

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **18 July 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 for Leave to Appeal the Decision on the 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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**The Office of Public Counsel for
Victims**

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute') issues the following 'Decision on Defence Request for Leave to Appeal the Decision on the Defence Request regarding the Evidentiary Regime'.

I. Procedural history and submissions

1. On 21 May 2019, the Defence filed a motion containing observations and several requests related to the evidentiary system ('Evidentiary Regime') established by the Chamber in this case ('Initial Request').¹
2. On 19 June 2019, the Chamber issued a decision on the Initial Request, dismissing it in its entirety ('Impugned Decision').²
3. On 24 June 2019, the Defence filed a request for leave to appeal the Impugned Decision ('Request').³ It seeks leave to appeal with regard to two issues:
 - '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 finding 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.'⁴ ('First Issue')
 - 'Whether TC IX erred in re-characterizing the Defence request under Rule 134(3) of the Rules as a motion for reconsideration.'⁵ ('Second Issue')
4. Concerning the First Issue, the Defence argues that the Appeals Chamber held in the *Bemba* case that evidentiary rulings are required for every item of evidence⁶ and that the Chamber ignored this decision.⁷ It further submits that the Chamber did 'not consider nor

¹ 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.

² Decision on Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1546.

³ Defence Request for Leave to Appeal the 'Decision on Defence Request regarding the Evidentiary Regime', ICC-02/04-01/15-1550.

⁴ Request, ICC-02/04-01/15-1550, para. 2 A.

⁵ Request, ICC-02/04-01/15-1550, para. 2 B.

⁶ Request, ICC-02/04-01/15-1550, para. 3.

⁷ Request, ICC-02/04-01/15-1550, para. 10.

make any finding’ regarding several separate opinions issued in the appellate phase of the *Bemba* case.⁸

5. The Defence submits that the fair and expeditious conduct of the proceedings is significantly affected since ‘Mr Ongwen has the fundamental right to know the reasons for [the Chamber’s] decision on his guilt or innocence’ and that it is ‘essential for the Defence to know how every item submitted into evidence was assessed’ by the Chamber in the final judgment.⁹
6. Regarding the Second Issue, the Defence continues to argue that the Initial Request was a request under Rule 134(3) of the Rules.¹⁰ It also submits that even if the Chamber found the request not to fall under this provision ‘it was incorrect not to consider the Defence Request in the interests of justice.’¹¹
7. The Defence avers that the Second Issue is essential for the determination of the matter raised in the Initial Request¹² and that it significantly affects the fair and expeditious conduct of the proceedings, since the Impugned Decision uses the ‘higher standard’ of reconsideration.¹³
8. On 28 June 2019, the Office of the Prosecutor (‘Prosecution’) filed its response (‘Prosecution Response’).¹⁴ The Prosecution submits that both, First¹⁵ and Second Issue,¹⁶ do not arise from the Impugned Decision, are a mere disagreement with the Impugned Decision and are therefore not appealable.
9. The Prosecution further argues that both issues also do not meet the other requirements for granting leave to appeal.¹⁷
10. On the same day, the Common Legal Representatives for Victims (‘CLRV’) also filed a response (‘CLRV Response’).¹⁸ The CLRV submits that the First¹⁹ and the Second

⁸ Request, ICC-02/04-01/15-1550, paras 8 and 10.

⁹ Request, ICC-02/04-01/15-1550, para. 17.

¹⁰ Request, ICC-02/04-01/15-1550, paras 12 and 14.

¹¹ Request, ICC-02/04-01/15-1550, para. 15.

¹² Request, ICC-02/04-01/15-1550, para. 21.

¹³ Request, ICC-02/04-01/15-1550, para. 22.

¹⁴ Prosecution’s Response to Defence Request for Leave to Appeal ‘Decision on Defence Request regarding the Evidentiary Regime’, ICC-02/04-01/15-1554.

¹⁵ Prosecution Response, ICC-02/04-01/15-1554, paras 5-7.

¹⁶ Prosecution Response, ICC-02/04-01/15-1554, para. 11.

¹⁷ Prosecution Response, ICC-02/04-01/15-1554, paras 13-16.

Issue,²⁰ as formulated by the Defence, do not constitute appealable issues. The CLRV also argues that both issues do also not meet the other requirements for granting leave to appeal.²¹

11. On the same day, the Legal Representatives for Victims ('LRV') also filed their response ('LRV Response').²² As the Prosecution and the CLRV, they submit that both issues are not appealable issues²³ and that they do not meet the further requirements for granting leave to appeal.²⁴

II. Analysis

12. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.²⁵

1) *First Issue*

13. The Defence frames the issue as the Chamber's 'failure to consider and adhere to the applicable Appeals Chamber's jurisprudence in the *Bemba* case' and cites to an interlocutory appeal ('*Bemba* Interlocutory Appeal')²⁶ and several separate opinions to the final appeals judgment in the *Bemba* case ('*Bemba* Final Appeals Judgment')²⁷.
14. In the Impugned Decision, the Chamber specifically referred to the submissions made by the Defence in the Initial Request on this topic, which are identical to the ones brought

¹⁸ CLRV's Response to "Defence Request for Leave to Appeal the 'Decision on Defence Request regarding the Evidentiary Regime'", ICC-02/04-01/15-1555.

¹⁹ CLRV Response, ICC-02/04-01/15-1555, para. 15.

²⁰ CLRV Response, ICC-02/04-01/15-1555, para. 17.

²¹ CLRV Response, ICC-02/04-01/15-1555, paras 23-25.

²² Victims' Response to "Defence Request for Leave to Appeal the 'Decision on Defence Request regarding the Evidentiary Regime'", ICC-02/04-01/15-1556.

²³ LRV Response, ICC-02/04-01/15-1556, paras 8 and 14.

²⁴ LRV Response, ICC-02/04-01/15-1556, paras 10-12 and 17.

²⁵ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

²⁶ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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", 3 May 2011, ICC-01/05-01/08-1386.

²⁷ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2019, ICC-01/05-01/08-3636-Conf. A public-redacted version was filed on the same day, ICC-01/05-01/08-3636-Red.

forward now.²⁸ Accordingly, the assertion that the Chamber did not consider the jurisprudence referred to by the Defence is false.

15. As to the Chamber's 'failure to adhere' to the jurisprudence of the Appeals Chamber, the evidentiary approach was not an issue in the *Bemba* case and the *Bemba* Final Appeals Judgment. Consequently, the majority judgment of the Appeals Chamber contains no finding in this regard. The Appeals Chamber judgment squarely addressing the disputed evidentiary approach was *Bemba et al.* case²⁹, and the Defence makes no argument that the Chamber's approach is not in full conformity with it.
16. It must also be noted that the *Bemba* Final Appeals Judgment contains various dissenting, separate and concurring separate opinions, which are in part advocating opposing positions. The Defence may rely on separate opinions in order to argue its position, but the fact the Chamber does not follow these arguments does not mean that it failed to adhere to the Appeals Chamber's jurisprudence.
17. The Defence further claims that the final judgment of appeal in the *Bemba et al.*³⁰ case and the *Bemba* Interlocutory Appeal 'resulted in a conflict regarding the interpretation of Article 74(5)' and that the Chamber 'evaded this conflict'.³¹ The Chamber considers that the Defence misrepresents the *Bemba* Interlocutory Appeal when asserting that the decision states that a trial chamber 'is still obliged to make evidentiary rulings of every item of evidence'.³² The Defence refers to paragraph 37 of this decision to support its claim. In the cited paragraph, the Appeals Chamber concluded that 'irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point of the

²⁸ Impugned Decision, ICC-02/04-01/15-1546, para. 33 and footnote 54.

²⁹ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, 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-Conf. A public-redacted version was filed on the same day, ICC-01/05-01/13-2275-Red.

³⁰ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, 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-Conf. A public-redacted version was filed on the same day, ICC-01/05-01/13-2275-Red.

³¹ Request, ICC-02/04-01/15-1550, para. 10.

³² Request, ICC-02/04-01/15-1550, para. 6.

proceedings’.³³ This is different from the assertion made by the Defence, and is not in conflict with the findings made in the final judgment of appeal in the *Bemba et al.* case.

18. Equally, the Initial Directions in this case are in complete conformity with this, stating that ‘[t]he Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment...’.³⁴ The fact that the Defence disagrees with the continuation of this sentence (‘...though it may not necessarily discuss these aspects for every item submitted in the judgment itself.’) does not mean that the Trial Chamber acted in contravention with the jurisprudence of the Appeals Chamber.
19. Accordingly, the Chamber finds that the First Issue, as framed by the Defence, does not arise from the Impugned Decision.

2) *Second Issue*

20. Concerning the Second Issue, the Chamber does not find that the issue is an appealable issue under Article 82(1)(d) of the Statute, since the Defence failed to show that it is essential for the determination of matters arising in the judicial cause under examination.
21. Much of the submissions are a mere repetition by the Defence of why the Initial Request fell indeed under Rule 134(3) of the Rules and was not a request for reconsideration. However, even if that were the case, the Defence fails to show how this error would have affected the Impugned Decision in a substantial manner.
22. After having found that Rule 134(3) of the Rules is not applicable for the Initial Request, the Chamber re-characterised it as a request for reconsideration and ruled on its merits.³⁵ This means that the Defence’s allegation that ‘it was incorrect not to consider the [Initial] Request in the interest of justice’³⁶ is simply false. The Chamber did consider the Initial Request, it just did not grant it.
23. The assertion that the Chamber, by treating the Initial Request as a request for reconsideration, applied the higher standard of ‘exceptional measure’ rather than ‘the

³³ Bemba Interlocutory Appeal, ICC-01/05-01/08-1386, para. 37.

³⁴ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 24.

³⁵ Impugned Decision, ICC-02/04-01/15-1546, paras 17-20.

³⁶ Request, ICC-02/04-01/15-1550, para. 15.

lower threshold in Rule 134(3) of the Rules',³⁷ misunderstands Rule 134(3) of the Rules. The need to demonstrate that an issue arose during the course of the trial is not a 'threshold', as is invoked by the Defence, but the prerequisite to apply Rule 134(3). It does not mean that every request will necessarily be granted if the issue arose during the trial and the request invokes Rule 134(3) of the Rules. The Defence makes no submission why the outcome of the Impugned Decision would have changed and there are no indications that the Initial Request would have been granted had it been considered as request under Rule 134 instead of as a request for reconsideration.

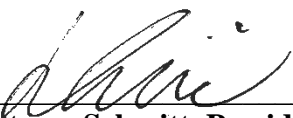
24. Accordingly, the Second Issue does also not constitute an appealable issue.

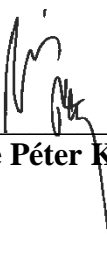
25. Both issues do not fulfil the requirements of Article 82(1)(d) of the Statute and the Chamber consequently rejects the Request in its entirety.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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


Judge Bertram Schmitt, Presiding Judge


Judge Péter Kovács


Judge Raul C. Pangalangan

Dated 18 July 2019

At The Hague, The Netherlands

³⁷ Request, ICC-02/04-01/15-1550, para. 22.