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**International
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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution's application for leave to appeal the "Decision on witness preparation and familiarisation"

Source: Office of the Prosecutor

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

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Introduction

1. In its decision on 2 December 2015, the Majority of Trial Chamber I rejected the jointly agreed request by the Parties and the Legal Representative of Victims to adopt a Witness Preparation Protocol.¹ The Presiding Judge dissented: Judge Henderson would have granted the joint request for a witness preparation protocol.² As a result of the Majority's Decision, 138 witnesses for the Prosecution alone will now testify without having had an opportunity to prepare with the calling party prior to their testimony. Nor will the Prosecution, or indeed any Party or Participant, be able to review the anticipated evidence and particular courtroom procedures relevant to the testimony with the witnesses. The inability to conduct appropriate witness preparation for witnesses—both critical and vulnerable—impedes the Prosecution's right and ability to present its case. It also hampers this Chamber in establishing the truth. Finally, it directly impacts the efficient conduct of trial proceedings.

2. The Prosecution seeks leave to appeal the Decision, under article 82(1)(d) of the Statute, on the following two discrete issues:

- a) Whether witness preparation, as a matter of principle and practice, is a critical aspect of a Party's right and ability to present its case in a meaningful, fair and expeditious manner and the Court's truth finding function ("First Issue")
- b) Whether, in the case at hand, the alleged potential risks of witness preparation outweigh the Parties' right to prepare and present their cases and the substantial benefits of witness preparation to a fair and expeditious trial and the well-being of witnesses ("Second Issue")

¹ ICC-02/11-01/15-355 ("Decision"), paras. 13-19, p. 12.

² ICC-02/11-01/15-355-Anx1 ("Dissent"), paras. 1-17.

3. Both Issues are appealable: they are essential to determine the correctness of the Decision on whether witness preparation is necessary and appropriate in this case. Because the Decision is the determinative ruling on witness preparation in the case, both Issues arise from the Decision.

4. The Issues also meet the remaining article 82(1)(d) criteria. First, they significantly affect the fair and expeditious conduct of the proceedings. The impact on the fairness of the proceedings is evident: witness preparation (or the lack of it) will critically determine whether and how a party is able to prepare and present its case. It also impacts the nature and manner of witness testimony before the Chamber, and whether the interests of such witnesses and victims are protected. Likewise, the Issues significantly affect the expedition of the proceedings. Witness preparation leads to more focussed and efficient proceedings. The Issues also significantly affect the outcome of the trial. Whether witness preparation is allowed in this trial necessarily affects the evidence that can be elicited from particular witnesses. Not only does this have a bearing on the Chamber's truth finding function; it can also affect the article 74 decision as a whole.

5. Further, the Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings. Not only is witness preparation considered by several Trial Chambers as a critical procedure at this Court; it is also one that is subject to divergent judicial opinions across Chambers, and equally within this Chamber. The Appeals Chamber is best placed to bring both predictability and finality at this critical juncture ahead of the start of trial.

6. The Prosecution respects the recent guidance of this Chamber, emphasising the exceptional nature of the remedy under article 82(1)(d).³ However, this Application is

³ ICC-02/11-01/15-T-5-ENG, p. 15 lns. 13-22, stating “[w]hile the Chamber is mindful of the rights of the Parties to seek legal remedy under Article 82(1)(d), I would like to remind that such interlocutory appeals are exceptional. They are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber's decisions. Furthermore, even if we talk about potentially reversible error, this may be better and justly deferred to any final appeal under Article 81.”

neither a bid for reconsideration, nor a mere disagreement with the Decision.⁴ Nor, given its significance and its predicted impact on the entire Prosecution case even before the trial has started, can the matter be deferred to the stage of final appeal. Rather, that the Presiding Judge dissented on this important matter—and opined that witness preparation should be allowed—further underscores that it is not only ripe but *crucial* for the Appeals Chamber to immediately consider the matter. In this sense, the restrictive criteria in article 82(1)(d) should not effectively be erected as an insurmountable obstacle barring appellate review of issues when there is a clear and tangible need for consistency, uniformity of approaches and legal certainty. Indeed, in a decision involving similarly critical procedural aspects with wide-ranging implications for this Court (witness summons), even though the Judges disagreed on the substance, they granted leave to appeal.⁵

Submissions

7. The two Issues arise from the Decision, and are appealable. They reveal identifiable subject(s) or topic(s) requiring a decision for its resolution.”⁶

i. The First Issue arises from the Decision and is appealable

8. The First Issue—whether witness preparation, as a matter of principle and practice, is a critical aspect of a Party’s right and ability to present its case in a

⁴ *Contra* ICC-01/12-01/15-T-1-ENG (open session), p. 12, lns. 7-16; ICC-01/05-01/13-T-10-CONF-ENG (open session), p. 3, lns. 3-12.

⁵ *See e.g.*, ICC-01/09-01/11-1313 (“*Ruto and Sang Decision on Witness Summons ALA*”). Although the Judges disagreed on whether “the Government of Kenya has the legal obligation, pursuant to Article 93(1)(d) and (l) of the Statute, to enforce such a summons”, leave to appeal was granted.

⁶ *See* ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. *See also* ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.” *See also* ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

meaningful, fair and expeditious manner and the Court's truth finding function—arises from the Decision. It is also appealable.

9. The First Issue squarely emanates from the Decision. The First Issue underscores the importance of witness preparation to a party's ability to present its case. Equally, it highlights the impact of witness preparation (or the lack of it) on the Chamber's obligation to seek the truth.⁷ The Decision is *the* determinative ruling in the case disallowing witness preparation; it is inherently the only decision in this case pronouncing on whether witness preparation is appropriate for the case. No other decision in the case has or will address both the significance and appropriateness of witness preparation for the entire case.

10. Indeed, in rejecting the jointly agreed upon witness preparation protocol, the Majority pithily encapsulated this very Issue, when it stated that “[...] witness preparation, as a general rule, is not appropriate in this case.”⁸ Likewise, the Dissenting Judge considered “[...] the appropriateness and necessity of adopting a witness preparation protocol.”⁹ The Dissenting Judge also considered witness preparation to be “a useful tool in order to further the Court's truth finding obligation.”¹⁰ In the same vein, the Dissenting Judge considered the relevance of witness preparation to the “ability of the parties calling its witness to ensure that all relevant matters are placed before the Chamber” and “the statutory rights of the parties to conduct investigations.”¹¹

11. The First Issue is also appealable: the Chamber's views—those of both the Majority and Dissenting Judges—on whether witness preparation affects the Parties' ability to present their cases and the Court's truth finding function are essential to the Decision itself. Significantly, the Issue led to the Decision's result. Put simply, the

⁷ See e.g., article 69(3) stating “[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”

⁸ Decision, para. 19.

⁹ See e.g., Dissent, para. 7.

¹⁰ Dissent, para. 2.

¹¹ Dissent, paras. 5, 9.

Judges' findings on whether witness preparation was appropriate pivoted on their underlying views on the role of witness preparation, if at all, at this Court, and whether the practice had wider ramifications on the Court's obligations and the Parties' rights.

12. The First Issue does not merely express a conflicting opinion to the Decision. Nor does it merely disagree with the findings or views expressed by the Judges. Rather, the Issue for appellate determination is what, if any, is the role of witness preparation in this case, and more broadly, at this Court. That there exists a wide range of judicial opinion on the significance and utility of witness preparation, including in this case, demonstrates that this Issue is not confined to one party's conflicting opinion.

13. For these reasons, the First Issue arises from the Decision and is an appealable issue within the context of article 82(1)(d).

ii. The Second Issue arises from the Decision and is appealable

14. The Second Issue—whether, in the case at hand, the alleged potential risks of witness preparation outweigh the Parties' right to prepare and present their cases and the substantial benefits of witness preparation to a fair and expeditious trial and the well-being of witnesses—derives from the Decision. It is also appealable.

15. The Second Issue also clearly arises from this Decision. Despite deciding differently, both the Majority Judges and the Dissenting Judge weighed the potential risks of witness preparation (namely, witness interference and distortion of evidence) against the potential benefits.¹²

16. In particular, the Majority, in paragraphs 16–19 of the Decision, conducted exactly such a balancing exercise. It first stressed “the inherent risk of witness

¹² Decision, paras. 15-19; Dissent, paras. 7-16.

interference and the truth being distorted.”¹³ According to the Majority, “the mere exercise of taking a witness systematically through inconsistencies in their statements may lead to [impermissible] conduct, such as rehearsal, practice and coaching.”¹⁴ In the Majority’s view, witness preparation “could inhibit the entirety of the true extent of an account” and “could diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness.”¹⁵ The Majority considered, as an additional risk, that proceedings may be delayed when new evidence emerging from the witness preparation sessions is disclosed.¹⁶

17. The Majority then considered the factors favouring witness preparation in other cases, such as *Ruto and Sang*, *Kenyatta* and *Ntaganda*, namely “the singularity and complexity of the given case, including the lapse of time since the occurrence of the alleged facts and the large number of potential exhibits.”¹⁷ However, in its assessment, these favourable factors did not outweigh the risks of witness preparation in this case.¹⁸

18. Likewise, the Dissenting Judge found that “in principle, witness preparation carries with it the risks of witness interference and distortion of the witnesses’ evidence.”¹⁹ However, in his view, such risks exist even before witness preparation, insofar as the parties conduct their own investigations.²⁰ Moreover, such risks “are mitigated both by the trial process itself, as well as by available sanctions” — including through the robust safeguards provided for such witness preparation.²¹ The Dissenting Judge further considered the possibility that without witness preparation, the Chamber may not receive the best evidence possible. He underscored that the need for witness preparation was heightened in the unique

¹³ Decision, para. 17.

¹⁴ *Ibid.*, para. 17.

¹⁵ *Ibid.*, para. 17.

¹⁶ Decision, para. 17.

¹⁷ Decision, para. 18.

¹⁸ Decision, para. 19.

¹⁹ Dissent, paras. 2, 8.

²⁰ Dissent, para. 8.

²¹ Dissent, para. 11.

circumstances of international criminal justice; the presence of potentially vulnerable witnesses and/or witnesses whose evidence is of a sensitive nature (allegations of sexual offences); the time that has lapsed between the alleged events and the investigation, and the witness's own testimony; and the expected scope of the case and the anticipated evidence.²² Having assessed both the potential risks and benefits, the Dissenting Judge concluded that "a witness preparation regime" would have "facilitate[d] the focused, efficient and effective questioning of the witnesses during the proceedings."²³

19. The Second Issue is also appealable. Its subject matter—whether the potential risks outweighed the benefits—was material to the Judges' decision. Identifying and balancing the individual risks and benefits specific to this case was determinative. Nor is the Second Issue a mere disagreement: different Judges have themselves weighed the risks and benefits differently to arrive at varied conclusions.

20. For these reasons, the Second Issue arises from the Decision and is appealable in article 82(1)(d) terms.

iii. Both Issues meet the criteria for leave to appeal under article 82(1)(d)

a) The Issues significantly affect the fairness of the proceedings

21. Both Issues significantly affect the fairness of the proceedings. The First Issue explores the impact of witness preparation on the Parties' rights to prepare and present their cases and the Court's truth finding function. The Second Issue invites a case-specific determination on whether the potential risks of witness interference and possible delays in disclosing information from witness preparation sessions outweigh the benefits of having witness preparation in this particular case—including having focussed, efficient and effective testimony during the proceedings

²² Dissent, paras. 13-15.

²³ Dissent, para. 16.

and due regard for vulnerable witnesses. As such, both Issues relate to a critical procedural feature that cuts across the intrinsic fairness of the proceedings, affecting the Parties, the Chamber and the witnesses. And as the Chambers of this Court have consistently recalled, “the notion of fairness of the proceedings should be preserved to the benefit of all participants in the proceedings.”²⁴

22. Without witness preparation, the Prosecution is in particular impeded in presenting its case. The Prosecution has a right to prepare and present its case in the manner it deems best suited to establish the truth.²⁵ An inability to meet its witnesses prior to their testimony fundamentally affects this right. The proceedings are then unfair to the Prosecution.

23. And unfairness to the Prosecution, as the party which bears the burden of proving its case beyond reasonable doubt, impacts the fairness of the proceedings as a whole. Indeed, the Decision itself situates the practice of witness preparation within the Chamber’s obligation under article 64 to “ensure that the trial is fair and expeditious.”²⁶ This Chamber has itself recognised that in exercising its trial management powers under article 64, it has a “duty [...] to ensure the trial is conducted fairly both to the prosecution and the accused.”²⁷ So too have the Judges of the Appeals Chamber endorsed the principle that “fairness also extends to [...]the Prosecution.”²⁸ Significantly, several Judges of the Appeals Chamber, noting both article 69(3) and rule 140(2), have opined that the Prosecution is entitled to submit

²⁴ ICC-02/04-112, para. 27; ICC-02/04-01/05-90-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-135, para. 24.

²⁵ *See e.g.*, articles 54(1) and 69(3).

²⁶ Decision, para. 15; Dissent, para. 3, stating “[t]he trial chamber is under a further obligation to confer with the parties and to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings.” “[...] Article 64 of the Statute provides a sufficient legal basis to allow the calling party to prepare witnesses, should the relevant party wish to do so.”

²⁷ ICC-02/11-01/15-313, para. 14.

²⁸ ICC-01/04-02/12-271-AnxA, paras. 5-6.

evidence relevant to the case.²⁹ However, without witness preparation, the Prosecution is significantly hampered in the exercise of this right.

24. The bar on witness preparation uniquely disadvantages the Prosecution.

25. First, because the Prosecution must present its case first in the proceedings, and with less than a month left before the trial starts, the prohibition on preparation prejudices the Prosecution. Before this decision was rendered, the Parties had reasonably assumed, based on Trial Chambers' practice in three out of four recent cases (all involving significant live testimony)³⁰ and given that all Parties and Participants had agreed on the need for witness preparation, that the legitimacy of the practice itself was not in question in this case. The Prosecution reasonably believed that only the modalities remained to be decided. The Parties had asked for a protocol on witness preparation, and at no point did the Chamber indicate that one was not needed.³¹ It is only now, at the eleventh hour, that the Prosecution has learned that it will not be allowed to prepare with its witnesses prior to testimony.³²

26. Second, contrary to the Majority's determination, this case is no less complex or extensive than the *Ruto and Sang*, *Kenyatta* and *Ntaganda* cases, where witness preparation was allowed. The present case is comparable in complexity and scope to these cases, if not more so. As the Dissenting Judge observed, the Prosecution case involves 138 Prosecution witnesses, 4, 862 items of evidence and is likely to take up

²⁹ ICC-01/04-02/12-271-AnxA, paras. 5-6. See also rule 140(2)(a): a party that submits evidence in accordance with article 69, paragraph 3, by way of a witness, has the right to question that witness; rule 140(2)(b): the Prosecution and the Defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters.

³⁰ See ICC-01/09-01/11-524 ("*Ruto and Sang* Witness Preparation Decision"); ICC-01/09-02/11-588 ("*Kenyatta* Witness Preparation Decision"); ICC-01/04-02/06-652 ("*Ntaganda* Witness Preparation Decision")— in all three cases, witness preparation was allowed. Of the recent cases, *Bemba Article 70* is the only case where witness preparation was prohibited (ICC-01/05-01/13-1252 "*Bemba* Article 70 Witness Preparation Decision")

³¹ See e.g. transcripts of the status conferences: ICC-02/11-01/15-T-1-CONF-ENG; ICC-02/11-01/15-T-4-ENG, pp. 32-33; ICC-02/11-01/11-T-25-CONF-ENG; ICC-02/11-01/11-T-27-CONF-ENG, pp. 2, 16-17, 28-29, 41-45.

³² The Prosecution notes that the Dissent accommodates for different understandings of witness preparation: a ban prohibiting any contact with the witness by anyone in the calling party in relation to the subject matter of his or her expected testimony, and a ban on the meeting between the witness and the counsel (or representative thereof) who plans to question that witness in court. (Dissent, para. 9).

to 522 hours for its presentation.³³ Not only is it a case involving two high-profile accused and five separate crime bases, it is the Prosecution's, and the Court's, first case on the post-election violence in Côte d'Ivoire. It is also the first trial ever before the Court involving a former head of state. As such, evidence will be led for the first time at this Court on several matters without an accustomed level of familiarity with the contextual background and its distinct circumstances. Likewise, the time period between the events and the testimony in the Kenya cases and this one is analogous—approximately five years. And as the Dissenting Judge noted,³⁴ the Prosecution's Pre-Trial Brief shows that it will present evidence of the historical background to the alleged offences that date to ten years ago.

27. Third, as the Dissenting Judge emphasised,³⁵ the live testimony, of no less than 138 witnesses, is likely to constitute a significant body of evidence in the case. The lack of witness preparation thus has several important repercussions for the case. Witnesses will not be able to re-familiarise themselves, together with a member of the trial team, with the statements they gave several years ago. In addition, Prosecution trial lawyers will not be able to properly assess whether their evidence is up to date, and if exhibits which have been seized after members of the Prosecution team first met with them are relevant (or still relevant) to their testimony, and if so how. A witness preparation session would give the first opportunity to do so.

28. Fourth, several witnesses are vulnerable and/or will testify about sensitive issues—including allegations of sexual violence which feature in two out of the five crime bases.³⁶ Neither the courtesy VWU-led familiarisation meeting nor the procedures contained in the protocol for vulnerable witnesses can provide what a witness preparation session can to these witnesses: a comfort and familiarity with the sensitive and traumatic issues to be rendered in an open and unfamiliar courtroom.

³³ Dissent, para. 16.

³⁴ Dissent, para. 15.

³⁵ Dissent, para. 16.

³⁶ Dissent, para. 14.

Specifically, Witness P-190 will be shown a video with graphic images concerning the 3 March demonstration, where the witness was allegedly present. This video contains images of dead bodies, including that of the witness's friend. The witness would never have seen this footage prior to testimony in open court, nor has the Prosecution shown the witness the HD version. Without witness preparation, Witness P-190 could be distressed when confronted with this footage and a suspension of the hearing necessary. With witness preparation, the initial potential shock of seeing the video for the first time would likely be minimised.

29. In these circumstances, the integrity of the Prosecution's intended evidence, and in turn, the Prosecution's case, is likely to be significantly compromised by a lack of a witness preparation procedure.³⁷ Critical witness testimony may lack precision, be incomplete, confused or given in an ill-structured or chaotic manner.³⁸ Such testimony will be of much less assistance to the Chamber in establishing the truth in these proceedings. To the contrary, such testimony may adversely impact on the perception of the strength of the Prosecution's case and its burden of proving its case beyond reasonable doubt. Even with the benefit of the Chamber's own questioning and direction in the courtroom, such testimony, in significant part, may remain confusing, or at the least, incomplete. One of the roles of counsel, in this respect, is to assist the witness in focussing his or her evidence and to ensure that the witness provides all of the relevant evidence he or she has to give to the Trial Chamber.

30. Fairness of the proceedings encompasses fairness to all its participants, including the victims and witnesses who testify. Both the Majority and Dissent identify "due regard for the protection of victims and witnesses" as critical to its assessment.³⁹ The protection of witnesses requires the Chamber to consider their

³⁷ See Jackson, J.D. and Brunger, Y.M., "Witness Preparation at the ICC", *Journal of International Criminal Justice*, Vol. 13, Issue 3 (2015) ("Jackson J.D."), pp. 615-618.

³⁸ See para. 31.

³⁹ Decision, para. 15; Dissent, paras. 3, 13-14.

physical, emotional and psychological well-being.⁴⁰ For witnesses appearing in an international criminal trial, not having a witness preparation procedure is simply unfair, and could adversely affect their well-being. Not only, as the Dissenting Judge underscores,⁴¹ are international criminal proceedings unique; they also lack the cohesion of a shared culture and often common language. As a result, even to a witness accustomed to testifying in domestic settings, testifying before the Court, an institution situated perhaps thousands of miles away from the witness's place of residence, can seem both foreign and intimidating. This sense of alienation is only further compounded with vulnerable witnesses.

31. Indeed, as the interview survey of 109 witnesses who testified in *Lubanga* and *Katanga* (without witness preparation) shows, despite the Court's familiarisation process, witnesses continued to feel unprepared when they took the stand. Their concerns extended beyond those that are addressed during the familiarisation process (limited to the individual protective measures, the layout of the courtroom and the role of the parties and participants). Rather, they said they were anxious about giving evidence, felt under-confident in articulating their experiences and were apprehensive about cross-examination.⁴² All these concerns equally exist in this case. Witness preparation sessions are better attuned to addressing these concerns and to reducing witness anxiety.

32. Even the Majority's primary concern of the risk of witness interference stemming from witness preparation underlines a threat to the fairness of the proceedings.⁴³ But as the Dissent notes, witness interference may take place prior to such pre-testimony meeting.⁴⁴ In the *Bemba* trial, where witness preparation was not permitted, contempt proceedings are being held on allegations of witness

⁴⁰ See Jackson J.D., pp. 613-615; article 68, Statute.

⁴¹ Dissent, para. 13.

⁴² See Jackson J.D., p. 614, citing Human Rights Center, University of California, Berkeley, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses (June 2014)*.

⁴³ Decision, paras. 16-17.

⁴⁴ Dissent, para. 8.

interference and fabrication of evidence. In such circumstances, witness preparation sessions can play an important role in eliciting information that may be previously unknown and assist the Chamber in its truth-finding function. They may even mitigate the risk of witnesses recanting on their original statements.⁴⁵ Without this opportunity, there is a risk that the proceedings could be tainted. Indeed, witness preparation sessions assist in preserving the fairness of the proceedings, especially when counsel are bound at all times by their ethical obligations⁴⁶ and the safeguards, as proposed in this case, include the audio and video recording of the preparation sessions.⁴⁷

b) The Issues significantly affect the expedition of the proceedings

33. Both Issues significantly affect the expedition of the proceedings. When witnesses testify without preparation, their testimony becomes much more time-consuming.

34. Testimony may well extend beyond the allotted time, as counsel and witness not only familiarise themselves with each other in open court but also search for focus in the testimony. The Prosecution's estimates of the number of hours required for witnesses were based on its reasonable assumption that witness preparation would be allowed. Witness preparation will assist conducting examination in chief with better focus, discarding irrelevant areas, and will save the Court's time.

35. Critically, precious time is lost when witnesses are shown exhibits, often voluminous, for the first time on the stand. Witnesses are likely to be "caught off guard" and to need more time to consider the documents. The intended Prosecution witnesses include a category of witnesses who will be shown numerous exhibits,

⁴⁵ See Jackson J.D., p. 615.

⁴⁶ Dissent, paras. 11, 12.

⁴⁷ Dissent, para. 11.

possibly even running into the hundreds, during their testimony in Court. Yet, some of these exhibits were seized only after any member of the Prosecution team had interviewed them. These witnesses have never reviewed the documents, nor has the Prosecution had the opportunity to explain to them the process by which the documents will be shown to them in the course of their testimony. By assessing whether the witness is cognisant (or not) of the substance of these newly seized documents, the Prosecution will save considerable time by setting aside those documents which the witness cannot comment on. Testing their knowledge in the courtroom for the first time only serves to waste court time.

36. The Judges may also have to intervene more frequently to assist the witnesses and to bring order to the testimony. Counsel too may need to seek adjournments to adjust to unanticipated witness testimony.

37. The lack of a witness preparation procedure only lengthens the proceedings. In these circumstances, even the potential for delayed disclosure of information from witness preparation, identified by the Majority,⁴⁸ pales in comparison to the very tangible delay caused by unprepared witnesses.

38. Critically, witness preparation is the quintessential tool to expedite the proceedings. In an era where the emphasis Court-wide is on improving the effectiveness and efficiency of the institution,⁴⁹ the two Issues underscore a key practice that can indeed enhance these goals.

⁴⁸ Decision, para. 17.

⁴⁹ *See e.g.*, Presentation of the Court's annual report to the Assembly of States Parties (ASP 14th session), Statement of Judge Silvia Fernández de Gurmendi (President of the International Criminal Court), 18 November 2015, noting that "the main priority" is to enhance the effectiveness and efficiency of the institution". This priority was also discussed during the Plenary Meeting on the Efficiency and Effectiveness of Court Proceedings at the ASP's 14th session.

https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-Opening-ST-PRE-ENG.pdf

See also Pre-Trial Practice Manual, September 2015, p. 4, noting the need for best practices "to contribute to the overall effectiveness and efficiency of the proceedings before the Court."

[https://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_\(September_2015\).pdf](https://www.icc-cpi.int/iccdocs/other/Pre-Trial_practice_manual_(September_2015).pdf)

c) The Issues significantly affect the outcome of the trial

39. The Issues significantly affect the outcome of the trial, and the article 74 decision. First, witness preparation (or its absence) has a direct bearing on what evidence may be elicited from the witnesses. It “directly relates with the amount and type of evidence that the Chamber will have to consider when making its final determination in accordance with [a]rticle 74.”⁵⁰ As such, it impacts the Chamber’s truth finding functions; the article 74 decision will not reflect all the evidence available. Second, the Decision, and thereby the Issues, affects all the witnesses in this case. Chambers have similarly granted leave when a critical procedural issue affects the “bulk of the evidence” in a case, and thus the outcome of the trial.⁵¹

d) The Appeals Chamber’s immediate resolution may materially advance the proceedings

40. The Appeals Chamber’s immediate resolution of the two Issues would materially advance the proceedings. As the Appeals Chamber itself has stated, the “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”⁵²

41. The Appeals Chamber’s timely intervention will avert the danger that subsequent proceedings in this case are later nullified, in whole or in part, by the Parties’ challenges. Indeed, under article 82(1)(d), the Appeals Chamber’s role is to “rid [...] the judicial process of possible mistakes that might taint [...] the fairness of the proceedings”.⁵³ And if the Decision in the case is incorrect, all of the evidence in the case will be affected; the preparation and conduct of the entire trial would have

⁵⁰ ICC-01/05-01/08-1169, para. 35.

⁵¹ See e.g., *Ruto and Sang* Decision on Witness Summons ALA , para. 51.

⁵² ICC-01/04-168 OA3, paras.14-15, 18.

⁵³ ICC-01/04-168 OA3, para.14. The Prosecution notes that the Appeals Chamber refers to “possible mistakes that might taint” (emphasis added).

proceeded on a flawed basis.⁵⁴ The Issues cannot be reserved for the stage of the final appeal.

42. Moreover, the Appeals Chamber's core function is to ensure that the law of the Court evolves in a coherent and standardised manner, and to provide guidance to Pre-Trial and Trial Chambers as to the correct interpretation of the law,⁵⁵ thereby enhancing clarity and predictability in the Court's proceedings. Only the Appeals Chamber can provide the most authoritative and final resolution of the Issues. Judicial opinion on the merits of witness preparation is divided in this case; judicial opinion across the Chambers is equally split. Given the scope and nature of this case, it is appropriate, even necessary at this stage, to bring finality to the matter at this Court.⁵⁶ Not only is the Prosecution prejudiced in this case; the unpredictability across the Chambers affects the effective functioning of the Office of the Prosecutor, and of multiple other areas of the Court, as a whole.

43. Nor will the Appeals Chamber be limited to only an advisory role. Instead, the Appeals Chamber will be asked to determine very tangible principles on the role of witness preparation at this Court, and whether it is appropriate in this case. Moreover, the Appeals Chamber's immediate consideration is even more appropriate in this case where the parties and participants did not fully ventilate the question of witness preparation at trial, but rather limited their discussion to the modalities once such preparation was allowed. To the contrary, that the Parties were

⁵⁴ See ICC-01/05-01/08-1169, para. 36, where the mode of questioning witnesses by parties and participants was found to have a direct impact on the conduct of the trial proceedings. See also *ICTR: The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing, 14 March 2007 (where leave to appeal the decision on witness preparation was granted).

⁵⁵ See e.g. *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber "is to ensure the development of the Tribunal's case-law and the standardisation of the applicable law"; <http://www.icty.org/x/cases/krnjelac/acjug/en/krn-aj030917e.pdf>. See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): "[t]he fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law"; <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>.

⁵⁶ *Contra* the practice at the other international criminal tribunals (ICTR, ICTY, SCSL and STL), where witness proofing or preparation is allowed.

not heard on the fundamental issue of whether witness preparation should be allowed makes appellate intervention at this stage even more relevant.

44. Further, the issues could have a potential far-reaching effect on other cases as well. In this sense, granting leave to appeal would also materially advance other proceedings,⁵⁷ because the Appeals Chamber could demarcate the permissible scope of witness preparation at this Court. No doubt, a determination by the Appeals Chamber at this stage would enhance consistency, predictability and efficiency of trial proceedings before the Court—and thereby significantly reduce the amount of litigation on the Issues and allow future trial proceedings to proceed promptly and in a streamlined fashion.

⁵⁷ In certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings”: *see* ICC-02/04-01/05-20-US-Exp, para.54 (unsealed pursuant to ICC-02/04-01/05-52).

Conclusion

45. For the above reasons, the Prosecution requests the Trial Chamber to grant it leave to appeal the Decision on the two Issues. Both Issues arise from the Decision and are appealable. Both Issues also meet the criteria for leave to appeal under article 82(1)(d).



Fatou Bensouda, Prosecutor

Dated this 14th December 2015

At The Hague, The Netherlands