

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 27 August 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Confidential

**CLRV's Response to Defence's "Motion for Reconsideration or, In the Alternative,
for Leave to Appeal Portion of the 'Decision on Defence Request to Add Two
Witnesses to its List of Witnesses and Accompanying Documents to its List of
Evidence'"**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Chief Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of the Victims

Ms Paolina Massidda
Ms Jane Adong
Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims¹ (the "CLRV") submits that the Defence's "Motion for Reconsideration or, In the Alternative, for Leave to Appeal Portion of the 'Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence'" (the "Defence's Motion")² should be rejected in its entirety because it fails to meet the specific requirements for both reconsideration of and leave to appeal the "Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence" (the "Impugned Decision").³

2. As far as the reconsideration is concerned, the Trial Chamber (the "Chamber") has consistently ruled that this procedural avenue is exceptional and should only be pursued if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. None of these criteria has been fulfilled by the Defence in its Motion.

3. As far as the leave to appeal is concerned, the first purported issue does not arise from the Impugned Decision since the Defence misrepresents the nature of the Chamber's Decision granting the CLRV's request to call an expert witness on rape

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. See also, 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 "Motion for Reconsideration or, In the Alternative, for Leave to Appeal Portion of the 'Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence', No. ICC-02/04-01/15-1567-Conf, 19 August 2019 (the "Defence's Motion").

³ See the "Decision on Defence Request to Add Two Witnesses to its List of Witnesses and Accompanying Documents to its List of Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-1565, 13 August 2019 (the "Impugned Decision").

and SGBC (the "Decision on the CLRV's Expert Evidence")⁴ on which it bases its arguments about the unfairness towards the Accused. The second purported issue also does not arise from the Impugned Decision since the Defence misrepresents the purpose and the nature of the ruling in question.

II. PROCEDURAL BACKGROUND

4. On 13 October 2017, the Single Judge of the Chamber issued the "Preliminary Directions for any LRV or Defence Evidence Presentation" requesting the Legal Representatives and the Defence to provide a preliminary list of witnesses and an estimate of how many hours of witness examination they will require by 14 December 2017.⁵ On 27 October 2017, the Defence filed its Observations on the Preliminary Directions asking, *inter alia*, a revision of the timeline for submitting the Defence's Final Lists.⁶ On 6 November 2017, in form of a reply to the Prosecution's response, the Defence modified its First Extension Request and further requested the Chamber to change the deadline for submitting the Defence's Final Lists to 1st June 2018 or three weeks after the close of the Prosecution case, whichever is later.⁷ On 16 November 2017, the Chamber rejected said request.⁸

⁴ See the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests" (Trial Chamber IX), No. ICC-02/04-01/15-1199-Red, 6 March 2018 (the "Decision on the CLRV's Expert Evidence").

⁵ See the "Preliminary Directions for any LRV or Defence Evidence Presentation" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1021, 13 October 2017, para. 3.

⁶ See the "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", with Confidential Annexes A-C, No. ICC-02/04-01/15-1029-Conf, 27 October 2017, paras. 41-46. A public redacted version of this document was filed on 08 November 2017. See No. ICC-02/04-01/15-1029-Red.

⁷ See the "Defence Reply to Prosecution Response ICC-02/04-01/15-1048-Conf", No. ICC-02/04-01/15-1064-Conf, paras. 23-26. A public redacted version of this document was filed on 08 November 2017. See No. ICC-02/04-01/15-1064-Red.

⁸ See the "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" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1074, 16 November 2017, paras. 20-27.

5. On 6 March 2018, the Chamber decided *proprio motu* to modify the deadline provided in the Preliminary Directions for submitting the Defence's Final Lists to 31 May 2018.⁹ Said deadline was subsequently postponed to 4 June 2018.¹⁰

6. On 10 July 2019, the Defence filed a request to add two witnesses to its List of Witnesses and related documents to its List of Evidence (the "Initial Request").¹¹ On 17 July 2019, the Prosecution¹² and the CLRV¹³ filed their responses to the Initial Request. On 13 August 2019, the Chamber issued the Impugned Decision, partially granting the Initial Request.¹⁴

7. On 19 August 2019, the Defence filed its Motion.¹⁵ On the same day, the Prosecution requested an extension of time limit to file its response (the "Prosecution's Request").¹⁶ The Defence did not object.¹⁷ The same day the Chamber granted said Request setting the deadline for filing responses to the Defence's Motion on 30 August 2019.¹⁸

⁹ See the "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests" (Trial Chamber IX), No. ICC-02/04-01/15-1199-Conf, 6 March 2018, para. 84. A public redacted version of the decision was filed on the same day. See No. ICC-02/04-01/15-1199-Red.

¹⁰ See the email sent by the Chamber on 24 May 2018 at 09:58.

¹¹ See the "Defence's request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence", No. ICC-02/04-01/15-1559-Conf, 10 July 2019 (the "Initial Request"). A public redacted version of the request was filed on 14 August 2019. See No. ICC-02/04-01/15-1559-Red.

¹² See the "Prosecution's Response to 'Defence Request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence'", No. ICC-02/04-01/15-1560-Conf, 17 July 2019. Pursuant to Decision No. ICC-02/04-01/15-1565, this document was reclassified as public.

¹³ See the "CLRV's Response to 'Defence's request to add Expert Witness UGA-D26-P-0158 and Fact Witness UGA-D26-P-0013 to its List of Witnesses and Accompanying Documents to its List of Evidence'", No. ICC-02/04-01/15-1561-Conf, 17 July 2019. A public redacted version of the response was filed on 19 August 2019. See No. ICC-02/04-01/15-1561-Red.

¹⁴ See the Impugned Decision, *supra* note 3.

¹⁵ See the Defence's Motion, *supra* note 2.

¹⁶ See the email sent by the Prosecution on 19 August 2019 at 16:06.

¹⁷ See the email sent by the Defence on 19 August 2019 at 16:33.

¹⁸ See the email sent by the Chamber on 19 August 2019 at 17:18.

III. LEVEL OF CLASSIFICATION

8. The present submission is filed confidential in accordance with regulation 23*bis* (2) of the Regulations of the Court, following the level of classification chosen by the Defence. However, the CLRV indicates that the present submission does not contain confidential information and can be reclassified as public.

IV. SUBMISSIONS

9. In its Motion, the Defence principally argues that the portion of the Impugned Decision rejecting the proposal to add D-0158 to its List of Witnesses and the accompanying materials to its List of Evidence violates Mr Ongwen's fair trial rights.¹⁹ Consequently, the Defence seeks reconsideration of or, in the alternative, leave to appeal the Impugned Decision.²⁰

A. Request Seeking Reconsideration

10. The Common Legal Representative recalls that the Chamber has consistently ruled that *"reconsideration is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice"*.²¹ Additionally, *"new facts and arguments arising since the decision was rendered may be relevant to this assessment"*.²²

¹⁹ See the Defence's Motion, *supra* note 2.

²⁰ *Idem*.

²¹ See the "Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance" (Trial Chamber IX), No. ICC-02/04-01/15-468, 15 June 2016, para. 4. See also the "Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-711, 23 February 2017, para. 4; the "Decision on Defence Request for Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim Participation" (Trial Chamber IX), No. ICC-02/04-01/15-1152, 26 January 2018, para. 6; and the "Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives" (Trial Chamber IX), No. ICC-02/04-01/15-1210-Conf, 26 March 2018, para. 6.

²² *Idem*.

11. Firstly, the Defence argues that the Impugned Decision is inconsistent with the Decision on the CLRV's Expert Evidence where the Chamber found that the anticipated witness testimony was not repetitive as the expert evidence differed from a first-hand account by a direct victim.²³ The Defence submits that, because D-0158's anticipated evidence is not repetitive, the Chamber applied a double standard in the Impugned Decision, violating Mr Ongwen's fair trial rights.²⁴

12. The CLRV posits that the Defence misrepresents the nature of the Decision on the CLRV's Expert Evidence. In granting the CLRV's request, the Chamber recalled that, under article 66(2) of the Rome Statute (the "Statute"), the burden of proof regarding the guilt of the Accused lies with the Prosecution and thus the experts called by the CLRV would not appear to prove in anyway the elements of the crimes charged against Mr Ongwen.²⁵ In this regard, the Chamber stressed that the experts called by the CLRV were proposed for other matters relevant to the personal interests of the victims, including on the nature of the harms they personally suffered from.²⁶ Specially, in relation to the expert witness called to testify about the consequences and effects on victims of rape and SGBC, the Chamber found that the proposed evidence was not repetitive since it would have allowed it to assess the impact of sexual violence on the lives of the victims in a more universal manner, including victims who did not provide testimony.²⁷

13. In other words, the Decision on the CLRV's Expert Evidence and the Impugned Decision contain fundamentally different rulings made in vastly different contexts. In the Impugned Decision, the Chamber found that the matters to be addressed by D-0158 have already been discussed by other witnesses called by the Defence which also questioned a number of Prosecution's witnesses on the same

²³ See the Defence's Motion, *supra* note 2, para. 8.

²⁴ *Idem*, para. 10.

²⁵ See Decision on the CLRV's Expert Evidence, *supra* note 4, paras. 16, 18 and 23.

²⁶ *Idem*, para. 23.

²⁷ *Ibidem*, paras. 33 and 35.

issues.²⁸ Consequently, the Chamber concluded that the proposed evidence of D-0158 would merely be additional evidence for topics for which direct evidence has already been elicited by the Defence.²⁹ The Chamber made this determination after having assessed the body of evidence concerning the guilt or innocence of the Accused already available before it. Yet, as mentioned above, the Chamber's ruling in the Decision on the CLRV's Expert Evidence was made in relation to the nature and the extent of the personal harm suffered by the victims of rape and SGBC. Therefore, the Chamber's finding to the effect that the proposed expert evidence called by the CLRV was non-repetitive in that specific context is not in any way equivalent to the conclusion contained in the Impugned Decision. Neither is indicative of any unfairness or double standard on the part of the Chamber concerning the evidentiary regime applicable to the parties and participants in the proceedings. As a result, no legal error of reasoning was committed by the Chamber in this regard.

14. Secondly, the Defence argues that the timing of its Initial Request cannot be faulted due to the alleged difficulty it faced in identifying an expert witness on SGBC and the inequality of personnel and resources available to the parties in conducting their investigations.³⁰ The CLRV submits that these arguments are nothing new and have already been considered by the Chamber in assessing the timeliness of the Initial Request.³¹ In particular, the Chamber noted that the Initial Request was filed over a year after the expiration of the deadline to provide the final lists of witnesses while the Defence must have been familiar with D-0158's work since at least the commencement of the trial in 2017.³² *Arguendo*, even if the Defence insists that the awareness of the expert's academic work does not instantly lead to the definite identification of the person as a potential expert witness, the sheer amount of time elapsed since the moment the Defence became familiar with D-0158 until the filing of

²⁸ See the Impugned Decision, *supra* note 3, paras. 16-20.

²⁹ *Idem*, para. 21.

³⁰ See the Defence's Motion, *supra* note 2, paras. 13-17.

³¹ See the Impugned Decision, *supra* note 3, paras. 12-15.

³² *Idem*, paras. 13-14.

the Motion shows an inexcusable delay. Consequently, the Chamber rejected the Initial Request in relation to D-0158 since there were no exceptional circumstances or sufficient cause, justifying such late addition.³³ Yet, the Defence does not even present a single new fact or circumstance that had not been placed before the Chamber when it rendered the Impugned Decision. Thus, the CLRV submits that none of the Defence's arguments shows a clear error of reasoning nor that it is necessary to reconsider the Impugned Decision in order to prevent an injustice.

B. Request Seeking Leave to Appeal

15. 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 the 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. For the purposes of the first prong of this 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*".³⁴ 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*".³⁵

16. Consequently, it must first be determined whether the purported "issue" identified in the Motion is an "appealable issue" 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 the Appeals Chamber, it must still identify clearly the appealable issue,*

³³ *Ibidem*, para. 13.

³⁴ 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.

³⁵ *Idem*, para. 20.

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”.³⁶

17. The Defence seeks leave to appeal the following issues: (a) *“Whether TC IX’s denial of the Defence Initial Request to add the SGBC expert witness, D-158, to the witness list, violates Mr Ongwen’s fair trial rights under Article 67, and especially Article 67(1)(e) of the Statute (‘Issue 1’); and (b) “Whether TC IX properly applied the legal standard for expert evidence (‘Issue 2’).”³⁷*

18. As for the first issue, the Defence submits that Mr Ongwen’s fair trial right to present evidence was violated by the Impugned Decision because it was unfair and unjust for the Chamber to have admitted the expert witness on rape and SGBC called by the CLRV while rejecting the expert evidence proposed by the Defence on the same matter.³⁸

19. Yet, again, the CLRV notes that the Defence misrepresents the nature of the Decision on the CLRV’s Expert Evidence. In rendering said ruling, the Chamber allowed the CLRV to call the expert witness in order to assess the impact of rape and SGBC on the lives of the victims.³⁹ In doing so, the Chamber explicitly forbid the CLRV to present incriminating evidence against the Accused because the participating victims are not the party opposing the Defence in this proceedings.⁴⁰ As a result, said ruling and the ensuing expert evidence do not in any way concern the guilt or innocence of the Accused. In contrast, the expert evidence proposed by the Defence would have dealt directly (albeit additionally) with the criminal liability of

³⁶ See the “Decision on the Gbagbo Defence request for leave to appeal the ‘Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief’” (Trial Chamber I), No. ICC-02/11-01/11-307, 21 October 2015, para. 70.

³⁷ See the Defence’s Motion, *supra* note 2, para. 19.

³⁸ *Idem*, para. 20.

³⁹ See Decision on the CLRV’s Expert Evidence, *supra* note 4, para. 35.

⁴⁰ *Idem*, para. 18.

Mr Ongwen.⁴¹ Therefore, the Chamber's reasoning expressed in the Decision on the CLRV's Expert Evidence is not at all comparable to the conclusion of the Impugned Decision. Consequently, no issue of unfairness or injustice can be raised in this regard. This in turn shows that the first proposed issue does not arise from the Impugned Decision.

20. Even if the Defence insists that the Impugned Decision is erroneous because the Chamber had unfairly treated the Defence in rejecting its proposal to call the expert, the Motion still fails to identify a specific subject or topic requiring resolution. Rather, the Defence simply disagrees with the ruling of the Chamber by comparing the outcome of two totally different decisions. Moreover, the Defence argues that the Chamber's denial of its request to call D-0158 is a violation of Mr Ongwen's fair trial rights because of the high number of charges related to rape and SGBC that he currently faces.⁴² The Defence already raised this argument in the Initial Request.⁴³ In repeating the arguments already addressed and ruled upon in the Impugned Decision, the Defence further shows its mere disagreement with the ruling of the Chamber.⁴⁴ Expressing nothing more than a mere disagreement with the Chamber's conclusions do not constitute an "*appealable issue*" within the meaning of article 82(1)(d) of the Statute.⁴⁵ Indeed, when a party challenges a judicial decision, more is needed than simply expressing a difference of opinion regarding the question *sub judice*.⁴⁶

⁴¹ See the Initial Request, *supra* note 11, paras. 14, 20-21.

⁴² See the Defence's Motion, *supra* note 2, paras. 21-25.

⁴³ See the Initial Request, *supra* note 11, para. 20.

⁴⁴ 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, 1 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.

⁴⁵ 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 34, para. 9.

⁴⁶ 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.

21. Additionally, the first purported issue does not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. The trial has reached an advanced stage as the Defence has already presented the majority of its witnesses. Needless to say, extra litigation of this matter on appeal will further delay the end of the trial proceedings. Moreover, even if the Appeals Chamber was to grant the appeal, the addition of a single witness to the total of seventy two witnesses called by the Defence would not materially advance the proceedings.

22. As for the second issue, the Defence submits that the proposed witness meets the legal requirements to testify as an expert according to the jurisprudence of the Court.⁴⁷ Yet, the Defence contends that the Impugned Decision does not discuss these criteria including the expertise and the qualification of the witness but rather focuses only on the lateness of the Initial Request, thus allegedly committing an error.⁴⁸

23. The CLRV posits that the Defence misrepresents the purpose and nature of the Impugned Decision and its own Initial Request. The expert in question is not introduced as an usual witnesses presented before the commencement of the Defence presentation of evidence. Rather and obviously, D-0158 is requested to be added to the Defence's List of Witnesses after the expiration of the 4 June 2018 deadline. Accordingly, the Defence acknowledges the relevant case law on the matter and proceeds to argue that the addition of the expert witness and accompanying documents are in line with those requirements.⁴⁹ Nowhere in the Motion, has the Defence raised any argument specifically targeting the legal standards for assessing the expertise and the qualification of the witness. Nor did the Chamber have any legal obligation to address the latter matters in the Impugned Decision. In fact, in similar situations in the past, the Chamber discussed only the relevant legal

⁴⁷ See the Defence's Motion, *supra* note 2, paras. 26-27.

⁴⁸ *Idem*, para. 28.

⁴⁹ See the Initial Request, *supra* note 11, paras. 16-21.

requirements applicable for late additions, not the expertise or the qualification of the witness.⁵⁰

24. Indeed, the Initial Directions on the Conduct of the Proceedings dictates that [...] *[a]ll expert witnesses must be clearly identified on the witness list. As a general rule, challenges to a witness's expertise should be made in writing so that they can be resolved prior to the start of testimony. No later than 30 days before the anticipated testimony of an expert witness, any non-calling participant may file a notice indicating whether it challenges the qualifications of the witness as an expert.*⁵¹ In other words, the expertise and the qualification of the expert shall only be challenged once the witness and accompanying documents are formally added to the Defence's List of Witnesses and the List of Evidence. Even in the decision quoted by the Defence in support of its arguments⁵², Trial Chamber V(a) held that *"the qualification of the expert a particular case is a judicial determination to be made in the context of the case, following the examination-in-chief and the cross-examination of the witness as to his specific expertise"* and it would rule on any objections to an expert testimony *"as they arise during trial."*⁵³

25. Consequently, the CLRV submits that the second purported issue does not arise from the Impugned Decision and thus is unavailable for appeals review. As held by the Appeals Chamber, a properly constituted appealable issue must first and foremost arise from the Impugned Decision.⁵⁴ In other words, the issue identified by

⁵⁰ See the "Corrigendum of Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-956-Corr, 22 August 2017, paras. 10-14; and the "Decision on Prosecution Request to Add Items Related to the Testimony of its Mental Health Experts to its List of Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-1202, 12 March 2018, paras. 8-18.

⁵¹ 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, para. 32 (emphasis added).

⁵² See the Defence's Motion, *supra* note 2, para. 26 and footnote 25.

⁵³ See the "Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu", (Trial Chamber V(a)), No. ICC-01/09-01/11-844, 7 August 2013, paras. 20 and 25.

⁵⁴ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 34, para. 9.

the appellant must be a “*specific issue*” which has been dealt within⁵⁵ or must “*emanate*” from the Impugned Decision and “*cannot represent a hypothetical concern or abstract legal question*”.⁵⁶ Consequently, the Chamber should reject the second purported issue.

26. Finally, the second purported issue cannot possibly significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial since the applicable legal standards for the expertise and the qualification of expert witnesses and related factual circumstances did not form part of the Impugned Decision. *Arguendo*, even if the Appeals Chamber was minded to address the matter, it would then be reviewing these issues for the first time on appeal, akin to a first instance court, which is against its corrective function.⁵⁷ Thus, the immediate resolution of the second purported issue by the Appeals Chamber will not materially advance the proceedings as it will be engaging in an academic exercise in reviewing a ruling which is not contained in the terms of the Impugned Decision.

27. In conclusion, the CLRV submits that none of the issues identified by the Defence constitute appealable issues, nor do they meet the stringent requirements for granting interlocutory appeal under article 82(1)(d) of the Statute.

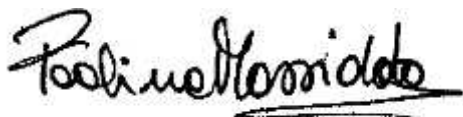
⁵⁵ See the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” (Trial Chamber IV), No. ICC-02/05-03/09-428, 13 December 2012, para. 7.

⁵⁶ 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. 8; and the “Decision on the Defence Request for Leave to Appeal” (Pre-Trial Chamber II), No. ICC-01/04-02/06-207, 13 January 2014, para. 11.

⁵⁷ 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.

V. CONCLUSION

28. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Defence's Motion in its entirety.

A handwritten signature in black ink, which appears to read "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda
Principal Counsel

Dated this 27th day of August 2019

At The Hague, The Netherlands