

**Cour
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**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Redacted

Decision on “Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") issues the following Decision on "Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'" ("Decision").

I. Background

1. On 7 June 2012, the Chamber issued its "Decision on the 'Submissions on Defence Evidence'" ("Decision 2225"),¹ in which it, *inter alia*, granted the defence for Mr Jean-Pierre Bemba ("defence") the 230 hours it had requested for the questioning of witnesses and ordered the defence to use these hours in the most efficient manner possible and, in any case, within a timeframe of eight months.²
2. On 14 December 2012, in its "Decision on measures to facilitate the continued presentation of evidence by the defence",³ the Chamber, after considering submissions from the Registry as to the feasibility of alternatives to live testimony, ordered the Victims and Witnesses Unit ("VWU") to make the necessary arrangements for a number of witnesses, including Witnesses D04-14 and D04-44, to testify via video-link from an appropriate location.⁴
3. At a public status conference held on 3 May 2013, the Chamber reiterated its decision that the defence's presentation of evidence should not exceed eight months and noted that the defence "should be in a position to conclude the

¹ Decision on the "Submissions on Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225.

² ICC-01/05-01/08-2225, paragraphs 8, 10, 11 and 23(a) and (b).

³ Decision on measures to facilitate the continued presentation of evidence by the defence, 14 December 2012, ICC-01/05-01/08-2482-Conf-Exp.

⁴ ICC-01/05-01/08-2482-Conf-Exp, paragraph 18 (iii). The Chamber notes that the present Decision was preceded by a number of *ex parte* documents. To the extent that this Decision refers to information filed or discussed on an *ex parte* basis, the Chamber considers that the information concerned does not warrant *ex parte* treatment at this stage.

presentation of its evidence by approximately 19 July 2013, unless due to compelling reasons the Chamber decides otherwise”.⁵

4. At a status conference held on 27 June 2013, the defence submitted that a certain group of witnesses, which did not include Witnesses D04-14 and D04-44, were “the crucial witnesses” and that “[o]nce those witnesses have given their testimony, our minds will be at ease [...] After that we will be flexible and realistic”.⁶
5. On 16 July 2013, in its “Decision on the timeline for the completion of the defence’s presentation of evidence and issues related to the closing of the case”, the Chamber, taking into account the manner in which the presentation of evidence by the defence had progressed to that date, and considering the parties’ submissions made at a status conference,⁷ extended the deadline for the conclusion of the defence’s presentation of evidence to 25 October 2013.⁸ The Chamber stressed that the timeframe granted to the defence was based upon the time it had requested for the questioning of its witnesses and noted that the total time granted to the defence of approximately 14 months “roughly ‘mirror[s] that taken by the Prosecution to present its case’”.⁹
6. On 6 September 2013, pursuant to an oral order of the Chamber,¹⁰ the defence filed its “Defence Submission as to the current timetable for the completion of its case” (“Submission 2796”),¹¹ in which, *inter alia*, it informed the Chamber that the remaining witnesses to be called were Witnesses D04-54, D04-14,

⁵ Transcript of hearing of 3 May 2013, ICC-01/05-01/08-T-311-CONF-ENG ET, page 30 line 11 to page 31 line 2.

⁶ Transcript of hearing of 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG ET, page 37, lines 4 to 7.

⁷ Decision on the timeline for the completion of the defence’s presentation of evidence and issues related to the closing of the case, 16 July 2013, ICC-01/05-01/08-2731, paragraphs 14 and 15. The status conference was held on 27 June 2013, *see* ICC-01/05-01/08-T-331-CONF-ENG ET.

⁸ ICC-01/05-01/08-2731, paragraphs 22 and 38 (b).

⁹ ICC-01/05-01/08-2731, paragraph 24 and footnote 99.

¹⁰ Transcript of hearing of 3 September 2013, ICC-01/05-08-T-342-CONF-ENG ET, page 32, line 20 to page 34, line 10.

¹¹ Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796.

D04-41, and D04-44, and that it did not currently anticipate calling any further witnesses.¹²

7. On 23 October 2013, the Chamber issued its “Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44”.¹³ Taking into account the long periods of suspension in the proceedings due to the non-availability of witnesses,¹⁴ the defence’s submissions as to the difficulties in arranging the appearance of its remaining witnesses,¹⁵ and the Registry’s submissions as to the “inconsistent requests” submitted by the defence,¹⁶ the Chamber further extended the 25 October 2013 deadline to 1 November 2013 to enable the defence to present the testimony of Witness D04-54.¹⁷ With respect to Witnesses D04-14, D04-41, and D04-44, the Chamber ordered the Registry to continue making the necessary arrangements to facilitate their voluntary appearance and to report to the Chamber by 30 October 2013 on their availability and the feasibility of hearing their testimonies soon.¹⁸ The Chamber noted that, on the basis of this report, it would decide whether a further extension of the deadline, in order to allow the defence to present the testimony of Witnesses D04-14, D04-41, and D04-44, would be appropriate.¹⁹
8. On 30 October 2013, the Registry filed its “Registry report on the remaining Defence Witnesses in compliance with Decision ICC-01/05-01/08-2842” (“Registry Report”),²⁰ in which it informed the Chamber that the final arrangements for hearing Witnesses D04-44 and D04-14’s testimony, according to the defence’s most recent request, made on 11 October 2013, had

¹² ICC-01/05-01/08-2796, paragraphs 1 to 4.

¹³ Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44, 23 October 2013, ICC-01/05-01/08-2842.

¹⁴ ICC-01/05-01/08-2842, paragraph 3.

¹⁵ ICC-01/05-01/08-2842, paragraph 4.

¹⁶ ICC-01/05-01/08-2842, paragraphs 5 to 7.

¹⁷ ICC-01/05-01/08-2842, paragraphs 9 and 11(i).

¹⁸ ICC-01/05-01/08-2842, paragraphs 10 and 11(ii) and (iii).

¹⁹ ICC-01/05-01/08-2842, paragraph 10.

²⁰ Registry report on the remaining Defence Witnesses in compliance with Decision ICC-01/05-01/08-2842, 30 October 2013, ICC-01/05-01/08-2856-Conf.

not been concluded.²¹ Consequently, the Registry submitted that it was not in a position to provide any estimate as to the feasibility of having the witnesses appear before the Court.²²

9. On 1 November 2013, the Chamber issued its "Decision on the time limit for the conclusion of the defence's presentation of oral evidence at trial".²³ In relation to Witnesses D04-44 and D04-14, the Chamber noted that "the delay in completing the necessary arrangements for their appearance appears to be attributable to the continuous additional requests made by the witnesses and the defence in relation to the conditions for their appearance, some of which required the Registry to seek the intervention of third parties and which required further administrative steps to be taken".²⁴ This notwithstanding, the Chamber stated that "taking into account the Registry's continuous efforts to secure the appearance of the Witnesses D04-14 and D04-44, the Chamber considers it appropriate to grant an additional limited extension to the deadline for the defence to conclude with its presentation of oral evidence".²⁵ Consequently, the Chamber extended the deadline for the completion of the defence's presentation of oral evidence once more, "in order to allow the defence to present the testimony of Witnesses D04-14 and D04-44, provided that they both complete their testimony by 15 November 2013, at the latest".²⁶
10. On 14 November 2013, the Registry informed the Chamber that, despite all efforts, the necessary authorisations for the appearance of Witnesses D04-14 and D04-44 had not been obtained.²⁷

²¹ ICC-01/05-01/08-2856-Conf, paragraphs 1 and 2.

²² ICC-01/05-01/08-2856-Conf, paragraph 5.

²³ Decision on the time limit for the conclusion of the defence's presentation of oral evidence at trial, 1 November 2013, ICC-01/05-01/08-2861.

²⁴ ICC-01/05-01/08-2861, paragraph 9.

²⁵ ICC-01/05-01/08-2861, paragraph 10.

²⁶ ICC-01/05-01/08-2861, paragraph 10.

²⁷ Email from the Registry to the Chamber of 14 November 2013, at 16.21.

11. On 15 November 2013, at 15.18 the Chamber was notified of a document filed at 13.20 by the defence, entitled "Defence Request for an Order for Cooperation" ("Defence Request 2891"),²⁸ in which the defence asked that the Chamber (i) request the competent authorities of the [Redacted] ("[Redacted]") to immediately facilitate the appearance of Witness D04-14 and D04-44 as witnesses in the present proceedings; and (ii) order that the defence presentation of evidence conclude upon the completion of the testimony of Witnesses D04-14 and D04-44, or by 15 December 2013 at the latest.²⁹

12. On 15 November 2013, urgently at 18.15, the Chamber issued its "Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'" ("Impugned Decision").³⁰

13. In the Impugned Decision, the Chamber noted that, "despite all efforts and numerous extensions granted by the Chamber, the Registry has not been able to conclude the necessary arrangements for Witnesses D04-14 and D04-44 to appear and conclude their testimony by no later than 15 November 2013" and underlined that "the delay in ensuring that the testimony of the two remaining witnesses called by the defence within the final deadline set by the Chamber, despite the repeated extensions, are mostly attributable to the continuous additional requests made by the witnesses and the defence in relation to the conditions for their appearance".³¹

²⁸ Defence Request for an Order for Cooperation, 15 November 2013, ICC-01/05-01/08-2891-Conf.

²⁹ ICC-01/05-01/08-2891-Conf, paragraph 12.

³⁰ Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the "Defence Request for an Order for Cooperation", 15 November 2013, ICC-01/05-01/08-2899-Corr, a corrigendum to this decision was filed on 19 November 2013: Corrigendum to Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the "Defence Request for an Order for Cooperation", 19 November 2013, ICC-01/05-01/08-2899-Conf-Corr.

³¹ ICC-01/05-01/08-2899-Corr-Red, paragraph 16.

14. The Chamber also noted that, pursuant to Regulation 35(2) of the Regulations of the Court ("Regulations"), it "may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the parties participants the opportunity to be heard".³² The Chamber held that from this wording "it is clear that the Chamber enjoys discretion as to whether to grant or reject [Defence Request 2891]".³³

15. The Chamber noted that the defence's request should have been filed sufficiently in advance of the lapse of the time limit for the completion of the defence's presentation of oral evidence and not on the day on which the deadline was due to lapse, resulting in the Chamber only being notified of the request 40 minutes prior to the lapse of the deadline. Nevertheless, the Chamber, in exercise of its discretionary power, held:³⁴

[t]he Chamber is of the view that the defence has not shown "good cause" within the meaning of Regulation 35(2) of the Regulations. In particular, the Chamber stresses once again the multiple and, at times, contradictory requests made by the defence regarding the appearance of the two witnesses involved. Remarkably, after having insisted for over a year that the witnesses were against their hierarchy knowing of their willingness to testify in the case, and after the Registry has made arrangements in order to accommodate the witnesses' wishes, the defence changed its position and requested the Registry to ask for the relevant authorisations only 2 weeks before the 25 October 2013 deadline. The defence being fully aware of the usual required time for securing cooperation, should have reasonably anticipated that such late request on 11 October 2013 was likely to be problematic. Consequently, the Chamber in exercising its discretionary power, finds that no good cause has been shown in order to extend the deadline for the completion of the defence's presentation of oral evidence.

Considering that the last extended deadline for the conclusion of the defence's presentation of oral evidence has lapsed, the Chamber no longer expects Witnesses D04-14 and D04-44 to provide testimony in the present case and instructs the Registry to inform the relevant authorities that the requested authorisations are no longer required.

II. Submissions

³² ICC-01/05-01/08-2899-Corr-Red, paragraph 17.

³³ ICC-01/05-01/08-2899-Corr-Red, paragraph 17.

³⁴ ICC-01/05-01/08-2899-Conf-Corr, paragraphs 19 and 20.

16. On 18 November 2013, the defence filed its “Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (“Request for Leave to Appeal”).³⁵ In its Request for Leave to Appeal, the defence submits that the Impugned Decision gives rise to six appealable issues which, it argues, meet the criteria set out under Article 82(1)(d) of the Rome Statute (“Statute”) and warrant consideration by the Appeals Chamber.³⁶ The defence submits that the “appealable issues are not merely ‘disagreements’ or ‘conflicts of opinion’ between the Defence and the Chamber but rather consist of discrete legal questions which arise directly out of the Impugned Decision”.³⁷

17. The defence generally submits that “each of these identified appealable issues significantly affects the fair conduct of the proceedings”.³⁸ The defence asserts that “[p]reventing an accused from presenting evidence to rebut the allegations against him goes to the heart of a fair trial”.³⁹ In addition, the defence submits that “[i]n refusing to order cooperation, the decision also affects the expeditious conduct of the proceedings”.⁴⁰ The defence submits that “Witnesses D04-14 and D04-44 are ready to testify immediately, the Registry asserts that it has made significant efforts to ensure cooperation, and all that is lacking for the trial to be concluded in a manner which ensures compliance with the Chamber’s obligations under Article 64(2) is authorisation on the part of the [Redacted] authorities. In refusing to order cooperation to resolve this impasse, the Chamber has left this critical issue of

³⁵ Defence Request for Leave to Appeal the “Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”, 18 November 2013, ICC-01/05-01/08-2901-Conf-Exp. A confidential redacted version of this document was filed on the same day: Defence Request for Leave to Appeal the “Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”, 18 November 2013, ICC-01/05-01/08-2901-Conf-Red.

³⁶ ICC-01/05-01/08-2901-Conf-Red, paragraph 18.

³⁷ ICC-01/05-01/08-2901-Conf-Red, paragraph 18.

³⁸ ICC-01/05-01/08-2901-Conf-Red, paragraph 20.

³⁹ ICC-01/05-01/08-2901-Conf-Red, paragraph 20.

⁴⁰ ICC-01/05-01/08-2901-Conf-Red, paragraph 20.

fairness open, requiring further litigation at both first instance and on appeal”.⁴¹

18. Finally, the defence generally submits that “[a]n immediate resolution by the Appeals Chamber would materially advance the proceedings” since, “[s]hould the Appeals Chamber identify errors in the Chamber’s approach and quash the Impugned Decision, the error can be corrected before a final judgement is rendered, thus avoiding a retrial or the reopening of the proceedings to allow the presentation of the evidence of Witnesses D04-44 and D04-14”.⁴²

19. On 22 November 2013, the prosecution filed its “Prosecution’s Response to the Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (“Prosecution Response”),⁴³ in which it submits that the issues as framed by the defence do not constitute appealable issues within the terms of Article 82(1)(d) or do not arise out of the Impugned Decision.⁴⁴ The prosecution further submits that the defence also fails to demonstrate that the Issues meet the criteria for leave to appeal under Article 82(1)(d).⁴⁵ The prosecution makes specific arguments in relation to each issue identified by the defence.

20. In addition to submissions specific to each issue identified by the defence, the prosecution submits that the defence “provide[s] no argument to support its submission that the Issues affect the fair and expeditious conduct of the proceedings, other than [a] general statement that ‘preventing an accused

⁴¹ ICC-01/05-01/08-2901-Conf-Red, paragraph 20.

⁴² ICC-01/05-01/08-2901-Conf-Red, paragraph 21.

⁴³ Prosecution’s Response to the Defence Request for Leave to Appeal the “Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”, 22 November 2013, ICC-01/05-01/08-2905-Conf.

⁴⁴ ICC-01/05-01/08-2905-Conf, paragraph 2.

⁴⁵ ICC-01/05-01/08-2905-Conf, paragraph 2.

from presenting evidence to rebut the allegations against him goes to the heart of a fair trial’’.⁴⁶ The prosecution argues that the defence fails to explain how the Issues relate to this statement or how they each impact upon the fairness of proceedings.⁴⁷ In addition, the prosecution submits that the decision not to hear the evidence of Witness D04-14 and D04-44 does not, *per se*, affect the fair and expeditious conduct of the proceedings, otherwise every refusal to admit evidence would automatically have the same effect; the defence, in the prosecution’s submission, must show why, in the concrete circumstances of this case, the decision not to hear these specific witnesses impacts upon fairness and expeditiousness, which it has not done.⁴⁸

21. Further, the prosecution argues that the fact that the grounds for rejecting the Defence Request 2891 were “to a large extent attributable to the Defence is relevant when assessing whether the Issues significantly affect the fair and expeditious conduct of the proceedings”.⁴⁹

22. The prosecution also argues that the defence argument is speculative and premature, in that the Chamber may consider the difficulties encountered by the defence in presenting its evidence when assessing the totality of the evidence at the end of the trial.⁵⁰

23. Finally, the prosecution asserts that intervention in relation to the Issues would not materially advance the proceedings given their “highly advanced” stage; the prosecution submits that any issues concerning the proceedings raised by the parties should be dealt with in the context of a final appeal.⁵¹

III. Analysis and Conclusions

⁴⁶ ICC-01/05-01/08-2905-Conf, paragraph 10.

⁴⁷ ICC-01/05-01/08-2905-Conf, paragraph 10.

⁴⁸ ICC-01/05-01/08-2905-Conf, paragraph 11.

⁴⁹ ICC-01/05-01/08-2905-Conf, paragraph 12.

⁵⁰ ICC-01/05-01/08-2905-Conf, paragraph 13.

⁵¹ ICC-01/05-01/08-2905-Conf, paragraph 14.

24. For the purpose of the present Decision and in accordance with Article 21(1) of the Statute, the Chamber has considered Articles 67 and 82(1)(d) of the Statute.

25. In deciding on the Request for Leave to Appeal, the Chamber is guided by the established jurisprudence of this Chamber and of the Court regarding the interpretation of Article 82(1)(d) of the Statute. In line with this jurisprudence, for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific “issues” which were dealt with in the relevant decision and which constitute the appealable subject.⁵²

26. The Appeals Chamber has held that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”⁵³ In addition, Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues.⁵⁴

27. Accordingly, the Chamber has examined the Application according to the following criteria:

⁵² Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9; *see also* Decision on the “Defence Request for Leave to Appeal the Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute”, 30 October 2012, ICC-01/05-01/08-2399, paragraph 9.

⁵³ ICC-01/04-168, paragraph 9; *see also* ICC-01/05-01/08-2399, paragraph 10.

⁵⁴ Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵⁵

28. The three criteria mentioned above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.⁵⁶

29. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.⁵⁷ Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.⁵⁸

30. In addition, a party seeking leave to appeal should take into account that the Appeals Chamber’s function in relation to the exercise of discretion by a Pre-Trial or Trial Chamber is limited to ensuring that the Chamber properly exercised its discretion. The Appeals Chamber has held that it “will interfere

⁵⁵ Decision on the prosecution and defence applications for leave to appeal the “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 26 January 2011, ICC-01/05-01/08-1169, paragraph 23; *see also* ICC-01/05-01/08-2399, paragraph 11.

⁵⁶ ICC-01/05-01/08-1169, paragraph 24; *see also* ICC-01/05-01/08-2399, paragraph 12.

⁵⁷ ICC-01/05-01/08-1169, paragraph 25. *See also* Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21; Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11; *see also* ICC-01/05-01/08-2399, paragraph 13.

⁵⁸ ICC-01/05-01/08-1169, paragraph 25; *see also* ICC-01/05-01/08-2399, paragraph 13.

with a discretionary decision only under limited conditions”,⁵⁹ namely: “(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is no unfair and unreasonable as to constitute an abuse of discretion”.⁶⁰

First issue

31. The first issue identified by the defence is “[w]hether the Trial Chamber erred in rendering the Impugned Decision in the absence of submissions from the Prosecution and Legal Representatives of Victims, and a response from the Defence, to ensure a full airing of the disputed issues” (“First Issue”).⁶¹

32. The prosecution submits that the First Issue does not arise from the Impugned Decision, since neither the prosecution nor the legal representatives claim to have suffered any prejudice from the fact that the Chamber did not seek their views prior to issuing the Impugned Decision.⁶²

33. As noted in the Impugned Decision, the Chamber was notified of Defence Request 2891 only 40 minutes before the lapse of the time limit for the completion of the defence’s presentation of oral evidence.⁶³ The Chamber noted that the defence’s failure to file Defence Request 2891 “sufficiently in advance” of the lapse of the time limit the defence sought to extend precluded the Chamber from seeking the views of the prosecution and the legal representatives of victims and at the same time rendering a timely decision.⁶⁴ Since the Chamber issued the Impugned Decision in the absence of

⁵⁹ Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, paragraph 80.

⁶⁰ ICC-02/04-01/05-408, paragraph 80.

⁶¹ ICC-01/05-01/08-2901-Conf-Red, paragraph 19 (a).

⁶² ICC-01/05-01/08-2905-Conf, paragraph 4.

⁶³ ICC-01/05-01/08-2899-Conf-Corr, paragraph 18.

⁶⁴ ICC-01/05-01/08-2899-Conf-Corr, paragraph 18.

submissions from the Prosecution and Legal Representatives of Victims, or any reply thereto, the Chamber finds that the First Issue arises from the Impugned Decision. As such, the Chamber will now assess whether the First Issue meets the requirements of Article 82(1)(d).

34. Under Article 82(1)(d), an appealable issue must “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. In Defence Request 2891, the defence fails to explain how the First Issue specifically affects the fairness or the expeditiousness of the proceedings. The defence submits generally that “[p]reventing an accused from presenting evidence to rebut the allegations goes to the heart of a fair trial” and that “[i]n refusing to order cooperation, the decision also affects the expeditious conduct of the proceedings”,⁶⁵ but fails to explain how these arguments apply to each of the six separate Issues identified in the Request for Leave to Appeal. Indeed, these arguments in no way relate to the First Issue or explain how the other participants’ not being heard specifically would affect the fairness or the expeditiousness of the proceedings. Further, Defence Request 2891 does not articulate how the Chamber not having sought the views of the prosecution and legal representatives caused any prejudice to the defence. The Chamber also notes the prosecution’s submission that no prejudice is claimed by either the prosecution or the legal representatives.⁶⁶ In light of this, the Chamber sees nothing to indicate that the First Issue would have any impact upon the fair and expeditious conduct of the proceedings or the outcome of the trial.

35. For the above reasons, although a matter dealt with in the Impugned Decision, the Chamber considers that the First Issue would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of

⁶⁵ ICC-01/05-01/08-2901-Conf-Red, paragraph 20.

⁶⁶ See -01/05-01/08-2905-Conf, paragraph 4.

the trial". The Chamber therefore concludes that the criteria under Article 82(1)(d) are not met.

Second Issue

36. The second issue is "[w]hether the Trial Chamber erred in law [by] failing to consider Defence arguments on the significance of the testimony of Witnesses D04-14 and D04-44" ("Second Issue").⁶⁷

37. With respect to the Second Issue, the prosecution argues that it does not arise from the Impugned Decision as the Chamber did consider the defence's arguments on the significance of the testimony of Witnesses D04-14 and D04-44.⁶⁸ In this regard, the prosecution highlights that the Chamber recalled, in the Impugned Decision, the efforts it had made to enable the defence to call the two witnesses, including granting several extensions of time which, the prosecution submits, require it to be assumed that the Chamber was aware of and gave due weight to the potential relevance of these witnesses' testimony.⁶⁹ The prosecution also notes that the Chamber referred to Articles 69(3) and (4) of the Statute, which deal with the relevance of evidence, as the basis of the Impugned Decision.⁷⁰ The prosecution concludes that the Chamber considered all relevant factors prior to exercising its discretion under Regulation 35(2) of the Regulations. The prosecution submits that disagreement on the part of the defence with the manner in which the Chamber exercised its discretion does not constitute an appealable issue.⁷¹

38. The Chamber notes that the extended deadline for the defence to present the testimony of Witnesses D04-14 and D04-44 of 15 November 2013 was set by

⁶⁷ ICC-01/05-01/08-2901-Conf-Red, paragraph 19 (b).

⁶⁸ ICC-01/05-01/08-2905-Conf, paragraph 5.

⁶⁹ ICC-01/05-01/08-2905-Conf, paragraph 5.

⁷⁰ ICC-01/05-01/08-2905-Conf, paragraph 5.

⁷¹ ICC-01/05-01/08-2905-Conf, paragraph 5.

the Chamber in a decision of 1 November 2013.⁷² In the Impugned Decision, the Chamber exercised its discretion to decide whether this time limit should be extended. In exercising this discretion the Chamber determined that there were no new justifiable grounds for further extending a previously set, and repeatedly extended, deadline. However, in exercising this discretion the Impugned Decision did not expressly discuss the “significance” of Witnesses D04-14 and D04-44’s testimony, which the defence alleges constitutes a legal error. As such, the Chamber considers that the Second Issue arises from the Impugned Decision.

39. However, when seeking leave to appeal, the defence is required to show that each issue it identifies “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.

40. In this regard, the Chamber recalls that the defence fails to explain how its *general* arguments relating to the effect of the Issues on the fair and expeditious conduct of the proceedings or the outcome of the trial apply to each of the separate Issues identified in the Request for Leave to Appeal. At this stage, the consequences described by the defence in relation to the potential necessity of a retrial or reopening of proceedings are nothing more than speculation. This is particularly so in light of the lack of precision in the defence’s formulation of its arguments in this regard, and the lack of any demonstration of concrete and specific links between the Second Issue and the requirement of Article 82(1)(d) of the Statute.

41. For the above reasons the Chamber considers that defence has failed to show that the Second Issue “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. The Chamber concludes that the criteria under Article 82(1)(d) are not met.

⁷² ICC-01/05-01/08-2861, paragraph 10.

Third Issue

42. The third issue identified by the defence is “[w]hether the Chamber erred in law in applying a different standard to the presentation of evidence by the Prosecution and the Defence, in violation of Article 67(1)(e) of the Statute, particularly as concerns the availability of Prosecution witnesses CAR-OTP-PPPP-0015; CAR-OTP-PPPP-0045; and CAR-OTP-PPPP-0044” (“Third Issue”).⁷³

43. The prosecution submits that the defence has failed to demonstrate any basis for its allegation that there has been a difference in treatment between the defence and prosecution with respect to the presentation of their evidence.⁷⁴ The prosecution asserts that the defence has failed to identify this issue with sufficient precision and instead has “simply advance[d] general and unsubstantiated allegations”.⁷⁵ The prosecution submits that the Third Issue is “an abstract question or hypothetical concern”.⁷⁶

44. The Chamber notes that a party seeking leave to appeal must identify and formulate the issue it seeks to appeal with sufficient clarity. The Chamber has previously held that “broad reference[s]”, lacking any detail as to the specific error allegedly made by the Chamber, “do[] not satisfy the requirement that an issue be a concrete subject, the resolution of which is essential for the determination of matters arising [in] the proceedings”.⁷⁷ In addition, as the

⁷³ ICC-01/05-01/08-2901-Conf-Red, paragraph 19 (c).

⁷⁴ ICC-01/05-01/08-2905-Conf, paragraph 6.

⁷⁵ ICC-01/05-01/08-2905-Conf, paragraph 6.

⁷⁶ ICC-01/05-01/08-2905-Conf, paragraph 6.

⁷⁷ Decision on Defence Request for Leave to Appeal the Decision on the Defence Motion on the Questioning of Defence Witnesses by the Legal Representatives of Victims, 11 September 2013, ICC-01/05-01/08-2800, paragraph 15.

Chamber has previously ruled, “[a]bsent any more particularised formulation” such issues do not constitute appealable issues.⁷⁸

45. In the present case, the defence alleges that the Chamber applied “a different standard to the presentation of evidence by the Prosecution and Defence”.⁷⁹ The only further detail given by the defence is that this different standard was applied “particularly as concerns the availability of Prosecution witnesses CAR-OTP-PPPP-0015; CAR-OTP-PPPP-0045; and CAR-OTP-PPPP-0044”.⁸⁰ The defence does not identify what the difference in standard allegedly applied by the Chamber was. The defence also fails to provide detail as to the type of standard which the Chamber applied differently, or the factors to which it was applied, save for mentioning the “availability” of witnesses. Furthermore, the defence does not identify how the alleged application of a “different standard” would constitute an error of law. In addition, the defence fails to provide any factual basis for its assertion.

46. Therefore, in relation to the Third Issue, the Chamber considers that the defence has failed to identify an appealable issue for the purposes of Article 82(1)(d) of the Statute.

Fourth issue

47. The fourth issue identified by the defence is “[w]hether the Trial Chamber erred in preventing the Defence from presenting the evidence of key exculpatory witnesses despite not having implemented the solution proposed by the Registry, the organ tasked with facilitating the presentation of witnesses before the Court, in December 2012” (“Fourth Issue”).⁸¹

⁷⁸ ICC-01/05-01/08-2800, paragraph 15.

⁷⁹ ICC-01/05-01/08-2901-Conf-Red, paragraph 19 (c).

⁸⁰ ICC-01/05-01/08-2901-Conf-Red, paragraph 19 (c).

⁸¹ ICC-01/05-01/08-2901-Conf-Exp, paragraphs 19 (d).

48. The prosecution submits that the Fourth Issue misrepresents the Chamber's ruling in the Impugned Decision and that, rather than *preventing* the defence from presenting the evidence of key exculpatory witnesses, the Chamber in fact noted: (i) the difficulties in the defence's presentation of evidence, (ii) the fact that the difficulties in presenting the testimony of Witnesses D04-14 and D04-44 were to a significant degree attributable to the defence's contradictory requests in relation to those witnesses, (iii) the efforts made by the Chamber to enable the defence to present the testimony of Witnesses D04-14 and D04-44, as well as the resulting delays in the trial proceedings, and (iv) that "the Defence request was filed just 40 minutes before the lapse of the time limit for the completion of the defence's presentation of oral evidence".⁸² The prosecution submits that having noted the above factors, the Chamber exercised its discretion under Regulation 35(2) of the Regulations and rejected the defence's Defence Request 2891 which would have resulted in further delay of the proceedings.⁸³ The prosecution submits that the fact that the defence disagrees with this exercise of discretion does not constitute an appealable issue.⁸⁴

49. By way of background, the Chamber notes that the "solution" referred to by the defence was a possibility proposed by the Registry, at a status conference on 11 December 2012, that the [Redacted]".⁸⁵ Following this status conference, on 14 December 2012, the Chamber, "having considered the Registry's submissions on the feasibility of alternatives to live testimony", decided upon the mode of presentation of a number of witnesses, including Witnesses D04-14 and D04-44, ordering the VWU to "make the necessary arrangements for [their testimony] to be given via video-link from an appropriate location

⁸² ICC-01/05-01/08-2905-Conf, paragraph 7.

⁸³ ICC-01/05-01/08-2905-Conf, paragraph 7.

⁸⁴ ICC-01/05-01/08-2905-Conf, paragraph 7.

⁸⁵ Transcript of hearing of 11 December 2012, ICC-01/05-01/08-T-282-CONF-EXP-ENG, page 31, lines 3 to 13.

[Redacted]”.⁸⁶ The defence did not file a request for leave to appeal in relation to this decision; rather, subsequent to this decision, the defence informed the Chamber by email that the witnesses concerned “would still require authorization” in order to testify via video-link and that, in light of this, the defence would continue to attempt to secure the agreement of the relevant witnesses to testify with the authorization of the [Redacted] authorities.⁸⁷

50. Given that this issue arose and was dealt with by the Chamber around one year ago, the Chamber considers that the defence has failed to identify any alleged legal or factual error made by the Chamber in the Impugned Decision.

51. For the above reasons, the Chamber considers that the Fourth Issue does not arise from the Impugned Decision and is therefore not an appealable issue.

Fifth Issue

52. The fifth issue identified by the defence is “[w]hether the Trial Chamber erred in preventing the Defence from presenting critical exculpatory evidence on the basis of the “usual time required”, [Redacted], thereby accepting the obstruction on the part of [Redacted] authorities and failing to ensure the provision of conditions for a fair trial pursuant to its obligation under Article 64(2) of the Statute” (“Fifth Issue”).⁸⁸

53. With respect to the Fifth Issue, the prosecution submits that the Chamber did not accept “obstruction on the part of the [Redacted] authorities” but rather, when exercising its discretion under Regulation 35(2) of the Regulations, took into consideration the timing of the defence’s Defence Request 2891, “i.e. 40 minutes before the expiration of the deadline for the defence to conclude the

⁸⁶ Decision on measures to facilitate the continued presentation of evidence by the defence, 14 December 2012, ICC-01/05-01/08-2482-Red, paragraph 15 and 18 (iii).

⁸⁷ Email from the defence to the Chamber on 9 January 2013 at 12.05.

⁸⁸ ICC-01/05-01/08-2901-Conf-Exp, paragraphs 19 (e).

presentation of its oral evidence”, which it “emphasised [...] was exacerbated by the Defence’s knowledge that securing the cooperation of the [Redacted] authorities to facilitate the testimony of defence witnesses takes some time”.⁸⁹ For these reasons the prosecution submits that the Fifth Issue does not arise from the Impugned Decision.⁹⁰

54. The Chamber notes that in the Defence Request 2891, the defence described the “obstruction” as “[t]he failure of the [Redacted] authorities to respond in a timely manner” which the defence stated was “effectively preventing the Defence presenting critical exculpatory evidence on behalf of the accused”.⁹¹
55. In this regard and contrary to the defence’s submission the Chamber, in the Impugned Decision, did not *accept* the length of time taken by the [Redacted] authorities to cooperate such that this length of time was allowed to prevent the defence from presenting evidence. Rather, the Chamber reiterated that Witnesses D04-14 and D04-44 not being heard within the deadline was attributable to the “multiple and, at times, contradictory requests made by the defence regarding the appearance of the two witnesses”.⁹² The Chamber had already noted the same in its decision of 1 November 2013,⁹³ but had exceptionally granted a further extension to the deadline for the defence to present the testimony of Witnesses D04-14 and D04-44.⁹⁴ Indeed, rather than accepting “obstruction”, the Chamber, in referring to the “usual time required”, expressly accounted for this time when exercising its discretion, allowing for its impact upon the proceedings in finding that the reason for which the witnesses were prevented from testifying was the changing requests conveyed by the defence. As such, the defence’s allegation that the Chamber accepted “obstruction” and prevented the defence from presenting

⁸⁹ ICC-01/05-01/08-2905-Conf, paragraph 8.

⁹⁰ ICC-01/05-01/08-2905-Conf, paragraph 8.

⁹¹ ICC-01/05-01/08-2891-Conf, paragraph 9.

⁹² ICC-01/05-01/08-2899-Conf-Corr, paragraph 19.

⁹³ ICC-01/05-01/08-2861, paragraph 9.

⁹⁴ ICC-01/05-01/08-2861, paragraphs 9 and 10.

evidence on this basis misrepresents the Chamber's decision. Therefore, the Fifth Issue, as framed by the defence in the Request for Leave to Appeal, does not arise from the Impugned Decision. As the defence has failed to identify any legal or factual error arising from the Impugned Decision, any further disagreement on the part of the defence in this regard constitutes nothing more than a difference in opinion as to the Chamber's exercise of discretion pursuant to Regulation 35(2) of the Regulations.

56. Consequently, the Fifth Issue identified by the defence does not constitute an appealable issue arising out of the Impugned Decision.

Sixth Issue

57. The sixth issue identified by the defence is "[w]hether the Trial Chamber erred in failing to consider the lack of cooperation on the part of a State Party to the ICC as good cause for extending the deadline for the presentation of Defence oral evidence to afford the accused the right to bring evidence to counter the allegations against him" ("Sixth Issue").⁹⁵

58. The prosecution submits that the Sixth Issue is neither an appealable issue, nor one that arises from the Impugned Decision.⁹⁶ The prosecution firstly submits that the predicate of the Fifth issue, that is that the Chamber "failed to 'consider the lack of cooperation on the part of a State Party to the ICC as good cause for extending the deadline for the presentation of [...] evidence'", is erroneous. The prosecution submits that "it is inaccurate to suggest that the [Redacted] is not cooperating with the Court to support the presentation of evidence by the Defence" as "the [Redacted] authorities have facilitated the testimony of Defence Witnesses D04-18, D04-19, D04-45, and D04-49, among

⁹⁵ ICC-01/05-01/08-2901-Conf-Red, paragraph 19 (f).

⁹⁶ ICC-01/05-01/08-2905-Conf, paragraph 9.

others”.⁹⁷ The prosecution further submits that while, from the record available to it, the [Redacted] authorities have taken some time to grant authorisation for witnesses to give evidence,⁹⁸ the Chamber did not fail to take this into consideration when rejecting the defence’s request for an extension of the deadline.⁹⁹ In this respect, the prosecution notes that the Chamber “expressly acknowledged the ‘usual time required for securing cooperation’, and noted [...] that the delay in securing the testimony of Witnesses D04-14 and D04-44 [was] to a large extent attributable to the Defence having submitted its request at a very late stage whilst knowing the time requirements of the [Redacted] authorities”.¹⁰⁰ Finally, the prosecution submits that the defence “merely disagrees with the manner in which the Chamber weighed the time requirements of the [Redacted] authorities when exercising its discretion under Regulation 35(2)”; which, the prosecution submits, does not constitute an appealable issue.¹⁰¹

59. The Chamber again, as in relation to the Fifth Issue, notes, contrary to the defence allegation that the Chamber did not take into account the [Redacted] authorities’ alleged “lack of cooperation”, that the length of time taken to secure cooperation from the [Redacted] authorities was expressly taken into account in the Chamber’s finding that the failure to meet the deadline was attributable to the defence’s “multiple and, at times, contradictory requests”.¹⁰² As such, the defence’s allegation that the Chamber failed to consider this issue misrepresents the Chamber’s decision. Any further disagreement on the part of the defence constitutes nothing more than a difference in opinion as to the Chamber’s exercise of discretion pursuant to Regulation 35(2) of the Regulations.

⁹⁷ ICC-01/05-01/08-2905-Conf, paragraph 9.

⁹⁸ ICC-01/05-01/08-2905-Conf, paragraph 9. In this regard the prosecution cites, as an example, submissions made by the VWU in the context of a status conference. *See* ICC-01/05-01/08-T-331-CONF-ENG, page 34, lines 3 to 8.

⁹⁹ ICC-01/05-01/08-2905-Conf, paragraph 9.

¹⁰⁰ ICC-01/05-01/08-2905-Conf, paragraph 9.

¹⁰¹ ICC-01/05-01/08-2905-Conf, paragraph 9.

¹⁰² ICC-01/05-01/08-2899-Conf-Corr, paragraph 19.

60. For the above reasons, the Chamber does not consider the Sixth Issue to be an appealable issue.

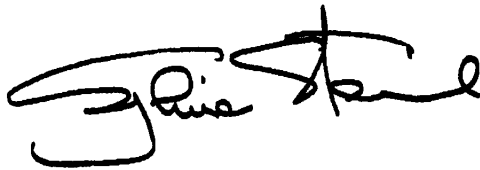
61. As the Issues identified in the Request for Leave to Appeal are either not appealable issues or fail to meet at least one of the cumulative requirements of Article 82(l)(d) of the Statute, the Chamber need not address the remaining criteria set out in paragraph 28 above.

IV. Disposition

62. For the foregoing reasons, the Chamber hereby:

- (i) DENIES the Request for Leave to Appeal; and
- (ii) ORDERS that, in the interests of ensuring the publicity of the proceedings, public redacted versions of Defence Request 2891, the Prosecution Response, and the Request for Leave to Appeal, should be filed by the party from which the document originates, by 17 January 2014, at the latest.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 20 December 2013

At The Hague, The Netherlands