. The Defence explains why, in contradiction to its earlier submissions, it now prefers evidentiary rulings at the point of submission and why it considers this to be permissible under the statutory framework. But it does not address how this fulfils the conditions for the exceptional measure of reconsideration.
26. Further, the Chamber notes the Defence’s arguments alleging that the Evidentiary Regime causes prejudice to the accused. For example, the Defence points to a decision in which the Single Judge made an assessment of relevance with regard to information which the Defence sought to have disclosed.⁴¹ Yet, this decision did not concern any

³⁹ Joint Prosecution and Defence submissions on the conduct of proceedings, 30 June 2016, ICC-02/04-01/15-486, paras 50-51.

⁴⁰ Joint Prosecution and Defence submissions on the conduct of proceedings, 30 June 2016, ICC-02/04-01/15-486, footnote 47.

⁴¹ See Decision in Response to an Article 72(4) Intervention, 1 June 2018, ICC-02/04-01/15-1267-Corr 2 (date of corrected version: 26 June 2018), paras 20-24.

assessment of the admissibility or relevance of evidence submitted in the case record, and therefore cannot serve as an example to illustrate the alleged ‘selective and inconsistent application of [the] evidentiary regime’.⁴² While the Defence submitted arguments in relation to the alleged relevance of the information,⁴³ the nature of the underlying request concerned an issue of disclosure in the framework of Article 72 of the Statute. Accordingly, any claim that an alleged prejudice resulted from the Evidentiary Regime cannot be followed.

27. The Defence further argues that evidence which falls outside of the temporal scope of the charges was recognised as formally submitted.⁴⁴ In this case too, the Chamber has already provided several rulings⁴⁵ and any alleged prejudice cannot be addressed by reconsideration of the Evidentiary Regime. Additionally, the Chamber notes that despite its opposition to these decisions the Defence has followed these rulings itself and elicited ample testimony which falls outside of the temporal scope of the charges.
28. Equally, the Defence submits⁴⁶ that the Chamber’s ruling on the admissibility of a report by an expert of the Common Legal Representatives in which the Chamber rejected to exclude portions of this report⁴⁷ and the (negative) ruling on the subsequent request for leave to appeal⁴⁸ are prejudicial. The Defence asserts that the ruling of the Chamber that it will not use comments of the expert on the accused’s responsibility or the elements of the crimes charged are ‘futile’, since those comments are now part of the case file and the Defence will have to address them in its closing brief.⁴⁹
29. The Chamber does not see how any prejudice can result in this case, since it clearly announced which parts it would not use to establish the criminal responsibility of the accused. The Defence is free to disregard the ruling of the Chamber and continue to make submissions on these parts, yet this would be a matter of it choosing to do so,

⁴² Request, ICC-02/04-01/15-1519-Red, para. 18.

⁴³ See Defence Request for Leave to Appeal “Decision in Response to an Article 72(4) Intervention”, 8 June 2018, ICC-02/04-01/15-1279-Conf, paras 34-55.

⁴⁴ Request, ICC-02/04-01/15-1519-Red, para. 19.

⁴⁵ Transcript of hearing, 14 August 2017, ICC-02/04-01/15-T-95-Red-ENG, page 8 line 16 to page 9 line 3. Transcript of hearing, 24 January 2018, ICC-02/04-01/15-T-147-Red2-ENG, page 7, lines 2-14.

⁴⁶ Request, ICC-02/04-01/15-1519-Red, paras 23-24.

⁴⁷ Transcript of hearing, ICC-02/04-01/15-T-175-Red-ENG, page 11, line 14 to page 13 line 3.

⁴⁸ Decision on Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, 1 June 2018, ICC-02/04-01/15-1268.

⁴⁹ Request, ICC-02/04-01/15-1519-Red, para. 24.

rather than it being necessitated by the Chamber's decision or the Evidentiary Regime. Again, even if the Request were granted, the Chamber has already ruled on the admissibility of the report in question and will not revisit its decision. Accordingly, the alleged prejudice would not be remedied were the Request to be granted. Additionally, the Chamber notes that the approach which the Defence criticises is applied equally throughout the case. The Chamber also rejected a request by the Prosecution to exclude part of a report produced by a Defence expert, applying the same reasoning.⁵⁰

30. Considering the above, the Chamber finds that the Defence merely uses the Request to express its continued disagreement with several decisions rendered by the Chamber. This is not sufficient to grant a request for reconsideration.
31. As regards the 'lack of safeguards' requiring a change in the Evidentiary Regime and the submissions made regarding one of the potential Prosecution witnesses,⁵¹ the Chamber notes that the factual statements made by the Defence are wrong. While it submits that '[t]he Defence objected in vain to P-0078's methods and standards of procuring evidence as well as witnesses for the Prosecution', none of the references made in support of this contention contain a concrete request.⁵² The Defence merely questioned other Prosecution witnesses about P-78 but did not once address the Chamber with a specific request. Again, the Request seems to be used by the Defence to submit a general list of grievances it has with the current proceedings, but which are unrelated to the Evidentiary Regime.
32. Lastly, the Chamber notes in the 'safeguards' submissions the contention that it needs 'to make admissibility assessments in order to screen itself from considering materials inappropriately'.⁵³ If this contention were true the Chamber would be tainted in the process of ruling on the admissibility of the evidence and granting the Request would not address the Defence's concern.

⁵⁰ See, E-mail from Trial Chamber IX to the parties on 22 March 2019, at 19:11, 'Decision on Submitted Materials for D-133'.

⁵¹ Request, ICC-02/04-01/15-1519-Red, paras 31-34.

⁵² Request, ICC-02/04-01/15-1519-Red, para. 31 and corresponding footnote .

⁵³ Request, ICC-02/04-01/15-1519-Red, title iii) after para. 26.

33. Regarding the submissions by the Defence that the Evidentiary Regime leads to legal uncertainty⁵⁴ the Chamber notes that up to now there is only one decision by the Appeals Chamber where it had to pronounce itself on the lawfulness of a system like the Evidentiary Regime. The Appeals Chamber confirmed the legality of this approach, with one judge writing separately on this point.⁵⁵ This finding has never been reversed. Accordingly, there are no jurisprudential arguments constituting a reason for reconsideration.
34. In summary, none of the submissions presented by the Defence justifies the exceptional measure of reconsideration. The Defence does not show a clear error of reasoning in the establishment of the Evidentiary Regime. Nor does it show that reconsideration is necessary in order to prevent an injustice. The Chamber considers that latter to be especially the case since the Defence initially requested that the Evidentiary Regime be applied in this case and does not provide any objective reason for its change of opinion.
35. Accordingly, the Chamber rejects the Request.
36. Lastly,⁵⁶ the Chamber orders that the Prosecution Response and CLRV Response be reclassified as public. The public-redacted version of the Request contains numerous unnecessary redactions. Keeping in mind that the Prosecution requested that it be reclassified as public, the Chamber hereby instructs the Defence to file a lesser public-redacted version, redacting solely footnote 50 of the Request.

⁵⁴ Request, ICC-02/04-01/15-1519-Red, paras 44-54.

⁵⁵ 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.

⁵⁶ Prosecution Response, ICC-02/04-01/15-1526-Conf, para. 2; CLRV Response, ICC-02/04-01/15-1538-Conf, para. 5.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Registry to reclassify ICC-02/04-01/15-1526-Conf and ICC-02/04-01/15-1538-Conf as 'public';

ORDERS the Defence to file a lesser public redacted version of the Request in accordance with paragraph 36 above within five days of the issuance of the decision; and

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Peter Kovács



Judge Raul C. Pangalangan

Dated 19 June 2019

At The Hague, The Netherlands