

**Cour
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**International
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Court**



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Date: 21 March 2025

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godinez
Judge Keebong Paek , Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI

Public

Victims' Response to the Defence Request for Leave to Appeal the "Decision on the Prosecution's Request for an Order to Exclude Defence Counsel from the Defence's List of Witnesses and Evidence" (No. ICC-01/14-01/21-940-Red)

Source: Office of Public Counsel for Victims

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D33

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I. INTRODUCTION

1. Counsel representing the collective interests of applicants and participating victims (the “Common Legal Representative”)¹ submits that the Defence request (the “Request”)² for leave to appeal the “Decision on the Prosecution’s Request for an Order to Exclude Defence Counsel from the Defence’s List of Witnesses and Evidence” (the “Impugned Decision”)³ does not satisfy the requirements of article 82(1)(d) of the Rome Statute (the “Statute”) and must be rejected in its entirety.

2. The Defence does not demonstrate that any of the four identified issues (the “Purported Issues”) can be the subject of an interlocutory appeal. Instead, the Defence reiterates its disagreement with, and merely misconstrues, the Impugned Decision. Since conflicts of opinion are not appealable issues, the Request must fail on that basis alone. If, by extraordinary, Trial Chamber VI (the “Chamber”) were to find that appealable issues do arise from the Impugned Decision, the Defence fails to demonstrate how those would significantly affect the fair and expeditious conduct of the proceedings and how their immediate resolution would materially advance the proceedings.

¹ See the transcript of the hearing held on 28 January 2022, [No. ICC-01/14-01/21-T-007-CONF-ENG-CT](#) and [No. ICC-01/14-01/21-T-007-Red-ENG](#), p. 47, lines 12-24; the “Decision on matters relating to the participation of victims during the trial” (Trial Chamber VI), [No. ICC-01/14-01/21-278](#), 13 April 2022, para. 29; the “Decision authorising 20 victims to participate in the proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-331](#), 27 May 2022; the “Second Decision Authorising Victims to Participate in the Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-640-Conf](#) and [No. ICC-01/14-01/21-640-Red](#), 8 November 2023; the “Third Decision Authorising Victims to Participate in the Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-695-Conf](#) and [No. ICC-01/14-01/21-695-Red](#), 14 February 2024; the “Fourth Decision Authorising Victims to Participate in Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-812](#), 22 July 2024; and the “Fifth Decision Authorising Victims to Participate in the Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-906](#), 13 December 2024.

² See the “*Demande d’autorisation d’interjeter appel de la ‘Decision on the Prosecution’s Request for an Order to Exclude Defence Counsel from the Defence’s List of Witnesses and Evidence’* (ICC-01/14-01/21-935)”, [No. ICC-01/14-01/21-940-Conf](#) and [No. ICC-01/14-01/21-940-Red](#), 17 March 2025 (the “Request”).

³ See the “Decision on the Prosecution’s Request for an Order to Exclude Defence Counsel from the Defence’s List of Witnesses and Evidence” (Trial Chamber VI), [No. ICC-01/14-01/21-935](#), 11 March 2025 (the “Impugned Decision”).

II. PROCEDURAL BACKGROUND

3. On 8 October 2024, the Chamber issued the Third Directions on the Conduct of Proceedings,⁴ instructing the Defence to submit its final lists of witnesses and of evidence by 21 February 2025.⁵

4. On 12 December 2024, the Defence informed the Chamber of its intention to present a case.⁶

5. On 17 January 2025, the Defence submitted a preliminary list of witnesses.⁷

6. On 30 January, in response to an order of the Chamber,⁸ the Defence submitted observations on a number of issues relating to its preliminary list of witnesses.⁹

7. On 21 February 2025, the Chamber partially granted a Defence request for an extension of time,¹⁰ ordering the latter to file a list of witnesses and a list of evidence

⁴ See the “Third Directions on the Conduct of Proceedings” (Trial Chamber VI), [No. ICC-01/14-01/21-873](#), 8 October 2024.

⁵ *Idem*, paras. 14-15.

⁶ See the “Notification de la Défense conformément au paragraphe 12 de la ‘Third Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024”, [No. ICC-01/14-01/21-904](#), 12 December 2024.

⁷ See the “Version confidentielle expurgée de la ‘Notification de la Défense conformément à la ‘Third Directions on the Conduct of Proceedings’ (ICC-01/14-01/21-873) rendue par la Chambre de première instance VI le 8 octobre 2024’”, [No. ICC-01/14-01/21-908-Conf-Red](#) and [No. ICC-01/14-01/21-908-Red](#), 17 January 2025.

⁸ See the “Order in relation to the Defence Notification of its Preliminary List of Witnesses” (Trial Chamber VI), [No. ICC-01/14-01/21-909](#), 24 January 2025.

⁹ See the “Version confidentielle expurgée des ‘Observations de la Défense conformément à l’ordonnance rendue par la Chambre le 24 janvier 2025 (ICC-01/14-01/21-909)’”, No. ICC-01/14-01/21-912-Conf-Exp”, [No. ICC-01/14-01/21-912-Conf-Red](#) and [No. ICC-01/14-01/21-912-Red](#), 3 February 2025.

¹⁰ See the “Version confidentielle expurgée de la ‘Demande d’extension de délais ciblée pour terminer des actes d’enquêtes en cours conformément à la Norme 35 du Règlement de la Cour’ ICC-01/14-01/21-917-Conf-Exp”, [No. ICC-01/14-01/21-917-Conf-Red](#) and [No. ICC-01/14-01/21-917-Red](#), 18 February 2025. See also the submissions by the Prosecution and the Common Legal Representative in this regard: the “Réponse de l’Accusation à la ‘Demande d’extension de délais ciblée pour terminer des actes d’enquêtes en cours conformément à la Norme 35 du Règlement de la Cour’”, [No. ICC-01/14-01/21-918-Conf](#), 20 February 2025; and the “Victims’ Response to the ‘Version confidentielle expurgée de la ‘Demande d’extension de délais ciblée pour terminer des actes d’enquêtes en cours conformément à la Norme 35 du Règlement de la Cour’ ICC-01/14-01/21-917-Conf-Exp’ (No. ICC-01/14-01/21-917-Conf-Red)”, [No. ICC-01/14-01/21-919-Conf](#) and [No. ICC-01/14-01/21-919-Red](#), 20 February 2025.

on 21 February 2025, whilst authorising it to update said lists in respect of outstanding matters by no later than 21 March 2025.¹¹

8. On the same day, the Defence filed its list of evidence and its list of witnesses,¹² which included the Defence Co-Counsel as a *viva voce* witness.¹³

9. On 25 February 2025, the Chamber invited the parties and participants to submit any observations regarding the Defence Co-Counsel testifying in the present proceedings by no later than 28 February 2025.¹⁴

10. On 28 February 2025, the Common Legal Representative¹⁵ and the Defence¹⁶ submitted their observations on said issue, whilst the Prosecution submitted a request to have the Defence Co-Counsel excluded from the Defence's list of witnesses (the "Prosecution Request").¹⁷

11. On 11 March 2025, the Chamber issued the Impugned Decision, granting the Prosecution Request.¹⁸

12. On 17 March 2025, the Defence submitted its Request.¹⁹

¹¹ See the "Decision on the Defence's Request for an Extension of Time to File its Final List of Witnesses, List of Evidence and Complete Disclosure" (Trial Chamber VI), [No. ICC-01/14-01/21-920-Red](#), 21 February 2025.

¹² See the Defence's Notification of its List of Witnesses, *supra* note **Error! Bookmark not defined..**

¹³ See Annex 2 to the Defence's Notification of its List of Witnesses, [No. ICC-01/14-01/21-921-Conf-Anx2](#), 21 February 2025.

¹⁴ See the email from the Chamber to the parties and participants on 25 February 2025 at 12:37, entitled "Regarding the Defence's Notification of its List of Witnesses".

¹⁵ See the "Victims' Observations regarding the Defence's Notification of its List of Witnesses", [No. ICC-01/14-01/21-929-Conf](#) and [No. ICC-01/14-01/21-929-Red](#), 28 February 2025.

¹⁶ See the "Observations de la Défense sur le cadre du témoignage du Conseil Associé permettant d'assurer l'égalité des armes entre Accusation et Défense et le principe du contradictoire, garantis du procès équitable et réponse à la demande de l'Accusation ICC-01/14-01/21-928", [No. ICC-01/14-01/21-930-Conf](#) and [No. ICC-01/14-01/21-930-Red](#), 28 February 2025 (the "Defence Observations").

¹⁷ See the "Prosecution Request to order the Defence to exclude Defence Counsel Dov Jacobs from its List of Witnesses and Evidence", [No. ICC-01/14-01/21-928](#), 28 February 2025.

¹⁸ See the Impugned Decision, *supra* note 3.

¹⁹ See the Request, *supra* note 2.

III. SUBMISSIONS

13. Article 82(1)(d) of the Statute provides for the possibility for the parties to seek leave to appeal *“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”*.

14. The jurisprudence of the Court has clarified the various requirements of article 82(1)(d) of the Statute.²⁰ In this regard, the Appeals Chamber ruled that *“[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”*.²¹ The Appeals Chamber further stated that *“[o]nly an ‘issue’ may form the subject-matter of an appealable decision”*,²² and defined the term “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”*.²³ The Appeals Chamber also considered that *“[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”*.²⁴

15. Consequently, it must first be determined whether the purported “issue” identified in the Request is an “appealable issue” within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, *“while an*

²⁰ See the “Decision on the Defence’s Request for Leave to Appeal the ‘Decision on the Prosecution’s Third Request for In-Court Protective Measures’” (Trial Chamber VI), [No. ICC-01/14-01/21-725](#), 19 March 2024, para. 19. See also the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), [No. ICC-02/04-01/05-20](#), 19 August 2005, para. 21; and the “Judgment 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, paras. 8, and 14.

²¹ 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 20, para. 8.

²² *Idem*, para. 9.

²³ *Ibid.*

²⁴ *Idem*, para. 10.

*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, 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”.*²⁵

1. The Purported Issues do not arise from the Impugned Decision

16. The Common Legal Representative submits that the Purported Issues do not constitute appealable issues under article 82(1)(d) of the Statute, but instead represent mere disagreements with the Impugned Decision. Said disagreements are revealed by the Defence’s attempt to relitigate questions that were already addressed and dismissed by the Chamber in the Impugned Decision. Indeed, the Common Legal Representative notes that the Defence, in its Request, merely reiterates arguments advanced at length before the Chamber in its earlier observations and response to the Prosecution Request, more specifically regarding: (i) the professional relationship and working methods that may exist between Co-Counsel and Lead Counsel;²⁶ (ii) the anticipated content of Co-Counsel’s testimony;²⁷ and (iii) the need to preserve the equality of arms between the parties by allowing the Defence Co-Counsel to present investigative findings in the same way as Prosecution investigators and analysts, given the similar nature of his role in the present proceedings.²⁸ In the Impugned Decision, the Chamber considered, and expressly rejected, said arguments.²⁹

17. The Common Legal Representative further posits that the Purported Issues, in addition to constituting mere disagreements, also misconstrue the Impugned Decision.

²⁵ 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.

²⁶ See the Request, *supra* note 2, para. 22; and the Defence Observations, *supra* note 16, paras. 28-33.

²⁷ See the Request, *supra* note 2, paras. 20, and 23-25; and the Defence Observations, *supra* note 16, paras. 44-50, and 56.

²⁸ See the Request, *supra* note 2, paras. 19-21, and 26-35; and the Defence Observations, *supra* note 16, paras. 10-27, 34-43, and 51-55.

²⁹ See the Impugned Decision, *supra* note 3, paras. 21-33, and 36-54.

18. Regarding the First Issue, the Chamber did not ignore the reality of the Defence Co-Counsel's role in the present proceedings, contrary to the Defence's submissions.³⁰ Instead, the Chamber specifically considered Co-Counsel's activities in the present case, such as leading the cross-examination of witnesses, and standing in for Lead Counsel during her absence,³¹ before correctly concluding that he occupies the role of associate counsel and is thus bound by the Code of Professional Conduct for Counsel (the "Code of Conduct for Counsel").³² The Defence draws a comparison between Co-Counsel and members of the Prosecution team,³³ but fails to mention that the members of the Prosecution team who perform the same activities as Co-Counsel have also not testified in the present case, nor would they be allowed to do so for obvious reasons. As such, the Common Legal Representative submits that the Chamber took Co-Counsel's actual prerogatives fully into account.

19. Under the Second Issue, the Defence contends that the Chamber committed a factual error regarding the anticipated content of Co-Counsel's testimony, which, according to the Defence, relates exclusively to factual observations that do not concern the substance of the case.³⁴ However, the Defence argues further on that the outcome of the trial could be affected "*si la Défense n'était pas autorisée à soumettre ses conclusions sur la topographie de l'OCRB, qui est le lieu principal des charges*",³⁵ thus seemingly contradicting its assertion that Co-Counsel's testimony would not concern the substance of the case. Moreover, the Common Legal Representative underlines that the Chamber not only took into account the summary of Co-Counsel's anticipated testimony, but also the specific contents of the Defence's investigation reports, in reaching its conclusion that said testimony would go to matters that are contested in the present case.³⁶ Based on these reasons, the Common Legal Representative posits

³⁰ See the Request, *supra* note 2, para. 22.

³¹ See the Impugned Decision, *supra* note 3, para. 38.

³² *Idem*, para. 39.

³³ See the Request, *supra* note 2, para. 22.

³⁴ *Idem*, paras. 23-25.

³⁵ *Idem*, para. 35.

³⁶ See the Impugned Decision, *supra* note 3, para. 44, footnote 78.

that the Chamber did not misinterpret the anticipated content of Co-Counsel's testimony.

20. With regard to the Third Issue, the Chamber did not err in law by finding that *"the personal interests of counsel in bolstering their credibility could lead to tension in the discharge of their duty to the Court and to their client"*.³⁷ The Defence, once more, submits that there is no difference between investigators of the Prosecution, on the one hand, and the Defence Co-Counsel, on the other hand, claiming that the Code of Conduct for Counsel, which is binding on the Co-Counsel, would not, in any way, affect the probative value of the intended testimony.³⁸ The Common Legal Representative recalls her submissions on the clear distinction between investigators of the Court, who are bound by their own specific Code of Conduct which does not contain a prohibition for them to appear as witnesses, and the Defence Co-Counsel, who is bound by the Code of Conduct for Counsel which prohibits him from appearing as a witness in present case, and which requires him to put his client's interests above any other interests.³⁹ In this regard, the Defence itself recognises that the applicable rules of deontology for members of the Prosecution have no impact on their ability to testify,⁴⁰ but then fails to acknowledge that this distinguishes them from the Defence Co-Counsel. The Chamber correctly pointed out said distinction concluding that the Defence's submissions in this regard were *"inapposite"*.⁴¹

21. Finally, under the Fourth Issue, the Defence contends that the Chamber committed an error of law by prohibiting the Defence from submitting its investigation reports,⁴² which is a misrepresentation of the Impugned Decision. Indeed, the Chamber clearly stated that the reports cannot be introduced into evidence *"[t]o the extent that [they] contain testimonial evidence on the part of the authors of the report (lead*

³⁷ See the Request, *supra* note 2, para. 26, referring to the Impugned Decision, *supra* note 3, para. 47.

³⁸ *Idem*, para. 27.

³⁹ See the "Victims' Observations regarding the Defence's Notification of its List of Witnesses", *supra* note 15, paras. 16-17.

⁴⁰ See the Request, *supra* note 2, para. 27.

⁴¹ See the Impugned Decision, *supra* note 3, para. 48.

⁴² See the Request, *supra* note 2, paras. 30-34.

counsel and associate counsel)”.⁴³ In addition, the Chamber provided the Defence with an alternative avenue to submit the relevant information into evidence by “*making a request for a limited amount of additional time to propose alternative means to authenticate relevant items/information collected at the TGI and/or the OCRB currently contained in the reports prepared by counsel*”.⁴⁴ A mere disagreement with the alternative avenue proposed by the Chamber cannot constitute an appealable issue.

22. The Defence reiterates its disagreement with, and merely misconstrues, the Impugned Decision and none of the four Purported Issues arise from the Impugned Decision. Since disagreements with, or misinterpretations of, said Decision are not appealable issues, the Request must fail on that basis alone.

2. The Purported Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and their litigation before the Appeals Chamber will not materially advance the proceedings

23. If, by extraordinary, the Chamber were to find that appealable issues do arise from the Impugned Decision, the Defence fails to demonstrate how they would significantly affect the fair and expeditious conduct of the proceedings and how their immediate resolution would materially advance the proceedings.

24. In analysing whether an appealable issue would “*significantly affect*” the fair and expeditious conduct of the proceedings under article 82(1)(d) of Statute, the notion of ‘fairness’ must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.⁴⁵ In turn, ‘expeditiousness’ must be read as “*closely linked to the concept of judicial proceedings ‘within a reasonable time’ [...], namely the speedy conduct of proceedings, without prejudice*

⁴³ See the Impugned Decision, *supra* note 3, para. 55 (emphasis added).

⁴⁴ *Ibid.*

⁴⁵ See, *inter alia*, the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), [No. ICC-01/05-01/08-75](#), 25 August 2008, para. 14.

to the rights of the parties concerned”.⁴⁶ The Appeals Chamber stated that in order to determine whether an issue would significantly affect the ‘outcome of the trial’ under article 82(1)(d) of the Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.⁴⁷

25. Contrary to the requirements of article 82(1)(d) of the Statute,⁴⁸ the Defence does not articulate how each of the Purported Issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial. Instead, it states, in one short paragraph and in vague terms, that the Impugned Decision undermines the equality of arms between the parties and thus the fairness of the proceedings⁴⁹ – arguments which the Chamber already addressed in the Impugned Decision⁵⁰ – and that the outcome of the trial could be affected.⁵¹ The Common Legal Representative submits that the Defence’s general assertions, which are sparse and lacking in specificity, clearly fall short of demonstrating that the fairness and expeditiousness of the proceedings or the outcome of the trial are affected by the Purported Issues.

26. The Common Legal Representative further recalls the Dissenting Opinion of Judge Eboe-Osuji regarding mere disagreements and their impact on the fairness or expeditiousness of the proceedings, or the outcome of the trial:

“Leave is not granted to appeal decisions of Trial Chambers, out of fear of the possibility or risk of what may or may not happen in an appeal on the merits of the case. The controlling general element of article 82(1)(d) is rather that the issue sought to be appealed must be one that ‘would

⁴⁶ *Idem*, paras. 17-18.

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” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 13.

⁴⁸ See the “Decision on the ‘Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility’” (Trial Chamber II), [No. ICC-01/04-01/07-1958](#), 11 March 2010, para. 20. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (Trial Chamber III), [No. ICC-01/05-01/08-2925-Red](#), 20 December 2013, para. 34.

⁴⁹ See the Request, *supra* note 2, para. 35.

⁵⁰ See *supra* para. 16.

⁵¹ See the Request, *supra* note 2, para. 35.

significantly' affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It is important to stress that the question is not whether the issue 'would' affect the fair conduct of the case or its outcome, without considering how 'significantly' so. Nor is the question whether the issue 'may' —not would— affect fair trial or the outcome, even though significantly. For leave to be granted, it needs to be seen that the issue would significantly affect the outcome of the trial or the fair and expeditious conduct of the proceedings. Both words— 'would significantly' —must be given their juristic values".⁵²

27. The Common Legal Representative submits that, as demonstrated *supra*,⁵³ none of the Purported Issues affects the fair and expeditious conduct of the proceedings or the outcome of the trial. Entertaining mere disagreements or incorrect readings of the Impugned Decision would significantly delay the proceedings and thus prejudice the very essence of said principles. She therefore submits that it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these Issues may materially advance the proceedings, inasmuch as such a resolution would lead to undue delays of the proceedings.⁵⁴

FOR THESE REASONS, the Common Legal Representative respectfully requests the Chamber to dismiss the Request in its entirety as it does not meet the legal criteria set out in article 82(1)(d) of the Statute.



Sarah Pellet

Dated this 21st day of March 2025

At The Hague, The Netherlands

⁵² See the "Dissenting Opinion of Judge Eboe-Osuji", [No. ICC-01/09-01/11-817-Anx](#), 18 July 2013, para. 3; and the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), [No. ICC-01/09-01/11-596](#), 11 February 2013, para. 6.

⁵³ See *supra* para. 25.

⁵⁴ See the "Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-530](#), 8 October 2013, para. 42.