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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

**Prosecution's request for leave to appeal the "Decision on Protocols to be Adopted
at Trial"**

Source: The Office of the Prosecutor

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Introduction

1. The Prosecution requests Trial Chamber IX to grant leave to appeal its decision denying the witness preparation proposed in the case.¹ Although granting leave under article 82(1)(d) of the Statute for interlocutory appeals is exceptional at this Court,² the leave to appeal criteria should not be interpreted as insurmountable barriers, effectively preventing any kind of appellate review during trial. Not only does such an approach render article 82(1)(d) a dead letter, it also deprives a trial of appellate guidance at critical junctures and the Court, as a whole, of legal certainty and predictability.

2. Rather, when the Parties advance fundamental issues that meet the criteria for leave to appeal, Chambers should grant leave to appeal and allow appellate review.³ Witness preparation is one such cardinal question. Not only does it—as shown below through the two identified Issues—squarely meet the article 82(1)(d) criteria, it also concerns a trial practice on which judicial opinion at this Court remains divided. Yet, individual opinions on the merits of the practice are immaterial at this stage. An article 82(1)(d) decision is merely procedural, limited to an impartial and objective assessment of whether the proposed issues meet the criteria: it should not be construed as a decision setting the policy or practice at this Court.⁴ Rather, if leave is granted, the Appeals Chamber is entrusted with determining the future direction of this Court.

¹ ICC-02/04-01/15-504 (“Decision”). *See also* ICC-02/04-01/15-472 (“Prosecution’s witness preparation request” or “Prosecution’s request”).

² ICC-01/05-01/13-T-10-RED-ENG, p. 11 lns. 3-12, noting “[i]nterlocutory appeals are exceptional [...]”

³ ICC-02/11-01/15-612-Anx, para. 2, noting “[i]t is [...] neither productive nor helpful to avoid appellate review, particularly when matters of fundamental importance are at stake.”

⁴ ICC-02/11-01/11-464-Anx, para. 6; *see also* para. 5, stating “[t]he Chambers are accorded a large margin of appreciation, but [not] an unfettered discretion to decide whether or not to grant an appeal”, para. 6, noting “[c]ertification of an appeal is merely procedural and should not be used by the Chamber to restate its position, clarify the impugned decision or supplement the legal reasoning contained therein” and ICC-02/11-01/15-612-Anx, para. 14, noting “[s]uch an approach is not only unfair to the appealing parties, as they are essentially aiming at a moving target, it also risks rendering significant rulings immune from appellate review because they are made in decisions on leave to appeal.” *See further* ICC-02/04-01/05-20-US-Exp (unsealed pursuant to ICC-02/04-01/05-52), para. 22, stating “[t]he existence of the requirements set forth in article 82, paragraph 1 (d), of the Statute is the sole factor of relevance in determining whether leave should be granted or not.”

3. In this light, the Prosecution seeks leave to appeal on two distinct issues arising from the Decision.

- a. Whether the Trial Chamber erred in paragraphs 7, 9, 10, 13 and 16 by equating “witness preparation” requested by the Prosecution to conduct which could lead to a “rehearsal” of the witnesses’ evidence, rather than properly considering the circumscribed procedure sought by the Prosecution and the nature of the five proposed individual measures, and accordingly, abused its discretion under article 64(2) and (3)(a) in rejecting the Prosecution’s request (“First Issue”).
- b. Whether the Trial Chamber erred in paragraph 11 in failing to recognise (or not properly recognising) the Prosecution’s right to prepare and present evidence in a manner best suited to establish the truth, instead focusing on the Chamber’s role in managing evidence presentation and its own duty to establish the truth, and accordingly, abused its discretion under article 64(2) and (3)(a) in rejecting the Prosecution’s request (“Second Issue”).

4. Both Issues arise from the Decision: the Decision is the determinative ruling on witness preparation in the case. Likewise, both Issues are appealable: they are essential to determine the correctness (on appeal) of the Chamber’s exercise of discretion denying witness preparation. Indeed, discretionary decisions are as appealable as any other.⁵

5. Moreover, the Issues meet the remaining article 82(1)(d) criteria. *First*, they significantly affect the fair and expeditious conduct of the proceedings. The absence of witness preparation adversely affects many of the witnesses in this case, the Chamber and the Parties, thus cutting across the intrinsic fairness of the proceedings. Likewise, without witness preparation, testimony is more likely to be unfocused,

⁵ ICC-02/11-01/15-388-Anx, para. 5, stating “[d]iscretionary decisions may give rise to appealable issues no differently from any other decision.”

onerous and time-consuming. *Second*, the Issues also significantly affect the outcome of the trial. Whether witness preparation is allowed in this trial necessarily determines whether and how evidence can be elicited. 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.

6. *Finally*, and critically, the Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings. Determining if witness preparation is allowed is essential to the conduct of this trial: a final decision on which trial practices are adopted cannot be deferred to the final appeal. In addition, this Chamber's evaluation of the utility of witness preparation is similar to some other Trial Chambers, but remains disparate from several other Trial Chambers. This Chamber has also rejected as irrelevant several factors that other Chambers considered highly relevant to allowing witness preparation. The Appeals Chamber is best placed to bring cohesion and predictability to these vastly varying assessments at trial and determine if the Decision is correct.

Submissions

A. Both Issues arise from the Decision and are appealable

7. The two Issues show "[a]n identifiable subject or topic requiring a decision for its resolution" and "[are] essential [to determine] matters arising in the judicial cause under examination."⁶

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

8. The First Issue—whether the Trial Chamber erred in paragraphs 7, 9, 10, 13 and 16 by equating "witness preparation" requested by the Prosecution to conduct

⁶ See ICC-01/04-168 OA3, para. 9; 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"; ICC-01/05-01/08-532, para. 17.

which could lead to a "rehearsal" of the witnesses' evidence, rather than properly considering the circumscribed procedure sought by the Prosecution and the nature of the five proposed individual measures, and accordingly, abused its discretion under article 64(2) and (3)(a) in rejecting the Prosecution's request—emanates from the Decision. It is appealable.

9. The First Issue underscores the evident tension between the nature of the Prosecution's request (witness preparation as a limited and carefully regulated practice composed of only five measures) and the Chamber's rejection of the practice as one that "could lead to a distortion of the truth and [come] dangerously close to constituting a rehearsal of in-court testimony."⁷ Indeed, although the Chamber first set out the particulars of the Prosecution's limited request, its subsequent analysis was entirely unresponsive to it.⁸ Rather, the Chamber focused on the entirely different practice of "witness proofing" that the Prosecution had specifically rejected and distinguished from its proposed witness preparation. Put simply, the Chamber misapprehended the Prosecution's request.

10. Decision paragraphs 7, 9, 10, 13 and 16 clearly demonstrate the First Issue, and the Chamber's error. *First*, despite the Prosecution's rejection of the definition of "witness proofing" discussed in previous cases including *Lubanga*, the Chamber's scrutiny pivoted on the practice considered in *Lubanga*. Thus, when in paragraphs 9 and 10 of the Decision, the Chamber emphasised "witness preparation's potentially distortive effects" and shared the "same concerns" as the *Lubanga* Trial Chamber, its conclusions were inapposite. Indeed, although the Chamber referred, in paragraph 7, to the definition of "witness preparation" adopted in *Ruto & Sang*,⁹ its subsequent analysis in paragraphs 9 and 10 reverts to the *Lubanga* practice. Likewise, the Chamber's fears that witness preparation "has an inherent risk of approaching a rehearsal of the witness's testimony" were unrelated to the Prosecution's

⁷ See Decision, paras. 6, 7, 9, 10, 13, 16.

⁸ *Ibid.*

⁹ Decision, para. 7, citing ICC-01/09-01/11-524, para. 4.

submissions.¹⁰ Equally, the Chamber's reservations that 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'"¹¹ are predicated on a misunderstanding of the scope of witness preparation requested by the Prosecution.

11. The Chamber, while importing its own understanding of witness preparation, failed to acknowledge the essential distinction drawn in the Prosecution's submissions: *i.e.*, the scope of its proposed witness preparation was distinct from the practices of "witness proofing" discussed in previous cases including *Lubanga* and carried out at the *ad hoc* tribunals. The Chamber effectively disregarded the Prosecution's caveat that it was advancing a different, and restricted, interpretation of the procedure.¹² Although the Chamber set out these submissions,¹³ its analysis failed to reflect their import.

12. *Second*, not only did the Chamber fail to consider the circumscribed nature of the Prosecution request, it failed to properly assess and appreciate what each individual measure entailed. Decision paragraphs 10, 13 and 16 further illustrate the Chamber's error in assessing the crux of the proposed witness preparation. Although the Prosecution affirmed that it did not envisage substantive, or extended discussions, the Decision persevered in using those terms.¹⁴ Likewise, although the Prosecution categorically stated that the calling party would "simply *identify* the anticipated topics of questioning in broad terms", but "[*not*] *explain* the relevance of

¹⁰ Decision, paras. 9-10.

¹¹ Decision, para. 9.

¹² Prosecution's request, paras. 2-4, 8-15.

¹³ Decision, para. 6.

¹⁴ Decision, para. 10, stating "[w]itness preparation still involves *extended meetings* with adversarial parties imminently before testimony is given"; para. 13, stating "[e]xtended *pre-testimony discussions with the parties about the topics of a witness's upcoming testimony* diminish spontaneity and thus reduce the benefit of the immediate impression" (emphasis added). *Contra* Prosecution's request, paras. 11, 12, 14 and 15, noting *inter alia* for Measures 2-5, that the calling party will not seek to elicit "new information", that there would not be substantive discussion and the party would not "[take] a witness systematically through inconsistencies in their statements", and the witness will not be permitted to comment on the substance.

[these] topics”, the Chamber found that “*explaining* the broad topics of the examination” unduly distorts the spontaneity of the testimony.¹⁵

13. Moreover, although the Chamber portrays Measure 2 as “confirming the accuracy of statements and explaining any inaccuracies *when testifying*”, the italicised words did not feature in the Prosecution’s request.¹⁶ In addition, these words appear to contradict the initial part of paragraph 16, which stated that witnesses are perfectly capable of conducting Measures 1, 2 and 5 as requested by the Prosecution in the context of the VWU-led witness familiarisation process.¹⁷

14. Further, in finding that three out of the five proposed measures (Measures 1, 2 and 5) could be left to the VWU-led witness familiarisation process, the Chamber failed to consider that these Measures, to be effective, require a case-specific familiarity and knowledge that the VWU does not have.¹⁸ In assigning these Measures to the VWU, the Chamber also failed to properly assess that although witness preparation and witness familiarisation are elements of a single process to induct the witness into the Court’s judicial functioning,¹⁹ they cannot substitute each other. The VWU simply cannot perform Counsel’s work. For instance, the VWU cannot assist the witness to either confirm the accuracy of a statement or explain inaccuracies. Counsel, with their knowledge of the case and the nature of the evidence as a whole, are the only ones who can.

15. Nor does the VWU itself endorse such a view. Rather, in the approved Familiarisation Protocol, the VWU concedes its limited role in relation to preparing the witness for testimony: it “will not be in a position to ascertain the content of the provided statement or to ensure that the witness comprehends all of the provided

¹⁵ Prosecution’s request, para. 12; Decision, para. 16 (emphasis added).

¹⁶ See Prosecution’s request, paras. 3, 11, 24.

¹⁷ Decision, para. 16.

¹⁸ Decision, para. 16; *contra* Prosecution’s request, paras. 10, 11, 15, 23-27, 33.

¹⁹ ICC-01/04-02/06-656-AnxA, para. 26.

material.”²⁰ Nor will it be “in a position to answer any legal or factual questions that might arise in relation to the statement.”²¹ Nor does it have a duty to monitor or record anything that is said by the witness during this process, unless something exceptional occurs.”²² The Decision failed to acknowledge this tension between the Chamber’s allocated role to the VWU,²³ and the VWU’s own limited mandate recognised in the Familiarisation Protocol. And in failing to do so, the Decision rendered Measures 1, 2 and 5—now left in the VWU’s hands—redundant.

16. *Third*, and finally, although the Chamber adopted a definition of “witness preparation” from the *Ruto & Sang* case, it remains ambiguous if this definition related to the limited witness preparation proposed, or a broader “[discussion] on matters relating to the witness’s testimony.”²⁴

17. The First Issue is also appealable. It is not a mere contrary opinion. Its subject matter—the Chamber’s comprehension of “witness preparation” and the proposed individual measures—was crucial to how the Chamber chose to exercise its discretion. This in turn affected the Decision’s outcome.

18. For these reasons, the First Issue arises from the Decision and is appealable.

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

19. The Second Issue—whether the Trial Chamber erred in paragraph 11 in failing to recognise (or not properly recognising) the Prosecution’s right to prepare and present evidence in a manner best suited to establish the truth, instead focusing on

²⁰ ICC-02/04-01/15-504-Anx 1 (“Familiarisation Protocol”), para. 88.

²¹ *Ibid.*, para. 89.

²² *Ibid.*, para. 90.

²³ Decision, para. 16.

²⁴ See Decision, para. 7, stating “[t]he Chamber understands ‘witness preparation’ to refer to a *meeting* between a witness and the party calling that witness, taking place shortly before the witness’s testimony, for the purpose of *discussing* matters relating to the witness’s testimony.” *Contra* Prosecution’s request, para. 8, noting that the scope of the “witness preparation” proposed was different from “witness proofing”, *the latter* consisted of a “*meeting* [...] between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness’s evidence” and where “the party will ‘*discuss* the topics to be dealt with in court’ (emphasis added).

the Chamber's role in managing evidence presentation and its own duty to establish the truth, and accordingly, abused its discretion under article 64(2) and (3)(a) in rejecting the Prosecution's request—arises from the Decision. It is also appealable.

20. The Second Issue derives from the Decision. It pertains to the Chamber's rejection, in principle, of the Prosecution's right to prepare and present evidence in a manner it deems best suited to establish the truth. As paragraph 11 reflects, not only did the Chamber question the very existence of such a right (apparent in the use of the phrase "alleged right" and the use of quotation marks when using the word "right"), it also dismissed it as a relevant factor in considering witness preparation.²⁵ This, in turn, affected the Chamber's subsequent exercise of discretion in which it failed to consider this factor. Instead the Chamber prioritised its "broad discretion in managing evidence presentation", the Judges' duty to establish the truth, and the Defence's submissions objecting to an unspecified form of witness preparation,²⁶ to ultimately deny witness preparation.

21. That the Second Issue arises from the Decision is further demonstrated by the following. *First*, in summarily dismissing the existence of the Prosecution's right, the Chamber contradicted, even ignored, the Appeals Chamber's case law recognising such a right. The Prosecutor's right to a fair trial guaranteed under article 64(2) has been endorsed by some appellate judges, in line with the principle of fair trial. They considered that the Prosecutor, acting in public interest, "[is] entitled pursuant to article 69(3) [...] to submit the evidence relevant to the case and to examine the existing evidence at trial."²⁷ Other appellate judges, although reluctant to determine the Prosecution's right to a fair trial in the abstract, have upheld not only the principle that the Prosecutor's ability to present evidence to prove charges against the accused is a core function, but also the Chamber's duty to ensure that the

²⁵ Decision, para. 11.

²⁶ Decision, para. 11.

²⁷ ICC-01/04-02/12-271-AnxA, paras. 5-6 (emphasis added).

Prosecutor is afforded an adequate opportunity to present her case—more so since article 54(1)(a) enjoins the Prosecutor “to establish the truth”.²⁸

22. *Second*, even if, *arguendo*, the Chamber recognised such a Prosecution right, it failed to conduct a balancing exercise and to give it appropriate weight. Rather, the Chamber appeared to consider that any such right, in all instances, must necessarily be subordinated to its own discretion and duty to establish the truth—failing to acknowledge that the Prosecution’s right and the Chamber’s duty are not necessarily competing considerations.²⁹ Indeed, as the Appeals Chamber has noted, the core functions of both the Prosecutor and the Trial Chamber affect a fundamental aspect of a trial, namely, the objective of establishing the truth.³⁰

23. *Third*, the Chamber wrongly evaluated the Defence submissions, when it denied the Prosecution’s right. Although the Chamber considered that “[t]he Defence do not assert any sort of right to witness preparation”,³¹ a party’s submissions cannot usurp the place of the Appeals Chamber’s law. Nor were the Defence submissions opposing the Prosecution’s request apposite. The submissions barely addressed the circumscribed nature of the Prosecution’s specific proposal.³² Moreover, the Defence submissions, in purporting that “the Prosecution has recently and extensively questioned the witnesses in the present case”,³³ fail to capture the Prosecution’s position. Indeed, as the Prosecution made clear, many of its witnesses made their substantive statements over a decade ago, and have not since been re-interviewed.³⁴

24. The Second Issue is also appealable: it was essential to the Chamber’s determination and is not a mere disagreement. If the Chamber had not incorrectly

²⁸ ICC-01/04-02/12-271-Corr, para. 256.

²⁹ Decision, para. 11.

³⁰ ICC-01/04-02/12-271-Corr, para. 256.

³¹ Decision, para. 11.

³² See generally ICC-02/04-01/15-473 (“Defence opposition”).

³³ Defence opposition, paras. 15-16.

³⁴ *E.g.*, P-0006, P-0018, P-0024, P-0045, P-0048, P-0067, P-0070, P-0081, P-0085, P-0119, P-0138, P-0145 and P-0146. See also Prosecution’s request, para. 39. The Chamber focused on those witnesses who have been interviewed more recently (Decision, para. 12).

dismissed the Prosecution's right and ability to present its case, it could have exercised its discretion differently. Even if it has considered such a right, it wrongly juxtaposed the right against other considerations, some even irrelevant. All of this led to the Chamber's rejection of the Prosecution's request.

25. For these reasons, the Second Issue emanates from the Decision and is appealable.

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

a) *The Issues significantly affect the fairness of the proceedings*

26. Both Issues significantly affect the fairness of the proceedings. If, as in the First Issue, the Chamber has wrongly assessed the nature of the Prosecution's request, the Decision is itself vitiated. Letting an incorrect decision stand on the record, which denies the entire trial of an effective trial practice, tarnishes the fairness of the proceedings. Likewise, as both Issues show, the Chamber's exercise of discretion denied to the trial, the Chamber, the Parties (the Prosecution in particular) and the witnesses, a critical procedural feature. In these circumstances, "the notion of fairness of the proceedings [is not] preserved to the benefit of all participants in the proceedings."³⁵

27. *First*, 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.³⁶ An inability to conduct witness preparation fundamentally affects this right, and its ability to present its best case. Although the Chamber situates the practice of witness preparation within its exercise

³⁵ 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; ICC-01/04-02/12-271-Corr, para. 256; ICC-02/11-01/15-388-Anx, para. 8, noting that a decision denying witness preparation "may negatively affect the fair and expeditious conduct of proceedings or the outcome of the trial."

³⁶ See e.g., articles 54(1) and 69(3). See also ICC-01/04-02/12-271-Corr, para. 256; ICC-01/04-02/12-271-AnxA, paras. 5-6.

of discretion under article 64 to “ensure that the trial is fair and expeditious”,³⁷ it does not consider that this very provision obliges the Chamber to exercise its trial management powers so as “[t]o ensure the trial is conducted fairly both to the prosecution and the accused.”³⁸

28. *Second*, given that the Prosecution is obliged to prove its case beyond reasonable doubt, it is uniquely disadvantaged by the Chamber’s denial of the complexity of the case.³⁹ Minimising the intricacies and magnitude of this case, and indeed any international criminal trial, affects the perception and treatment of these proceedings and, thereby, their fairness.

29. Contrary to the Decision, this case is no less complex or extensive than the *Ruto & Sang*, *Kenyatta* and *Ntaganda* cases, where witness preparation was allowed for that reason.⁴⁰ And, as the Chamber correctly recognised, the *Gbagbo* and *CAR Article 70* cases are also complex.⁴¹ Indeed, considering the nature of the cases tried at the Court, all these cases are almost indistinguishable in their levels of complexity and should be treated alike. Thus the Chamber’s suggestion⁴² that the *Ongwen* case is somehow not—or less—complex is erroneous.

30. Undoubtedly, the *Ongwen* case is complex. Not only does it involve large numbers of witnesses and exhibits, and many charges (a fact the Chamber accepts),⁴³ Dominic Ongwen’s alleged acts and conduct date back 14 years, and span over three years. Moreover, the Chamber erred when it found that the fact that the Prosecution had interviewed many of its witnesses more recently somewhat mitigated “[the] long gap in time between the witnesses’ testimonies in this case and the alleged crimes.”⁴⁴

³⁷ Decision, para. 7.

³⁸ ICC-02/11-01/15-313, para. 14.

³⁹ Decision, para. 14, stating that “[t]he alleged complexity of this case also does not justify witness preparation.”

⁴⁰ ICC-01/04-02/06-652, para. 18; ICC-01/09-01/11-524, para. 33; ICC-01/09-02/11-588, para. 37.

⁴¹ Decision, para. 14; ICC-02/11-01/15-355, para. 18; ICC-02/11-01/15-355-AnxI, paras. 15-16.

⁴² Incorrectly relying on the Defence submissions: *Contra* Defence opposition, para. 17; Decision, para. 14, noting only “alleged complexity”.

⁴³ Decision, para. 14.

⁴⁴ Decision, para. 12. *Contra* Defence opposition, para. 16.

The Chamber's remedy does not cater to the witnesses who indeed were not re-interviewed. These include 13 legacy witnesses, most of whom were first interviewed in 2004, and not since.

31. *Third*, the Decision negates the Prosecution's own obligations towards its witnesses.⁴⁵ This case is characterised by the systematic vulnerability of its witnesses: not only are many witnesses victims of the Lord's Resistance Army (LRA), several are former child soldiers and victims of sexual and gender-based violence.⁴⁶ The calling party is in a better position to fully appreciate the details of this vulnerability. Although the VWU's mandate is distinct,⁴⁷ as the Statute and the Appeals Chamber recognise, the Prosecution is equally responsible for ensuring that appropriate measures are taken to protect the safety of victims and witnesses.⁴⁸ As the Appeals Chamber has stated, "[...] cooperation between the Prosecutor and the VWU will be essential to ensure, as a matter of the highest priority, that witnesses are appropriately protected."⁴⁹ Not only is such cooperation vitally important; Chambers expect such cooperation.⁵⁰ Joint efforts by the Prosecution and the VWU are essential to bolster the well-being of witnesses, especially the vulnerable witnesses. Yet, by relying solely on the VWU-led familiarisation process,⁵¹ the Decision denies this possibility. Neither the courtesy VWU-led familiarisation meeting, nor the possibility of requesting rule 88 special measures on a case by case basis,⁵² provides what a witness preparation session provides to these witnesses: a comfort and familiarity

⁴⁵ Decision, para. 15.

⁴⁶ Prosecution's request, para. 40.

⁴⁷ See e.g., article 43(6), Statute; rules 16-19.

⁴⁸ ICC-01/04-01/07-776 OA7, paras. 80, 69-71. See also articles 54(3)(f), 68(1).

⁴⁹ ICC-01/04-01/07-776 OA7, para. 101, stating *inter alia* "[c]ooperation between the Prosecutor and the VWU will be essential to ensure, as a matter of the highest priority, that witnesses are appropriately protected. This is, pursuant to article 68 of the Statute, a responsibility of the Court as a whole." See also ICC-01/04-01/06-2582 OA18, paras. 53-54, emphasising "[t]he importance of consultation, where appropriate between the relevant organs of the Court as specified in the Court's legal texts and prior jurisprudence [and] the importance of the Prosecutor alerting the Trial Chamber of information in his possession concerning matters of protection."

⁵⁰ ICC-01/04-01/07-776 OA7, para. 101.

⁵¹ Decision, paras. 15-16.

⁵² See e.g., Decision, paras. 25-29, rejecting the Vulnerable Witness Protocol, and stating "[t]he familiarisation protocol adopted by the Chamber already governs many aspects of the Vulnerable Witness Protocol, including all those involving the VWU's interactions with the parties."

with the sensitive and traumatic issues to be elicited by counsel in an open and unfamiliar courtroom. Moreover, in rejecting “witness well-being” as “the trial’s sole, overriding consideration” and assuming that some witnesses prefer the VWU-led familiarisation procedure,⁵³ the Chamber failed to consider the requirements of those witnesses who indeed did not. Not all witnesses are cast in the identical mould, and several could be dissatisfied with the VWU-familiarisation process, and require more.⁵⁴

32. *Fourth*, and finally, the Decision fails to allow the proper role of counsel towards establishing the truth in the proceedings and dilutes the Chamber’s search for the truth. In the ICC’s hybrid legal system, as opposed to certain national systems, counsel’s role is to ensure that the witness provides all of the relevant evidence he or she has to give to the Chamber. In this system where the Prosecution investigates and the Chamber has allowed the Parties to examine and to cross-examine the witnesses called by them, witness preparation is an essential and logical aspect of the truth-finding process, which recognizes the distinct functions that each party and the Chamber have in that process. Without witness preparation, the system suffers a lacuna, which prevents it from operating most effectively. Now, critical witness testimony may lack precision, be incomplete, confused, or given in an ill-structured or chaotic manner. Even with the benefit of the Chamber’s direction in the courtroom, such testimony, in significant part, may remain confusing, or at the least, incomplete. The Chamber will not be assisted in establishing the truth in these proceedings.

b) The Issues significantly affect the expedition of the proceedings

33. Both Issues significantly affect the expedition of the proceedings. Witness preparation saves valuable court time. In contrast, the lack of a witness preparation procedure only exacerbates the tangible delay caused by unprepared witnesses and

⁵³ Decision, para. 8.

⁵⁴ Prosecution’s request, para. 17.

lengthens the proceedings. This is all the more so when dealing with unsophisticated witnesses with little or no formal education, to whom court proceedings are completely foreign.

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. Witness preparation will assist the calling party and the witness to focus the examination, avoiding irrelevant matters. This, in turn, brings better focus in the examination of the non-calling party, and will save the Court's time. The Defence's claim that witness preparation leads to denial of exculpatory material is only camouflage.⁵⁵ To the contrary, the non-calling party has access to the witness preparation sessions, which are duly recorded and disclosed, and can fully avail of it. Having prior access to such material, instead of being taken by surprise in the courtroom, facilitates a smoother examination by the non-calling party. To the contrary, without witness preparation, counsel too may need to seek adjournments to adjust to unanticipated witness testimony. The Judges may also have to intervene more frequently to assist the witnesses and to bring order to the testimony.

35. When exhibits (estimated at 1000 in this case and often voluminous) are shown to the witnesses for the first time, the trial will be interrupted when the witnesses seek time to properly understand and consider the documents in the courtroom. Neither Party will be able to save the Court's time by first assessing whether the witness is cognisant (or not) of the substance of these documents and then setting aside those documents which the witness cannot comment on.⁵⁶

36. Critically, the Decision erodes the effectiveness of rule 68(3) applications, as a time-saving measure. No party can responsibly file such applications, without first ascertaining with the witness if the statement remains accurate. Absent witness

⁵⁵ *Contra* Defence opposition, paras. 3-10.

⁵⁶ See Decision, para. 16: witnesses are not allowed to be shown exhibits during the VWU-led familiarisation process.

preparation, the Parties will be compelled to conduct this assessment in court, extending, rather than saving, the Chamber's time.

37. Nor, as wrongly characterised by the Defence, is witness preparation solely a question of "cost-effectiveness" or "expediency".⁵⁷ Rather, when a party is compelled to expend valuable resources (human and financial) to re-interview witnesses in the field, additional protection concerns and witness fatigue result. Nor is the Court's calendar effectively utilised when witness testimony is unnecessarily prolonged.

c) The Issues significantly affect the outcome of the trial

38. 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."⁵⁸ As such, it impacts the Chamber's truth-finding function; the article 74 decision will not reflect all the evidence available, as witnesses may fail to testify on all relevant matters or counsel may be unable to elicit all relevant evidence. Likewise, irrelevant evidence elicited from unprepared witnesses could cloud the case record, unfairly influencing the assessment of witness credibility. *Second*, the Decision, and thereby the Issues, affects all the witnesses in this case. It affects the "bulk of the evidence" in a case, and thus the outcome of the trial. Chambers have similarly granted leave when such critical procedural issues are at stake.⁵⁹

⁵⁷ *Contra* Defence opposition, para. 12.

⁵⁸ ICC-01/05-01/08-1169, para. 35.

⁵⁹ See e.g., ICC-01/09-01/11-1313 ("Ruto & Sang Decision on Witness Summons ALA"), para. 51.

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

39. The Appeals Chamber's immediate resolution of the two Issues *would* materially advance the proceedings. 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."⁶⁰

40. 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 on final appeal.⁶¹ 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 proceeded on a flawed basis.⁶² The Issues cannot be reserved for the stage of the final appeal.

41. Interlocutory appeals are particularly suited to determining the validity of practices that affect the length and breadth of a trial. For example, the *Gbagbo* Trial Chamber has recently granted leave to appeal the applicable criteria pursuant to rules 68(2)(b) and (3) in the course of the trial.⁶³ Not only does the Appeals Chamber ensure that the law of the Court evolves in a coherent and standardised manner, and provide guidance to Pre-Trial and Trial Chambers as to the correct interpretation of the law,⁶⁴ it also enhances the clarity and predictability in the Court's overall proceedings. By finally resolving the Issues, the Appeals Chamber can determine, in

⁶⁰ ICC-01/04-168 OA3, paras.14-15, 18.

⁶¹ ICC-01/04-168 OA3, para.14. The Appeals Chamber refers to "possible mistakes that might taint" (emphasis added).

⁶² 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 (granting leave to appeal the decision on witness proofing).

⁶³ ICC-02/11-01/15-612, para. 24

⁶⁴ 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 [...] 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>.

a tangible way, whether witness preparation is appropriate in this case, and which factors are relevant and determinative.

42. This need is even more pressing in this case, when this Chamber has significantly differed with the practices of other Chambers. For instance, not only did this Chamber reject the complexity of a case as a factor favouring witness preparation (in contrast with three other Chambers), it also departed from the practice of the *Gbagbo* Trial Chamber in its consideration of vulnerable witnesses.⁶⁵ As a result of this Decision, the law on witness preparation at this Court is in a state of uncertainty, with three different practices at play across Chambers. Not only does the unpredictability across the Chambers affect the effective functioning of the Office of the Prosecutor (since it is common across all trials), multiple other areas of the Court, including those units providing support to witnesses, are affected when the practice lacks uniformity. Indeed, without a clear regime on witness preparation and with radically different practices in cases, neither the Parties nor the VWU can properly plan for each case. Budgetary consequences ensue: neither does the Registry know if it should provide for preparation-related costs, nor can the Parties properly anticipate if they are required to shoulder costs for extensive re-interviewing in the field *in lieu* of witness preparation. The unpredictability hinders the Court's smooth operation. Undeniably, 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.

⁶⁵ ICC-02/11-01/15-T-12-Red-ENG, p. 85 lns. 4-14, p. 86 lns. 2-22, amending the general principle, allowing “in exceptional cases [...] the presence of and limited interactions with counsel from the calling party during these sessions if needed to further reduce the scope for potential retraumatisation.”

Relief Sought and Conclusion

43. The two Issues meet the leave to appeal test. The Prosecution requests the Chamber to grant leave to appeal its Decision denying a highly circumscribed and carefully regulated form of witness preparation proposed in the case.



Fatou Bensouda
Prosecutor

Dated this 1st day of August 2016
At The Hague, The Netherlands