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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

Lesser Public Redacted Version of
"Defence Request and Observations on Trial Chamber IX's Evidentiary Regime", filed 21 May 2019

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. The Defence for Dominic Ongwen ('Defence') submits its request and observations on Trial Chamber IX's admissibility and/or relevance of evidence regime in the *Ongwen* case.

2. The Defence hereby objects to this approach[1] that permits Trial Chamber IX ('TC IX') to defer its assessment of relevance, probative value and potential prejudice of each item of evidence submitted into evidence until deliberating its judgment. The Defence also objects to the fact that TC IX does so without the fundamental guarantee of discussing the assessment of standard evidentiary criteria for each item in its final judgment, rendering TC IX's approach to evaluation of evidence opaque and erroneous as a matter of law.

3. The Defence is timely in seeking a ruling under Rule 134(3) of the Rules of Procedure and Evidence ('Rules') from TC IX given that the issues elaborated on in this motion arose[2] and continue to arise[3] during the trial proceedings. TC IX's evidentiary regime not only causes confusion and legal uncertainty, but continues to delay the proceedings and undermine Mr Ongwen's fair trial right to present a defence. Such situation has become untenable.

4. At the request of a party under Rule 7(3) or Rule 132*bis* (3) of the Rules, the TC IX may decide that the functions of Single Judge Bertram Schmitt be exercised by the full Chamber. Given the inherent importance of the issue being litigated, *i.e.* the evidentiary regime in the *Ongwen* case, the Defence requests that the issue at hand be determined by the full TC IX bench.

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[1] *Ongwen*, Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, 13 July 2016, ('**Initial Directions**'), para. 24; *Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615, 1 December 2016 ('**Intercepts Decision**'); *Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, 28 March 2017; *Ongwen*, 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, ICC-02/04-01/15-1074, 16 November 2017, para. 33.

[2] See, for example, *Ongwen*, Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580), ICC-02/04-01/15-599, 21 Nov. 2016; *Ongwen*, Defence Request for Leave to Appeal 'Decision on Prosecution Request to Submit Interception Related Evidence' (ICC-02/04-01/15-615)', ICC-02/04-01/15-625, 7 Dec. 2016; *Ongwen*, Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654), ICC-02/04-01/15-701, 7 Feb. 2017; see also *Ongwen*, Defence Response to "Prosecution's request to admit evidence preserved under article 56 of the Statute", 6 July 2016; *Ongwen*, Defence Response to the Prosecution Application to Admit Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", ICC-02/04-01/15-509-Conf-Corr, 27 July 2016.

[3] See, for example, *Ongwen*, 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, ICC-02/04-01/15-1029, 27 October 2017, paras 29-46; *Ongwen*, Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, ICC-02/04-01/15-1261, 17 May 2018; *Ongwen*, Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal, ICC-02/04-01/15-1300, 5 July 2018, paras 15-17.

II. CONFIDENTIALITY

5. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC'), the Defence files this request as confidential because it refers to and quotes from evidentiary items that are labelled as confidential. A public redacted version of this request will be filed in due course.

III. SUBMISSIONS

6. TC IX's evidentiary regime in the *Ongwen* case is as follows:

> The Chamber emphasises that its general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission – not even on a *prima facie* basis […] such assessments are not required by the Court's statutory scheme and are considered to be unhelpful and unwarranted.[4]
>
> 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.[5]

7. The Defence disagrees with TC IX and presents its position in the following sections: **(A)** the holistic evaluation of evidence does not preclude TC IX from evidential rulings at the point of submission or during the trial; **(B)** TC IX's evidentiary regime results in Mr Ongwen suffering prejudice; and **(C)** the evidentiary approach of TC IX leads to legal uncertainty.

A. The holistic evaluation of evidence does not preclude TC IX from evidential rulings at the point of submission or during the trial[6]

8. The Rome Statute ('Statute') embodies a compromise between two different legal systems being Common Law and Romano-Germanic Law.[7] As a result of this compromise, Trial

[4] Intercepts Decision, para. 7; see also, Initial Directions, paras 24-25.
[5] Initial Directions, para. 24.
[6] In paragraph 24 of its Initial Directions, TC IX stated that it "will consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment," hence the '**deliberation phase**'. Due to this, the Defence understands that the trial finishes before the start of the deliberation phase.
[7] *Bemba et al.*, Judgment on the appeals of Mr Jean Pierre Bemba, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", Separate Opinion of Judge Geoffrey Henderson, ICC-01/05-01/13-2275-Anx, ('**Judge Henderson Separate Opinion on Art 70 Judgment**'), para. 38; see also para. 52 of Henderson's abovementioned opinion, "the main point I take away from Mr Piragoff's publications is that the drafters genuinely tried to find a common ground between the common law and the Romano-Germanic approach to evidence. In my respectful view, the effect of my colleagues' decision has been to undermine that compromise." Particularly, Judge Henderson refers to the following publication by Mr. Piragoff in footnote 69: D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck *et al.*, 3rd ed., 2016), p. 1322: "As with all of article 69, para. 4 is an amalgam of both common law and civil law concepts and does not strictly

Chambers are given "considerable flexibility in evaluating the appropriateness of admitting evidence into the case record"[8] to the extent that they do not omit "the need to consider the question of admissibility".[9]

9. One of the reasons given by TC IX for relying on its 'submission approach', as outlined in its Initial Directions,[10] is that it will be able to assess more precisely both the relevance and probative value of each item, once all the evidence has been submitted.[11] TC IX appears to adopt the approach which the majority of the Appeals Chamber in *Bemba et al.* referred to as the Romano-Germanic "holistic" system, instead of making evidential rulings during the trial.[12]

10. That said, the Defence avers that evidential rulings at the point of submission or during the trial do not preclude a holistic assessment of the evidence on the case record; specifically, Judge Henderson opined:

> […] my colleagues [the majority in the Appeals of *Bemba et al.*] repeat the worn argument that Common Law systems approach evidence "atomistically", whereas Romano-Germanic systems adopt a "holistic" approach […] the fact that Common Law judges consider the authenticity, probative value and potential prejudice of each item of evidence individually does not mean that they consider these factors in isolation. Moreover, once the evidence is admitted, its evidentiary weight is assessed ever so "holistically" as in any other legal system.[13]

11. Indeed, TC IX is obliged to "carry out a holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue" in order to determine whether Article 66(3) of the Statute has been met.[14] However, before undertaking such evaluation, TC IX *still* needs to asses

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follow the procedures of either. While the article adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence, **some common law concepts are incorporated, which results in a hybrid system**." (Bold added).

[8] Judge Henderson Separate Opinion on Art 70 Judgment, para. 39.

[9] Judge Henderson Separate Opinion on Art 70 Judgment, para. 39.

[10] Initial Directions, paras 24-26.

[11] Initial Directions, para. 25.

[12] *Bemba et al.*, Judgment on the appeals of 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 ('***Bemba et al.*, Article 70 Appeals Judgment**'), para. 574, and footnote 1252.

[13] Judge Henderson Separate Opinion on Art 70 Judgment, para. 41.

[14] *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, para. 22.

which items of evidence meet the admissibility and/or relevance evidentiary criteria stipulated in Article 69(4) of the Statute.[15]

12. This is because Article 66(3) and Article 74 of the Statute intertwine; if TC IX is convinced about the guilt of the accused beyond a reasonable doubt, it needs to issue a judgment of conviction pursuant to Article 74 of the Statute. However, Article 74(2) of the Statute requires TC IX to base its judgment on its evaluation of evidence and limits this evaluation to all the evidence that has been submitted at trial.[16] In addition, Rule 64(3) of the Rules unequivocally stipulates that evidence which does not meet the admissibility or relevance criteria "shall not be considered by the Chamber." Therefore, TC IX is holistically limited to assessing evidence that has met the admissibility and/or relevance evidentiary criteria.

13. For these reasons, the Defence avers that if TC IX decides to make evidential rulings at the point of submission or during the trial, it will not have a bearing on its exercise of the holistic evaluation of the evidence during 'deliberations phase'. Especially, given that only evidence ruled as admissible and/or relevant is to be considered for the abovementioned holistic evaluation and the eventual Article 74 judgment.

14. Moreover, the Statute embodies safeguards foreign to a Romano-Germanic 'submission approach' to evidence,[17] such as Article 69(4) which was designed for the purpose of filtering submitted evidence before it is admitted to reduce clutter.[18] The Defence agrees with both Judge Van den Wyngaert and Judge Morrison that "analysing evidence holistically cannot cure the weakness of individual items of evidence and a number of weak arguments for a proposition do not and cannot ever combine into a strong reason for accepting it"[19] and for this

[15] O. Triffterer and A. Kiss, "Article 74 Requirements for the decision" in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court* (Beck *et al.*, 3rd ed., 2016), p. 1837 "[on Article 74] Accordingly, the judgment is to be based only on evidence that has been (i) submitted; (ii) discussed; (iii) assessed on relevance, probative value and prejudice; and (iv) evaluated by the Trial Chamber." Additionally, Article 69(4) of the Statute stipulates: "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."

[16] This is supported by O. Triffterer and A. Kiss in, "Article 74 Requirements for the decision" in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, (Beck *et al.*, 3rd ed., 2016), p. 1836 "[on Article 74(2)] [a]ccordingly, evidence that has not been submitted and discussed before the Court at the trial and evaluated by the Trial Chamber cannot properly be the basis for the judgment."

[17] Judge Henderson Separate Opinion on Art 70, para. 40.

[18] Judge Henderson Separate Opinion on Art 70, paras. 40 and 43-45.

[19] *Bemba et al.*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", Separate Opinion of Judges Van den Wyngaert and Morrison, 8 Jun 2018, ICC-01/05-01/08-3636-Anx2 ('**Separate Opinion of Judges Van den Wyngaert and Morrison**'), para. 15.

reason, TC IX needs to "apply the admissibility criteria of article 69 (4) […] sufficiently rigorously to avoid crowding the case record with evidence of inferior quality."[20]

15. The Defence submits that the evidentiary approach currently employed by TC IX follows an *overly* Romano-Germanic system of evidence and as a result, it disregards the application of the safeguards embodied in Article 69(4) of the Statute, and overcrowds the case record with items that the Defence maintains are inadmissible and/or irrelevant.

B. TC IX's evidentiary regime results in Mr Ongwen suffering prejudice

16. The submissions below address TC IX's reasons for deferring its assessment of the admissibility and/or relevance of evidence until deliberating its Article 74 judgment. TC IX provided the parties with four reasons[21] to support the adoption of its evidentiary regime.[22] The Defence will address each of the reasons individually and provide its arguments as to their unreasonableness and prejudicial effect on Mr Ongwen's right to a fair trial.

(i) Evidentiary rulings at the point of submission or during the trial do not prevent TC IX from accurate assessment of the evidence (*contra* TC IX's first reason)[23]

17. TC IX's reasoning that its regime allows for a 'more accurate assessment' after having received all of the evidence is without merit. The Defence avers that 'ruling out' items that do not meet standard evidentiary criteria at the point of submission or during the trial does not prevent TC IX from accurately evaluating the remaining (not ruled out) evidence during 'deliberations phase'.[24] Moreover, TC IX is expected and required to exercise its evidentiary assessment as accurately as possible at all times.

[20] Separate Opinion of Judges Van den Wyngaert and Morrison, para. 18.
[21] Initial Directions, para. 25.
[22] Initial Directions, para. 24: "Article 69(4) of the Statute gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission. As a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. When the participants formally submit evidence during trial, all the Chamber will generally do is recognise their formal submission. 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."
[23] Initial Directions, para. 25: "(i) the Chamber is able to assess more accurately the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial".
[24] See above, '**Section A**' of this motion.

18. The Defence also submits that the trial record demonstrates TC IX's selective and inconsistent application of its evidentiary regime. TC IX has selectively departed from its evidentiary regime to the prejudice of Mr Ongwen. For example, in its 'Decision in Response to an Article 72(4) Intervention',[25] TC IX held that a person's identity who was extremely close to Joseph Kony and who had a direct knowledge about the implicit threat of lethal violence which Joseph Kony held over his subordinates in the event that his subordinates disobeyed or disrespected him is "manifestly unimportant" and irrelevant to the *Ongwen* case.[26]

19. In contrast, and as an example of TC IX's flawed evidentiary regime, TC IX recognized as formally submitted into evidence items that a) fall outside of the temporal jurisdiction of the *Ongwen* case;[27] b) have no evidential purpose, and/or c) lack reliability and authenticity.[28]

(ii) TC IX's approach does not save "significant amount of time" and violates Mr Ongwen's Article 67(1)(b), (c) and (e) fair trial rights (*contra* TC IX's second reason)[29]

20. TC IX's reason that its approach saves "significant amount of time" is illogical, because irrespective of whether TC IX decides to make evidential rulings at the point of submission, before 'closing briefs' or at the deliberation phase, it is *nonetheless* required to make the evidential rulings and discuss the assessment of standard evidentiary criteria for each item in its judgment;[30] therefore, using the same amount of time. More importantly, TC IX's approach and its consequences violate Mr Ongwen's Article 67(1)(b), (c) and (e) fair trial rights.

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[25] *Ongwen*, Decision in Response to an Article 72(4) Intervention, ICC-02/04-01/15-1267-Corr, 6 June 2018 ('Article 72(4) Decision').
[26] Article 72(4) Decision, paras 20-24; *Ongwen*, Decision on Defence Request for Leave to Appeal the Decision in Response to an Article 72(4) Intervention, ICC-02/04-01/15-1290, 26 June 2018, paras 12-13: TC IX also concluded that this person's identity is not relevant to the *Ongwen* case and to the preparation of the defence of duress without ever knowing this person's identity.
[27] See, for example, *Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, 28 March 2017, para. 7; see also, *Ongwen*, Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654), ICC-02/04-01/15-701, 7 February 2017, paras 10 and 47, and Conf-AnxA; see also *Ongwen*, Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580), ICC-02/04-01/15-599, 21 November 2016.
[28] See, for example, *Ongwen*, Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580), ICC-02/04-01/15-599, 21 November 2016; *Ongwen*, Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654), ICC-02/04-01/15-701.
[29] Initial Directions, para. 25: "[A] significant amount of time is saved by not having to assess an item's relevance and probative value at the point of submission and again at the end of the proceedings".
[30] See above, paras 11-14.

21. The *Ongwen* case record is overcrowded with thousands of Prosecution's items.[31] These items were recognized by TC IX as formally submitted into the evidence without any *prima facie* assessment. From the Defence's experience, TC IX's lack of assessment of the evidence submitted throughout the trial continues to have a significant impact on its attempts to anticipate how to organise and plan defence work, take strategic decisions in relation to its presentation of evidence and effectively manage limited personnel and monetary resources.

22. The lack of evidentiary rulings is unduly prejudicial as it creates uncertainty which hinders the capability of Mr Ongwen and his Defence "to prepare their cases".[32] Moreover, such an approach results in unfairness as it places an "impermissible burden on the defence" given that the Defence must guess or work on the assumption that thousands of items submitted by the Prosecution will be admitted and considered for the purposes of Article 74 judgment.[33]

23. An example demonstrating that TC IX's evidentiary regime is prejudicial is its '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', in which TC IX rejected the Defence request to exclude portions of the CLRV expert PCV-1's report that impermissibly provide comments on Mr Ongwen's responsibility. Although TC IX confirmed in respect to PCV-1's report that "even if certain comments inadvertently appear to do so – those comments cannot be relied upon to establish the accused's responsibility for the crimes", it still recognised submission of this report into evidence, including the comments on Mr Ongwen's responsibility.[34]

24. TC IX's assurances that PCV-1's comments cannot be relied upon to establish Mr Ongwen's responsibility are futile. First, these prejudicial comments are now part of the evidentiary 'case file'. Second, submission of these prejudicial comments into evidence puts an additional burden on the Defence because it will be required to address once again the prejudicial nature of these comments in its 'closing brief'. Third, it is likely that the Defence will also have to respond and

[31] For example, of the **2507** (ICC-02/04-01/15-580) and **1006** (ICC-02/04-01/15-654) items requested to be submitted into evidence by the Prosecution through bar table motions only **47** were rejected. However, the number of items submitted into evidence is higher, as there are several other items submitted into evidence after the examination of the Prosecution witnesses.
[32] *Gbagbo and Blé Goudé*, Decision on the submission and admission of evidence, Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-405-Anx ('**Judge Henderson Dissent**'), para. 9.
[33] *Gbagbo and Blé Goudé*, Decision concerning the Prosecutor's submission of documentary evidence on 28 April, 31 July, 15 and 22 December 2017, and 23 March and 21 May 2018, Dissenting Opinion of Judge Geoffrey Henderson, ICC-02/11-01/15-1172-Anx, ('**Judge Henderson Second Dissent**'), para. 4.
[34] *Ongwen*, 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, ICC-02/04-01/15-1268, 1 June 2018, para. 10.

object to the CLRV's reliance on the prejudicial parts of PCV-1's report, given that its position is that these comments are permissible.[35]

25. To conclude, nothing suggests that TC IX's evidentiary regime saves time. On the contrary, the regime delays the trial[36] and undermines the Defence's right to prepare a defence[37] by overloading the 'case file' with thousands of items. Due to a lack of evidential rulings during the trial proceedings, the Defence currently has to work on the assumption that all the evidence submitted by the Prosecution[38] will be admitted and considered by TC IX, as the current evidential regime of TC IX is opaque and leaves the Defence "in the dark".[39]

26. For these reasons, the Defence requests TC IX to rule on the admissibility and/or relevance of all items formally submitted into evidence by the parties now or before 'closing briefs'.[40]

(iii) The adversarial manner of the *Ongwen* case proceedings requires TC IX to make admissibility assessments in order to screen itself from considering materials inappropriately (*contra* TC IX's third reason)[41]

27. Given the adversarial nature of this trial and TC IX's evidentiary regime which allows any kind of item to be submitted without a *prima facie* screening, there is nothing to safeguard the quality of the evidentiary process, *i.e.* permissible means of evidence and their collection.

28. First, the Statute is clear that cases before this Court follow an adversarial structure; Articles 66(2) and 67(1)(e) of the Statute place the onus on the Prosecution to "discharge of the burden

[35] *Ongwen*, CLRV Response to the "Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, ICC-02/04-01/15-1262, 21 May 2018, paras 17-18.
[36] Article 67(1)(c) of the Statute.
[37] Articles 67(1)(b) and (e) of the Statute.
[38] For example, of the **2507** (ICC-02/04-01/15-580) and **1006** (ICC-02/04-01/15-654) items requested to be submitted into evidence by the Prosecution through bar table motions only **47** were rejected. However, the number of items submitted into evidence is higher, as there are several other items submitted into evidence after the examination of the Prosecution witnesses.
[39] Judge Henderson Second Dissent, para. 5.
[40] *Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, 28 March 2017; and *Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615, 1 December 2016. Additionally, should the Defence file a BTM it equally requests TC IX to rule on it as well; see also *Ongwen*, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, ICC-02/04-01/15-520, 10 August 2016; *Ongwen*, Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, ICC-02/04-01/15-535, 9 September 2016; *Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Conf, 18 November 2016; *Ongwen*, Decision on Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01-15-600, 5 December 2016.
[41] Initial Directions, para. 25: "[T]here is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately".

of proof" and for the Defence to challenge the evidence brought forth by the Prosecution.[42] In its Initial Directions, TC IX refers to the Prosecution and the Defence as parties.[43] Additionally, each party along with the LRVs is given a phase during the trial to present its evidence.[44] Thus, given that the *Ongwen* case is conducted in an adversarial manner,[45] the parties are required to manage their own investigations, collections and presentation of evidence.

29. Second, unlike in inquisitorial system, where there is "the safeguard of an independent nonpartisan investigating judicial officer and a central dossier"[46] or an impartial magistrate that both collects and sifts through evidence; without evidential rulings in adversarial system, the case record becomes cluttered with vast amounts of evidence of uncertain authenticity, probative value and/or relevance.[47]

30. There is no such 'safeguard' of an independent nonpartisan body that would assess with appropriate rigour the Prosecution's and LRVs' investigations, collection and submission of thousands of evidentiary items into evidence in this case. Thus, the permissible means of evidence and their collection are *solely* dependent on TC IX's admissibility and/or relevance of evidence rulings. As discussed in this motion, these evidential rulings are however non-existent at the point of submission or during this trial.

31. An example of lack of safeguards that would protect the *Ongwen* 'case file' from potentially prejudicial items is the involvement of the Prosecution's potential witness and intermediary, P-

[42] *Gbagbo and Blé Goudé*, Decision on the submission and admission of evidence, Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-405-Anx ('**Judge Henderson Dissent**'), para. 7.
[43] Initial Directions, para. 7.
[44] Initial Directions, para. 9.
[45] Judge Henderson Dissent, para. 7: Judge Henderson, in his capacity as a Trial Judge, argues in his Dissent that the Blé Goudé trial was conducted on an adversarial basis given that according to the Direction on the Conduct of Proceedings it "was […] conducted on a basis more consistent with the practice and procedure of an adversarial trial, in which the phases of trial provide for each *party* to present its case and its evidence to the Chamber." See also, *Ntaganda,* Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion" 5 September 2017, ICC-01/04-02/06-2026 OA6, para. 50 and *Ongwen,* Decision on Defence Request for Leave to File a No Case to Answer Motion, 18 July 2018, ICC-02/04-01/15-1309, para. 13: where Trial Chamber IX seems to acknowledge that the *Ongwen* trial is run in an adversarial manner.
[46] Judge Henderson Separate Opinion on Art 70 Judgment, para. 51.
[47] *Bemba*, Judgment on the appeal of Mr Jean- Pierre Bemba Gombo against the Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3 ('**Concurring Separate Opinion of Judge Eboe-Osuji**'), Appendix I, paras 313-314.

0078. The Defence objected in vain to P-0078's methods and standards of procuring evidence as well as witnesses for the Prosecution.[48]

32. P-0078 was involved in collection of several evidentiary items[49] and located over 40 Prosecution insider witnesses, specifically for the purposes of the *Ongwen* case.[50] However, some items disclosed by the Prosecution also show that P-0078 a) was directly involved in the conflict between the LRA and Government of Uganda, and in killing of Raska Lukwiya during the peace talks;[51] and b) appeared to be acting in conflict with Article 44(2) of the Statute and the Code of Conduct for the Office of the Prosecutor during the exercise of her/his role as an intermediary.[52]

33. In particular, some reports demonstrate that P-0078 was asked by the Prosecution to provide an explanation for the misuse of a phone and other funds provided to him/her by the Office of the Prosecutor.[53] It is important to note that the phone or funds which were supposedly misused by the Prosecution's intermediary, P-0078, were provided to this Court by the citizens and taxpayers of the State Parties to the Rome Statute.[54]

34. The Prosecution's investigation reports also allege that P-0078 pressured Prosecution witnesses P-0037 and P-0105 "by encouraging that they give evidence to OTP investigators during their

[48] Transcript of hearings, ICC-02/04-01/15-T-116-CONF-ENG, pp 46-47, ICC-02/04-01/15-T-117-Red-ENG, pp 43-45, ICC-02/04-01/15-T-179-Red-ENG, p. 63, lines 5-20; ICC-02/04-01/15-T-189-CONF-ENG, p. 52; ICC-02/04-01/15-T-161-CONF-ENG, p. 4; see also *Ongwen*, Confidential Redacted Version of "Defence Request for a Deadline Extension", 18 April 2018, ICC-02/04-01/15-1232-Conf-Red, para. 39.
[49] Based on the information from Defence Ringtail, it appears that P-0078 is linked to at least **271** evidentiary items, either via "Chain of Custody" or "Source Identity" fields.
[50] [redacted]
[51] UGA-OTP-0196-028-R01, at 0031.
[52] Article 44(2) of the Statute; see also Code of Conduct for the Office of the Prosecutor, Chapter 2, Sections 1, 3 and 4; and Chapter 3, Sections 1-2.
[53] UGA-OTP-0263-2681-R01, at 2681; see also UGA-OTP-0263-2689-R01, at 2691: After P-0078's failure to provide any explanation as to her/his alleged misuse of public funds the Prosecution concluded that "[t]he issue of the phone misuse was discussed within the OTP Integrated Team on 15 April 2015 with the conclusion that the office would continue working with [P-0078], as [P-0078] was officially appointed [her/his] superiors and because [she/he] had proved efficient in [her/his] role".
[54] UGA-OTP-0263-2671-R01, at 2671.

recent interviews."[55] Indeed, the Defence shares the Prosecution's concerns regarding P-0078's standard of professional conduct and her/his involvement in the case against Mr Ongwen:

> Any questions in relation to the integrity or behaviour of P-0078 could therefore be potentially sensitive for the interaction of this office with a large pool of important witnesses.[56]

35. In light of the above, it is essential that TC IX intervenes and provides its admission and/or relevance rulings on such evidentiary items now or before parties file their 'closing briefs'. Otherwise, as demonstrated above, submission and reliance on some of the items and witnesses collected by P-0078 may be highly prejudicial to Mr Ongwen, and significantly affect the outcome of this trial.

(iv) The TC IX is required to discuss or explicitly articulate its assessment of standard evidentiary criteria for each item formally submitted into evidence in its Article 74 judgment (*contra* TC IX's fourth reason)[57]

36. The Defence does not question the professionalism of TC IX's judges and legal officers. Rather, it notes the stark contrast between TC IX's holding in **paragraph 24** of the Initial Directions that "it may not necessarily discuss these aspects [the relevance, probative value and potential prejudice] for every item submitted in the judgment itself"[58] and TC IX's holding in **paragraph 25** of the same filing that "the requirement of a reasoned judgment enables the participants to verify precisely how the Chamber evaluated the evidence."[59]

37. **On the one hand**, TC IX seemingly adheres to the fundamental requirements under Article 74(5) of the Statute, which dictate that the judgment "shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions."[60] **On the other hand**, TC IX incorrectly and without any legal basis or authority vests itself with discretion not to provide any reasoned opinion on why certain formally submitted items were ruled (in)admissible and/or (ir)relevant.

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[55] UGA-OTP-0263-2688; UGA-OTP-0263-2685-R01, at 2686: Another investigation report corroborates that the same Prosecution witnesses "had alleged they had been pressured by P-0078 to speak to the ICC".
[56] UGA-OTP-0263-2689-R01, at 2689.
[57] Initial Directions, para. 25: "[T]here is no reason to assume that professional judges would consider irrelevant or unduly prejudicial material, noting in particular that the requirement of a reasoned judgment enables the participants to verify precisely how the Chamber evaluated the evidence".
[58] Initial Directions, para. 24.
[59] Initial Directions, para. 25.
[60] Concurring Separate Opinion of Judge Eboe-Osuji, para. 305.

38. The Defence avers that Mr Ongwen has the right to a reasoned statement that indicates the rationale behind TC IX's Article 74 judgment; this right is violated if TC IX does not discuss its assessment of standard evidentiary criteria for each item submitted into the evidence, which, in turn, amount to a violation of the right to a fair trial.[61] The Defence submits that this includes not only the items of evidence it objected to, but **all** the submitted items by the parties.

39. Furthermore, Article 69(4) of the Statute is clear: when considering the admissibility or relevance criteria, TC IX needs to do so "in accordance with the Rules of Procedure and Evidence." Rule 64(2) of the Rules is unambiguous: "[a] Chamber **shall** give reasons for any rulings it makes on evidentiary matters. These reasons **shall** be placed in the record of the proceedings […]" (bold added).[62] In other words, TC IX is required to discuss or explicitly articulate its assessment for every evidential ruling it makes on **all** the submitted items.

40. TC IX further undermines the fundamental requirement of a full and reasoned statement by finding that:

> [T]hough each and every item will be considered when deliberating its judgment, the Chamber may not necessarily discuss every item in the judgment itself […] [e]xamples of when items may not be discussed in the judgment could include items which, upon consideration during deliberations, end up being assessed as: (i) going solely to points ultimately having no impact on the Chamber's essential findings or (ii) needlessly cumulative in relation to other evidence supporting these findings."[63]

41. TC IX's position that it does not need to discuss every item that ended up being assessed for the purposes of the judgment is incorrect, and risks rendering the judgment obscure. For example, if TC IX concludes that a particular item "has no essential impact on its findings" or "is

[61] Concurring Separate Opinion of Judge Eboe-Osuji, para. 305: Judge Eboe-Osuji opined the following: "the Majority's contrary observation in the *Bemba No 2 Appeal* judgment [Article 70] would turn the requirements of article 74(5) into a legal mirage […]. It fails to appreciate the elementary proposition that failure to provide a reasoned judgment is fundamentally a violation of the right of fair trial, which includes an accused person's entitlement to know the basis of the Trial Chamber's decision on the guilt of the defendant." See also, para. 315 of the same above cited opinion: "at the time of judgment writing, an ICC Trial Chamber is confronted with the imperatives of article 74(5), which dictates that the judgment 'shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions.' **The Chamber that deferred evidential rulings, must now confront the difficulty of having to explain clearly in the judgment, both the basis of the acceptance of the evidence relied upon and the basis of rejection of evidence that the losing party tendered**". (Bold added).

[62] Concurring Separate Opinion of Judge Eboe-Osuji, para. 301 "[Rule 64(2) of the Rules] it does specify an *obligation to give reasons* for any evidential ruling made, **which ruling 'shall' be placed on the record of the proceedings.**" (Bold added).

[63] Intercepts Decision, para. 13.

cumulative in relation to other evidence", then it is critical for the Defence to be able to review such conclusion and TC IX's basis for it.

42. Without this discussion, Mr Ongwen may never be able to demonstrate that TC IX potentially erred in giving (or not giving) consideration to certain items of evidence, which led to a "faulty basis" for his conviction.[64] As a result, this would significantly limit Mr Ongwen's right to appeal pursuant to Article 81 of the Statute, and thus violate his right to a fair trial.

43. In sum, if TC IX maintains its erroneous and prejudicial approach of deferring evidential rulings until 'deliberations phase', it will have to discuss or explicitly articulate in the judgment, the assessment of standard evidentiary criteria for **each** item formally submitted into evidence by the parties. Failure to do so will amount to neglecting the obligation to provide a reasoned judgment pursuant to Article 74(5) of the Statute. Accordingly, this will amount to a fundamental violation of the right to a fair trial, including Mr Ongwen's entitlement to know the basis of TC IX's decision on his guilt or innocence.

C. The Evidentiary Approach of TC IX leads to Legal Uncertainty

44. The Defence avers that TC IX's evidentiary regime amounts to confusion and legal uncertainty in the trial proceedings, which, consequently, violate Mr Ongwen's right to a fair and expeditious trial under Articles 21, 64(2) and 67(1) of the Statute.

45. Article 21(1) of the Statute is clear that TC IX needs to apply the Statute, the Elements of Crimes and its Rules, and "where appropriate, applicable treaties and the principles and rules of international law". The Defence also notes Article 21(3) of the Statute according to which the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights […]".[65]

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[64] Concurring Separate Opinion of Judge Eboe-Osuji, para. 305: "[a] litmus test of that entitlement is that a fully reasoned opinion may reveal a faulty basis for a conviction, thus enabling the accused to appeal the conviction successfully. And, a classic faulty basis for a conviction is the taking into account **evidence which should not have been taken into account.**" (Bold added).

[65] *Situation in the State of Palestine*, Decision on Information and Outreach for the Victims of the Situation, ICC-01/18-2, 13 July 2018, para. 10; see *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, para. 37: In this context, the Appeals Chamber said: "[a]rticle 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights".

46. Further to this, the European Court of Human Rights in the *Nejdet Şahín and Perihan Şahín* v. *Turkey* case held that "the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. […] one of the fundamental aspects of the rule of law is the principle of legal certainty […] which, *inter alia*, guarantees a certain stability in legal situations".[66] Additionally, "however, […] the requirements of legal certainty […] do not confer an acquired right to consistency of case-law […] since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement".[67] The Defence avers that "the purpose and integrity" of the ICC is to "uphold the rule of law and human rights in the world",[68] and that the rule of law encapsulates legal certainty.[69] Similarly, the Extraordinary Chambers in the Courts of Cambodia recognizes pursuant to Rule 21 of the Internal Rules that legal certainty and the transparency of proceedings are requirements of a fair trial.[70]

47. Therefore, even if the Statute makes no explicit mention of the principle of legal certainty, the Defence avers that it forms part of the rule of law and the fair trial rights of Mr Ongwen, and thus TC IX is required to respect this principle and apply it throughout the proceedings.

48. To support its 'submission approach' to evidence, TC IX claims that "[s]uch an approach has been adopted in the recent cases of this Court" and cites the cases of *Gbagbo and Blé Goudé, Bemba et al.* and seemingly contrasts the *Ntaganda* case.[71] In particular, TC IX appears to

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[66] *Nejdet Şahín and Perihan Şahín* v. *Turkey*, Judgment ('*Nejdet Şahín and Perihan Şahín* v. *Turkey'*), Grand Chamber, European Court of Human Rights, Application no. 1327/05, 20 October 2011, para. 57; available at: https://www.legal-tools.org/doc/d7b771/pdf/ .

[67] *Nejdet Şahín and Perihan Şahín* v. *Turkey*, para. 58.

[68] D. Piragoff and P. Clarke, "Article 69 Evidence" in O. Triffterer and K. Ambos (eds.) *Rome Statute of the International Criminal Court: A Commentary* (3rd ed., C.H. Beck *et al*, 2016) at p. 1748 "the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights in the world (or in the words of the preamble to the Statute, [to] respect for the enforcement of international justice' […]". Additionally, both Judge Van den Wyngaert and Judge Morrison affirm that the rule of law is a tenet of the ICC "[…] especially because the ICC was established precisely to bring justice to situations that would otherwise fall beyond the reach of the **rule of law**" para. 77, Separate Opinion of Judges Van den Wyngaert and Morrison (bold added).

[69] *Nejdet Şahín and Perihan Şahín v. Turkey*, para. 57.

[70] Internal Rule 21 stipulates: "The applicable ECCC Law […] shall be interpreted so as to always safeguard the interests of the Suspects, Charged Persons, Accused and Victims and so as to **ensure legal certainty and transparency of the proceedings** […] a) ECCC proceedings shall be fair" (bold added), additionally, the Pre-Trial Chamber of the ECCC gave the following interpretation: "[t]he Pre-Trial Chamber has previously held that the fundamental principles expressed in Internal Rule 21, **which reflect the fair trial requirements that the ECCC is bound to apply**" see Case 004/07-09-2009-ECCC/OCIJ (PTC25), Decision on Appeal Against Order on [REDACTED]'s Responses D193/47, D193/49, D193/51, D193/53, D193/56 and D193/60, 31 March 2016, para. 21, available at: https://eccc.gov.kh/sites/default/files/documents/courtdoc/2016-04-01%2000:11/D284_1_4_Redacted_EN.PDF (Bold added).

[71] Initial Directions, paras 24-25.

recognize that Trial Chamber VI presiding over the *Ntaganda* case does not adopt the same approach as TC IX.[72] Concerning the *Gbagbo and Blé Goudé* case, Judge Henderson has recurrently dissented to the 'submission approach' adopted by the majority of Trial Chamber I.[73] In fact, many of his points made in his dissents have been echoed in his 'Judge Henderson Separate Opinion on Art 70 Judgment',[74] made in his capacity as an Appeals Judge.

49. Put differently, in support of its 'submission approach', TC IX cites a decision in the *Bemba et al.* case issued by Trial Chamber VII, the majority of which also presently sits on TC IX in the *Ongwen* case.[75] Indeed, TC IX's current evidentiary regime has a striking resemblance to that of Trial Chamber VII.[76] In the *Bemba et al*. conviction decision, Trial Chamber VII held that:

> [I]t considered all 'recognised' submitted evidence and all corresponding objections in its deliberations. However, the Chamber's admissibility approach does not mean that all such items have been discussed in the present judgment. Article 74(5) of the Statute merely requires the Chamber to provide a 'full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'. […] as long as the judgment remains 'full and reasoned' it need not discuss therein every item of evidence submitted during trial.[77]

50. Although the Appeals Chamber majority in the *Bemba et al.* case affirmed the evidentiary approach of Trial Chamber VII, Judge Henderson in his Separate Opinion has disagreed with both the approach of Trial Chamber VII and the Appeals Chamber majority's acceptance of this approach.[78] Specifically, Judge Henderson, in his capacity as an Appeals Judge stated the following: "[t]he Trial Chamber's approach, which is endorsed by my colleagues, essentially

[72] Initial Directions, para. 25, footnote 17; see, in this context, *Ntaganda*, Decision on the Conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 35; see also ICC-01/04-02/06-T-150-Red-ENG, page 33, lines 18 to 25, ICC-01/04-02/06-T-222-ENG, page 8, lines 11 to 17 and Decision on Prosecution's request for admission of documentary evidence, ICC-01/04-02/06-1838 (Trial Chamber VI ruled on the admissibility of items from the OTP's bar table): Trial Chamber VI has made admissibility rulings during the trial proceedings.
[73] See Judge Henderson Dissent, and Judge Henderson Second Dissent.
[74] Judge Henderson Separate Opinion on Art 70 Judgment; see, for example, paras 43 to 45 of Judge Henderson Separate Opinion and compare with paras 7 to 9 of Judge Henderson Dissent, and paras 1 and 3 of Judge Henderson Second Dissent. Also compare para. 49 of Judge Henderson Separate Opinion to para. 4 of Judge Henderson Second Dissent; see also, para. 50 of Judge Henderson Separate Opinion and para. 5 of Judge Henderson Second Dissent.
[75] In paragraph 25 (footnote 17) of its Initial Directions, to support its evidentiary approach, TC IX cites Trial Chamber VII's decisions: *Bemba et al.*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), ICC-01/05-01/13-1285, 24 Sept. 2015.
[76] *Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615, 1 Dec 2016, para. 4(ii) "[t]he Chamber will **consider** all the standard evidentiary criteria for each item of evidence submitted during its deliberations, though it may not necessarily **discuss these aspects for every item submitted in the judgment** itself." (Bold added); see also paras 36 and 37 of this motion.
[77] *Bemba et al.*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016, para. 193.
[78] Judge Henderson Separate Opinion on Art 70 Judgment, para. 38.

consists in leaving the parties entirely in the dark until the end of the trial and then to withhold any explanation as to why certain exhibits are relied upon and others not mentioned."[79]

51. Moreover, his Separate Opinion has been endorsed by Judges Van den Wyngaert and Morrison in their capacity as Appeals Judges[80] and by Judge Eboe-Osuji also in his capacity as an Appeals Judge.[81] Notably, Judge Eboe-Osuji opined the following regarding the holding of the Appeals Chamber in the *Bemba et al.* case that there is no obligation to make rulings on evidence:

> I am unable […] to subscribe to the reversal lately attempted by the Majority in a differently constituted Appeals Chamber in the derivative case (the '*Bemba No 2 Appeal'*) […] According to them, there is no general obligation on the Trial Chamber to make a ruling – at any time at all – on the evidence […] I am in the fullest accord with Judge Henderson and I fully adopt his opinion and fully recommend it.[82]

52. The Defence does not aver that inconsistency of case law leads to legal uncertainty; the matter at hand is far more serious.[83] There is a stark difference between the holdings of the Appeals Chamber in the *Bemba* main case and the Appeals Chamber in the *Bemba et al.* case; the Appeals Chamber in the *Bemba* main case held that Trial Chambers have the obligation to either make admissibility and/or relevance rulings at the point of submission, during the trial or at the end of the trial,[84] whereas the Appeals Chamber in *Bemba et al.* held "that Trial Chambers do not have to make individual admissibility rulings at all."[85] It is this direct contrast that prompted four Appeals Judges to disagree with the Appeals Chamber's holding in *Bemba*

[79] Judge Henderson Separate Opinion on Art 70 Judgment, para. 50.
[80] Separate Opinion of Judges Van den Wyngaert and Morrison, paras 17-18: "[R]ecently, the Appeals Chamber in the sister case of *Bemba et al* went significantly further by holding, by majority, that that Trial Chambers do not have to make individual admissibility rulings at all. Whereas this may have been unproblematic in the context of a case relating to offences against the administration of justice. […] it is not appropriate in cases relating to article 5 of the Statute. In this respect we agree with our colleagues Eboe-Osuji and Henderson. Not only is it necessary to rule on the admissibility of all evidence submitted by the parties [...]"
[81] Concurring Separate Opinion of Judge Eboe-Osuji, para. 297.
[82] Concurring Separate Opinion of Judge Eboe-Osuji, para. 297; see also, para. 293.
[83] See *Nejdet Şahín and Perihan Şahín* v. *Turkey*, para. 58.
[84] *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, para. 37. The Defence avers that this includes the obligation to provide reasoning and the result of all of the evidential rulings made for all items submitted, see Concurring Opinion of Judge Eboe-Osuji, para. 296.
[85] Separate Opinion of Judges Van den Wyngaert and Morrison, para. 17 interpreting *Bemba et al.*, Article 70 Appeals Judgment.

et al.,[86] one of which even described it as an attempted reversal of another Appeals Chamber's holding in *Bemba* main case.[87]

53. The attempted reversal by the Appeals Chamber in the *Bemba et al.* case of the Appeals Chamber's holding in the *Bemba* main case leads to uncertainty regarding which evidentiary regime applies at this Court. This confusion continues to undermine Mr Ongwen's right to present his defence; especially, given that the evidentiary approach endorsed by the majority of the Appeals Chamber in *Bemba et al.* concerns the evidentiary approach of Trial Chamber VII, which is identical to the regime applied by TC IX in the *Ongwen* case.[88]

54. In sum, the Defence submits that the holding of the Appeals Chamber in the *Bemba et al.* case is not applicable to Article 5 cases,[89] thus TC IX must follow the holding of the Appeals Chamber in the *Bemba* main case. The Defence maintains that evidentiary rulings at the point of submission or during the trial are required to ensure a fair trial. If TC IX declines to make its evidentiary rulings at the point of submission or during the trial, it still needs to discuss or explicitly articulate its assessment of standard evidentiary criteria for each item formally submitted into evidence in the judgment. To decide otherwise would not only contravene the appellate jurisprudence cited above and violate Mr Ongwen's right to a fair trial, but it would also disregard the compromise reached in the Statute between Common law and Romano-Germanic law evidentiary approaches.[90]

[86] See para. 51 above of this motion. NB: Judge Van den Wyngaert and Judge Morrison disagree with the holding of the Appeals Chamber in *Bemba et al.* only for Article 5 cases, see Separate Opinion of Judges Van den Wyngaert and Morrison, paras 17-18.
[87] Concurring Separate Opinion of Judge Eboe-Osuji, paras 295-297.
[88] See para. 49 above of this motion.
[89] Separate Opinion of Judges Van den Wyngaert and Morrison, paras 17-18.
[90] Judge Henderson Separate Opinion on Art 70 Judgment, paras 39-40.

IV. RELIEF SOUGHT

55. For the reasons stated above, the Defence respectfully requests that TC IX:

A) **RULE** on the admissibility and/or relevance of **all** items that the Prosecution and LRVs submitted into evidence through 'bar table' or other motions,[91] and provide a reasoned statement for these rulings now or before closing briefs;

B) **RULE** on the admissibility and/or relevance of **all** items that the Prosecution, LRVs, and Defence submitted into evidence (and those to be submitted) by email after the conclusion of the examination of the relevant witness, and provide a reasoned statement for these rulings now or before closing briefs;

Or, in the alternative,

C) **CONFIRM** that the evidential rulings for **all** items formally submitted into evidence and their assessment will be discussed in the judgment itself or in a separate annex to the judgment.

Respectfully submitted,

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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 3rd day of July, 2019
At Nairobi, Kenya

[91] As well as any 'bar table' motions submitted by the Defence, should it occur during the trial.