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**International
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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

**CLRV's Response to "Defence Request for Leave to Appeal the 'Decision on
Defence Request regarding the Evidentiary Regime'"**

Source: **Office of Public Counsel for Victims**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLRv”) opposes the Defence’s “Request for Leave to Appeal the ‘Decision on Defence Request regarding the Evidentiary Regime’” (the “Request”).²

2. The CLRv contends that the two purported issues identified in the Request either do not properly arise from the Decision on Defence Request regarding the Evidentiary Regime (the “Impugned Decision”)³ or fail to properly constitute appealable issues. Should the Trial Chamber (the “Chamber”) deem otherwise, the CLRv submits that the Request further fails to meet the remaining criteria for granting interlocutory appeals under Article 82(1)(d) of the Rome Statute (the “Statute”).

II. PROCEDURAL BACKGROUND

3. On 13 July 2016, the Chamber issued the “Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”).⁴ On 1 December 2016, the Chamber issued the “Decision on Prosecution Request to Submit Interception Related Evidence” (the “Decision on Intercept Evidence”).⁵ On 7 December 2016, the Defence filed a request

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Request for Leave to Appeal the ‘Decision on Defence Request regarding the Evidentiary Regime’”, No. ICC-02/04-01/15-1550, 24 June 2019 (the “Request”).

³ See the “Decision on Defence Request regarding the Evidentiary Regime” (Trial Chamber IX), No. ICC-02/04-01/15-1546, 19 June 2019 (the “Impugned Decision”).

⁴ See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX, Presiding Judge), No. ICC-02/04-01/15-497, 13 July 2016 (the “Initial Directions”).

⁵ See the “Decision on Intercept Evidence, the ‘Decision on Prosecution Request to Submit Interception Related Evidence’” (Trial Chamber IX), No. ICC-02/04-01/15-615, 1 December 2016 (the “Decision on Intercept Evidence”).

for leave to appeal the Decision on Intercept Evidence.⁶ On 12 December 2016, the CLRV and the Prosecution opposed said request.⁷ On 20 December 2016, the Chamber rejected the Defence's request for leave to appeal the Decision on Intercept Evidence.⁸

4. On 21 May 2019, the Defence filed the Request and Observations on Trial Chamber IX's Evidentiary Regime (the "Initial Request").⁹ On 28 May 2019, the Prosecution filed its response, asking the Chamber to dismiss the Initial Request *in limine*.¹⁰ On 31 May 2019, the Legal Representatives of Victims responded to the Initial Request, partially opposing it.¹¹ On 3 June 2019, the CLRV also filed her response, opposing it in whole.¹² On 19 June 2019, the Chamber issued the Impugned Decision, dismissing the Initial Request.¹³

5. On 24 June 2019, the Defence filed the Request¹⁴.

⁶ See the "Defence Request for Leave to Appeal 'Decision on Prosecution Request to Submit Interception Related Evidence' (ICC-02/04-01/15-615)", No. ICC-02/04-01/15-625, 7 December 2016.

⁷ See the "Response to the 'Defence Request for Leave to Appeal Decision on Prosecution Request to Submit Interception Related Evidence (ICC-02/04-01/15-615)", No. ICC-02/04-01/15-630; and the "Prosecution's Response to 'Defence Request for Leave to Appeal Decision on Prosecution Request to Submit Interception Related Evidence' (Decision 615)", No. ICC-02/04-01/15-631, 12 December 2016.

⁸ See the "Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted" (Trial Chamber IX), No. ICC-02/04-01/15-641, 20 December 2016.

⁹ See the "Defence Request and Observations on Trial Chamber IX's Evidentiary Regime", No. ICC-02/04-01/15-1519-Conf, 21 May 2019 (the "Initial Request").

¹⁰ See the "Prosecution's Response to 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'", No. ICC-02/04-01/15-1526-Conf, 28 May 2019.

¹¹ See the "Victims' Response to 'Public Redacted Version of 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'", No. ICC-02/04-01/15-1533, 31 May 2019.

¹² See the "CLRV's Response to 'Defence Request and Observations on Trial Chamber IX's Evidentiary Regime'", No. ICC-02/04-01/15-1538-Conf, 3 June 2019.

¹³ See the Impugned Decision, *supra* note 3.

¹⁴ See the Request, *supra* note 2.

III. SUBMISSIONS

A. Applicable law

6. Article 82(l)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Due to the cumulative nature of the criteria set out in Article 82(1)(d) of the Statute, the failure to satisfy any one of them must result in the rejection of a request for leave to appeal.¹⁵

7. For the purposes of the first prong of the above mentioned test, the Appeals Chamber defined an “issue” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*”.¹⁶ Moreover, the Appeals Chamber ruled that “*the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue*”.¹⁷

8. Consequently, it must first be determined whether the purported “issues” in the Request are “*appealable issues*” within the meaning of Article 82(l)(d) of the Statute as interpreted by the jurisprudence of the Court. Indeed, “*while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before*

¹⁵ See the “Decision on Defence Request for Leave to Appeal Decision 1248” (Trial Chamber IX), No. ICC-02/04-01/15-1263, 22 May 2018, para. 10. See also the “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” (Trial Chamber IX), No. ICC-02/04-01/15-1268, 1 June 2018, para. 8; and the “Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)” (Trial Chamber IX), No. ICC-02/04-01/15-1331, 5 September 2018, para. 8.

¹⁶ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

¹⁷ *Idem*, para. 20.

*the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.*¹⁸

B. Merits of the Purported “Issues”

9. The Defence identifies two purported issues in the Request. At the outset, the CLRV underlines that the Defence does not clearly indicate whether these matters constitute legal, factual or procedural error(s).

10. Notwithstanding, the first purported issue is framed as “[w]hether TC IX’s failure to consider and adhere to the applicable Appeals Chamber’s jurisprudence in the Bemba case, concerning the obligation to provide a full and reasoned statement of findings on each item of evidence submitted into evidence under Article 74(5) of the Statute, amounted to an error of law that materially affected the Decision (‘Issue 1’).”¹⁹

11. Furthermore, the Defence argues that “[i]n rejecting the Defence request to confirm that the evidential rulings for all items submitted into evidence and their assessment will be discussed in the judgment, TC IX held that there has been only one decision, the Bemba et al. Appeal Judgment which confirmed the lawfulness of the type of evidentiary regime used by TC IX and which has never been reversed. In effect, TC IX maintains its approach that it is not required to provide a full and reasoned statement detailing the results of its evidentiary rulings for all items of evidence submitted.”²⁰

¹⁸ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 29 November 2012, para. 70.

¹⁹ See the Request, *supra* note 2, para. 2.

²⁰ *Idem*, para. 4 (Emphasis added).

12. Firstly, the CLRV submits that the Request misrepresents the Appeals Chamber's decision in the *Bemba case*. In fact, the Appeals Chamber clearly stated that:

*"As borne out by the use of the word 'may' in article 69 (4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. [...] Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. [...] Moreover, it should be underlined that irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial".*²¹

13. In other words, the Appeals Chamber never ruled that the Chamber must discuss its assessment of all items of evidence in the judgment issued under article 74(5) of the Statute. Rather, the Appeals Chamber held that the Chamber will have to consider the relevance, probative value and the potential prejudice of each item of evidence when evidence is submitted during the trial or at the end of the trial.²² Accordingly, in the relevant part of the Impugned Decision, the Chamber reiterated its previous ruling that "[...] items of evidence will be recognised as formally submitted during the trial and consideration of their relevance, probative value, and potential prejudice will be deferred until the judgment. The Chamber will consider these standard evidentiary criteria for all items recognised as submitted during its deliberation of the judgment, but not necessarily entertain this discussion for each item in the judgment".²³ Thus, there is no doubt that the Chamber will indeed *consider* the relevance, probative value and the potential prejudice of each item of evidence at the end of the

²¹ See the "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'" (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 37 (Emphasis added).

²² *Idem*.

²³ See the Impugned Decision, *supra* note 3, para. 1 (Emphasis added.) See also the Initial Directions, *supra* note 4, para. 24.

trial, in compliance with the above mentioned Appeals Chamber's decision in the *Bemba case*. This is not the same as extensively discussing the admissibility of each item of evidence in the trial judgment, as suggested by the Defence.

14. Moreover, the Appeals Chamber also held that, in order to fulfil its obligation to provide a reasoned opinion under article 74(5) of the Statute, the Chamber is not required to address all the arguments raised by the parties *or every item of evidence relevant to a particular factual finding*, provided that it indicates with sufficient clarity the basis for its decision.²⁴ In addition, the Appeals Chamber stressed that it must be presumed that the Chamber evaluated all the evidence before it as long as there is no indication that it completely disregarded any particular piece of evidence.²⁵

15. Even if, *arguendo*, the Defence insists that the Chamber is required to discuss or explicitly articulate its assessment of standard evidentiary criteria for each item formally submitted into evidence in its judgment under article 74 of the Statute, it is still untimely to fault the Chamber's approach since the trial has not even reached its formal conclusion and, obviously, the Chamber has not yet considered, let alone discussed, any item of evidence in rendering its judgment on the merits of the case. Thus, it is particularly premature and speculative to argue at present that Mr Ongwen's right to a reasoned statement will somehow be violated at the end of the trial. Given the fact that the Chamber's evaluation of the evidence has been deferred until the deliberation of the judgment, the Defence's arguments in this regard are made *in vacuum* and devoid of any substance. As a consequence, the first purported issue does not arise from the Impugned Decision. On this ground alone, the Chamber should reject it.

²⁴ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 105.

²⁵ *Idem*.

16. The second purported issue is framed as “[w]hether TC IX erred in re-characterizing the Defence request under Rule 134(3) of the Rules as a motion for reconsideration (‘Issue2’).”²⁶ Furthermore, the Defence argues that it did not request a motion for reconsideration but requested the Chamber to rule on the issues identified in the Initial Request pursuant to Rule 134(3) of the Rules of Procedure and Evidence.²⁷

17. The CLRV submits that the Defence fails to raise a proper appealable issue. The starting point for considering an application for reconsideration is the duty on the part of a Trial Chamber to ensure that the trial is fair and expeditious, pursuant to Article 64(2) of the Statute.²⁸ Thus, the Chamber may reconsider its own decisions, prompted by the parties or *proprio motu*.²⁹ Indeed, reconsideration of a previous interlocutory decision is an inherent discretionary power of the international courts and tribunals.³⁰ In the practice, the trial chambers often face a situation where it needs to assess the true nature of requests or motions filed by the parties and participants and re-characterize it in order to determine *whether it has jurisdiction regarding it* and ultimately set the correct procedural steps to follow.³¹

18. Even, in the present case, the Single Judge of the Chamber had previously re-characterised a request filed by the legal representatives as amounting to a request

²⁶ See the Request, *supra* note 2, para. 2.

²⁷ *Idem*, para. 12.

²⁸ See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 13.

²⁹ See the “Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits” (Trial Chamber V(a)), No. ICC-01/09-01/11-1813, 10 February 2015, para. 19.

³⁰ See ICTR, *Prosecutor v. Pauline Nyiramasuhuko et al*, Judgement (Appeals Chamber), Case No. ICTR-98-42-A, 14 December 2015, para. 127 and ICTY, *Prosecutor v. Radovan Karadzic*, Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision (Trial Chamber), Case No. IT-95-5/18-T, 10 December 2010, para. 8.

³¹ See ICTY, *Prosecutor v. Pavle Strugar*, Decision on Strugar’s Request to Reopen Appeal Proceedings (Appeals Chamber), Case No. IT-01-42-Misc.I, 7 June 2007, paras. 20-22. See also the “Decision on the Admissibility of Documents filed by the Parties on 13 and 21 April 2017 and 5 May 2017” (Trial Chamber II), No. ICC-01/04-01/06-3314-tENG, 18 October 2017, paras. 12, 15 and 18.

for reconsideration.³² Motions or requests seeking a variation or modification of the rulings imposed by the Chamber³³ or re-opening an issue which had already been ruled upon by the Chamber³⁴ by making the same arguments rejected previously³⁵ amount to a motion for reconsideration; regardless of how differently they may be labelled. In assessing whether a document constitutes a motion for reconsideration, the object of the motion³⁶ or the subject matter identified in the request³⁷ or the *de facto* effect it seeks³⁸ is determinative. For example, the Defence had argued previously that one of the Prosecution's requests was a *de facto* request for reconsideration, despite the fact that the Prosecution had not labelled its Request as such.³⁹ Indeed, the Appeals Chamber of the ICTY held that:

³² See the "Decision on Legal Representatives' Request Regarding Opening Statements" (Trial Chamber IX), No. ICC-02/04-01/15-610, 29 November 2016, paras. 6 and 7.

³³ See the "Decision on Prosecution request for additional Defence disclosure" (Trial Chamber VI), No. ICC-01/04-02/06-1818, 10 March 2017, paras. 14-16.

³⁴ See the "Decision on Prosecution's Submission of Schedule of Evidence of Summoned Witnesses" (Trial Chamber V(a)), No. ICC-01/09-01/11-1442-Conf, 18 July 2014, para. 7 (pursuant to Trial Chamber V(a)'s Order ICC-01/09-01/11-2039, dated 1 December 2017, this document was reclassified as "Public"). See also the "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents" (Pre-Trial Chamber I), No. ICC-01/04-01/07-477, 15 May 2008, p. 5.

³⁵ See the "Second Decision on Disclosure and Related Matters", (Pre-Trial Chamber II), No. ICC-01/14-01/18-163, 05 April 2019, paras. 34-36.

³⁶ See the "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents", *supra* note 34, p. 5. See also. MICT, *Prosecutor v. Radovan Karadzic*, Decision on a Motion to Reclassify Filings (Appeals Chamber), Case No. MICT-13-55-A, 3 October 2017, p. 5.

³⁷ See the "Decision on the request to present views and concerns of victims on their legal representation at the trial phase" (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012, para. 6. See also ICTR, *Prosecutor v. Pauline Nyiramasuhuko et al*, Judgement (Appeals Chamber), Case No. ICTR-98-42-A, 14 December 2015, paras. 161, 2938 and 2939.

³⁸ See the "Public Redacted Version of the Decision on the 'Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo' of 2 September 2011" (Trial Chamber III), No. ICC-01/05-01/08-1691-Red, 6 September 2011, para. 17. See also MICT, *Prosecutor v. Radovan Karadzic*, Decision on a Motion for Inter Partes Proceedings in Rule 86 Matters (Appeals Chamber), Case No. MICT-13-55-A, 9 March 2017, para. 5; and ICTY, *Prosecutor v. Jadranko Prlic et al*, Public Redacted Version of the 'Decision on Valentin Coric's Request for Provisional Release' issued on 15 August 2016 (Appeals Chamber), Case No. IT-04-74, 1 December 2016, p. 3.

³⁹ See the "Public Redacted Version of 'Defence Response to the Prosecution Request for Reconsideration, ICC-02/04-01/15-778', filed on 3 April 2017", No. ICC-02/04-01/15-805-Red, 3 April 2017, paras. 2 and 12-15 and the "Decision on Prosecution Request for Further Directions on the Use of Documents during the Questioning of Witnesses" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-817, 13 April 2017, para. 4.

"[...] The Appeals Chamber next turns to preliminary matters of some importance: namely, how to characterize the Defence Request procedurally and whether the Appeals Chamber has jurisdiction regarding it. [...] The Defence Request is more plausibly construed as a motion for reconsideration of the Decision Accepting Withdrawals. For one thing, Strugar specifically asks the Appeals Chamber to 'revoke' the Decision Accepting Withdrawals. [...] For another, his arguments closely resemble the kinds of arguments raised in motions for reconsiderations. [...] Here Strugar suggests an error and implies an injustice. He claims that the Decision Accepting Withdrawals erroneously accepted an uninformed withdrawal - a claim that, if true, would demonstrate a miscarriage of justice. Given how closely his arguments track the sort of arguments relevant in motions for reconsideration, the Appeals Chamber considers that the Defence Request is properly viewed as such a motion."⁴⁰

19. Likewise, the Chamber considered the wording/overall language and the nature of the relief sought (aimed at revisiting an issue settled by the Chamber's previous decisions) by the Initial Request and thus decided to re-characterise it.⁴¹ Yet, the Defence still fails to identify a specific "issue" or "an identifiable subject or topic requiring a decision for its resolution"⁴² since it does not argue whether the Chamber acted outside of its competence or abused its discretionary power to re-characterise the document filed before it.

20. In fact, the Defence does not contend that, had it known the intention of the Chamber to re-characterise the Initial Request as a motion for reconsideration, it would have made substantially different submissions as to impact the Chamber's analysis of the Initial Request. Conversely, the Defence also fails to demonstrate that the Chamber would have reached a completely different conclusion if it had not re-characterised the Initial Request as a motion for reconsideration.

21. Consequently, the CLRV submits that the second purported issue fails to constitute a proper appealable issue. As it currently stands, it is framed in a general

⁴⁰ See ICTY, *Prosecutor v. Pavle Strugar*, Decision on Strugar's Request to Reopen Appeal Proceedings, *supra* note 31, paras. 20-22.

⁴¹ See the Impugned Decision, *supra* note 3, paras. 16-18.

⁴² See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 16, para. 9.

manner without pointing to sufficiently distinct legal, factual or procedural error(s) that the Chamber would have allegedly committed.⁴³ Indeed, “[i]t is not the Chamber’s duty to decompose broadly formulated issues in order to identify potential issues for certification”.⁴⁴ A party seeking leave to appeal a decision must “identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error” and “[l]eave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate ex novo before the Appeals Chamber the entire decision”.⁴⁵

22. In addition, the Defence simply disagrees with the outcome of the Impugned Decision. In this regard, the arguments expressing nothing more than a mere disagreement⁴⁶ with the Chamber’s conclusions do not constitute an “appealable issue” within the meaning of Article 82(1)(d) of the Statute.⁴⁷ Indeed, when a party challenges a judicial decision, more is needed than simply expressing a difference of opinion regarding the question *sub judice*.⁴⁸ Consequently, the Chamber should reject the second purported issue.

23. Should the Chamber consider that the two purported issues properly arise from the Impugned Decision or constitute appealable issues, the CLRV further posits that the remaining requirements of Article 82(1)(d) of the Statute are not met.

⁴³ See the “Decision on Defence Motion for Reconsideration of or Leave to Appeal the Decision on Defence Third Request to Add 12 Items to its List of Evidence” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1547, 20 June 2019, para. 14.

⁴⁴ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 70.

⁴⁵ See the “Decision on three applications for leave to appeal”, *supra* note 18, para. 70.

⁴⁶ See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 11 December 2013, para. 31; and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

⁴⁷ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 16, para. 9.

⁴⁸ See the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014” (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 4 July 2014, para. 33.

24. Firstly, the resolution of the purported issues would not significantly affect the fair and expeditious conduct of the proceedings. As shown above, the Defence's arguments concerning Mr Ongwen's right to a reasoned opinion can only be raised and litigated before the Appeals Chamber in conjunction with the merits of the trial judgment rendered pursuant to article 74(5) of the Statute.⁴⁹ Thus, the Defence's conjecture about the Chamber's impending refusal to consider or discuss the results of its evidentiary rulings in its judgment, failing somehow to provide a full and reasoned statement,⁵⁰ is pure speculation. Moreover, the propriety of the Chamber's decision to re-characterise the Initial Request cannot possibly affect the fair and expeditious conduct of the proceedings since the Chamber did not dismiss the Initial Request *in limine*, as had previously been requested by the CLRV. Regardless of the re-characterisation of the Initial Request, the Chamber addressed in detail the merits of the Defence arguments and fairly re-examined whether its previous decisions were erroneous.⁵¹ Furthermore, the second purported issue would not significantly affect the outcome of the trial since it raises at best a minor procedural matter that is inconsequential upon the quality or the quantity of the incriminating or exonerating evidence that will ultimately determine the criminal responsibility of the Accused.

25. Secondly, an immediate resolution of the purported issues by the Appeals Chamber would not materially advance the proceedings. Indeed, the Appeals Chamber's review function is "*corrective in nature and not de novo*".⁵² As elaborated above, the purported issues do not arise from the Impugned Decision and fail to properly constitute appealable issue(s). Consequently, the Appeals Chamber cannot be asked to engage in an academic exercise, supported by speculative arguments. Moreover, the trial has already reached an advanced stage as the Defence has already

⁴⁹ See *supra* para. 15.

⁵⁰ See the Request, *supra* note 2, paras. 16-20.

⁵¹ See the Impugned Decision, *supra* note 3, paras. 22-34.

⁵² See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

presented almost half of its witnesses. Thus, the intervention of the Appeals Chamber at this stage will only further prolong these already lengthy trial proceedings which commenced three full years ago.

26. Therefore, the CLRV posits that none of the issues identified by the Request constitutes an appealable issue, nor do they meet the stringent requirements for granting interlocutory appeal under Article 82(1)(d) of the Statute.

IV. CONCLUSION

27. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request in its entirety.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 28th day of June 2019

At Madrid, Spain