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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Prosecution's Request for Leave to Appeal the "Decision on Protocols at Trial"
8 October 2020 (ICC-01/14-01/18-677)**

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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I. INTRODUCTION

1. The Office of the Prosecutor requests Trial Chamber V (“Chamber”) for leave to appeal the Decision on Protocols at Trial, in denying the proposed procedure for witness preparation in this case.¹

2. The issues raised in this request concern a matter of fundamental statutory interpretation and meet the criteria for leave to appeal under article 82(1)(d). The questions surrounding the practice of Witness Preparation at the Court is one that—after twenty years of its existence, and amid divided judicial stances among the various Chambers—should finally be settled at the appellate level. The matter is a cardinal one that is intrinsic to the fairness of the proceedings, particularly as it relates directly to the Parties’ rights regarding the preparation of its case and the presentation of evidence.

3. The two issues arising from the Decision are:

- a. Whether the Chamber erred in failing to properly recognise the Prosecution's right to prepare its case and to present evidence in a manner best suited to establish the truth as a component of its right to a fair trial (“First Issue”);
- b. Whether the Chamber applied an incorrect standard of discretion or misapplied the correct standard in abridging the Prosecution’s exercise of a procedural right under the Statute when precluding Witness Preparation, absent a concrete and compelling basis or without otherwise meaningfully considering reasonable alternatives (“Second Issue”).

¹ See ICC-01/14-01/18-677, p. 31 (“[Decision](#)”); see ICC-01/14-01/18-476 (containing the Prosecution’s submissions on witness preparation) (“[Witness Preparation](#)”).

4. Both Issues arise from the Decision and satisfy the remaining article 82(1)(d) criteria.

5. *First*, they significantly affect the fair and expeditious conduct of the proceedings. The absence of Witness Preparation adversely affects the Prosecution's ability to prepare and present its case in a cogent and efficient way consistent with its statutory obligations,² which is inherent to the fairness of the proceedings. In addition, the absence of Witness Preparation impacts on the expeditious conduct of the proceedings, as it will make the witnesses' in-court testimony more time-consuming.

6. *Second*, the Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings. The Decision is conclusive as to the trial practices adopted in the case, and cannot be deferred to a final appeal. A definitive determination of whether witness preparation comprises an extension of the Parties' statutory fair trial rights to prepare its case and to present its evidence as it sees fit, is essential to the fair and expeditious conduct of this trial. Moreover, such a determination necessarily informs the standard for the appropriate exercise of a Chamber's discretion when infringing or curtailing a practice or conduct of a Party that is not prohibited under the Court's regulatory framework, and moreover falls squarely within the ambit of a statutory guarantee.

7. The Appeals Chamber is best placed to bring a long overdue close to the Court's inconsistent approach to Witness Preparation and to determine the correctness of the Decision, both in terms of its evaluation of the competing statutory rights and obligations involved, and the proper scope of a Chamber's exercise of discretion in that light.

² See *e.g.*, articles 54(1) and 66(2).

II. SUBMISSIONS

A. Both Issues arise from the Decision and are appealable

8. The two Issues demonstrate “[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”.³

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

9. The First Issue—whether the Chamber erred in failing to properly recognise the Prosecution's right to prepare its case and to present evidence in a manner best suited to establish the truth as a component of its right to a fair trial, emanates directly from the Decision and is appealable.

10. *First*, the notion of Witness Preparation is inherent to the Statute's express procedural guarantees of a fair trial among the Parties. Curtailing a Party's ability to avail itself of the practice, determines whether and how a party is able to prepare and present its case.

11. *Second*, procedural fairness extends to the Prosecution.⁴ In this sense, the Prosecution is also afforded the right to prepare a case and to present evidence, similarly to the rights afforded to the Defence under article 67(1) (b) and (d). Thus, “[a]lthough the notion of fair trial is perceived predominantly with respect to the accused, fairness “also extends to other parties in proceedings such as the

³ 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.

⁴ See [ICC-02/11-01/15-1234](#), paras. 22-25, 35; [ICC-01/05-01/08-3636-Anx3](#), para. 51; [ICC-02/04-112](#), para. 27; see *Prosecutor v. Tadić*, Case No. IT-94-1-A, [Judgement](#), 15 July 1999, paras. 43, 44, 48 and 52 (acknowledging that “the right to a fair trial [...] covers the principle of equality of arms” which “means that the Prosecution and the Defence must be equal before the Trial Chamber”); see also *Prosecutor v. Prlić, et al*, Case No. IT-04-74-AR73.4, [Decision on Reducing Time for the Prosecution Case](#), 6 February, 2007, para. 1; and see also [Aleksovski Evidence Admissibility Decision](#), para. 25; [Karemera et al. Severance Decision](#), para. 26; [Martić Witness Admissibility Decision](#), para. 13.

Prosecution”,⁵ and is therefore subsumed under article 64(2). As other Chambers have recognised, article 64 “provides a sufficient legal basis to allow the calling party to prepare witnesses, should the relevant party wish to do so.”⁶

12. The Chamber’s observation that “the Prosecution does not point to the legal basis of [its ‘statutory right to effectively prepare and present its case’ in a manner best suited to establish the truth]”⁷ presumes that there is no such basis, and underpins the Chamber’s analysis. This goes to the core of the First Issue and demonstrates that the First Issue arises from the Decision.

13. Although the Decision correctly recites that Chambers have “discretion in adopting procedures to ensure that the trial is fair and expeditious”,⁸ such discretion must be exercised in the context of the statutory framework. Whether a Party’s right to effectively prepare its case and to present evidence is a component of its right to a fair trial is an issue that, not only arises from the Decision, but one necessarily affecting the scope and standard of a Chamber’s exercise of discretion with respect to Witness Preparation.

14. The First Issue does not merely express a contrary opinion, or simply disagree with the Decision. Rather, whether and to what extent, Witness Preparation intrinsically comprises an extension of a Party’s statutory right is a fundamental matter of *statutory construction*. The Issue is not confined to conflicting opinion, but continues to persist in the Court’s inconsistent jurisprudence.⁹

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

⁵ [ICC-01/04-02/12-271-AnxA](#), para. 4

⁶ [ICC-01/04-02/06-652](#), para. 16; *see also*, [ICC-01/09-01/11-524](#), para. 50; [ICC-01/09-02/11-588](#), para. 52.

⁷ [Decision](#), para. 25; *see* [ICC-01/14-01/18-476](#), para. 9, 11-13.

⁸ [Decision](#), para. 17.

⁹ *See* [Decision](#) on, para. 25; *see also e.g.*, [ICC-02/04-01/15-504](#), para. 11 (questioning the existence of such a right in using the phrase “alleged right”).

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

16. The Second Issue— whether the Chamber applied an incorrect standard of discretion or misapplied the correct standard in abridging the Prosecution’s exercise of a procedural right under the Statute by precluding Witness Preparation absent a concrete and compelling basis, or without otherwise meaningfully considering reasonable alternatives, arises from the Decision and is appealable.

17. Although a Chamber may appropriately apply its discretion, its exercise is not unfettered and must respond to the statutory rights and interests affected, particularly where they are express.¹⁰

18. In determining that Witness Preparation is not “*necessary* for a Calling Party to effectively prepare and present its case”,¹¹ the Chamber applied an incorrect standard for the exercise of its discretion, reversing the relevant burden. Rather than justifying the abridgement of the Calling Party’s right to prepare its case and present evidence, the Decision conversely places the burden on the relevant Party to justify its exercise of a statutory right. Instead, the onus of justifying an infringement of a Party’s statutory right—particularly one relevant to a fair trial—lies with the Chamber where it acts to curtail it. As such, the Decision fails to apply the appropriate standard for the exercise of discretion. It does not strike a reasonable balance between the rights and interests at stake.

¹⁰ See e.g., [ICC-01/05-01/13-2168-Red](#), paras. 116, 117 (concerning the exercise of discretion in imposing suspended sentences); see also, [ICC-02/04-01/15-422-Red](#), para. 26 (noting the Chamber’s obligation to “strike the appropriate balance between these different interests” referencing article 67(1)’s right to a public hearing and the obligation to protect victims and witnesses under article 68); [ICC-01/09-01/11-902-Red2](#), paras. 11-13 (noting the need for a “case a case-by-case assessment” in determining whether certain protective measures are necessary and proportionate, in the Chamber’s exercise of discretion when impose measures that attenuate a defendant’s statutory rights); see also e.g., [ICC-02/11-01/11-464-Anx](#), paras. 5-6; (concerning the discretion to certify matters for interlocutory appeal, and noting that “[t]he Chambers are accorded a large margin of appreciation, but [not] an unfettered discretion to decide whether or not to grant an appeal”).

¹¹ [Decision](#), para. 25 (emphasis added).

19. Assuming *arguendo* that the Decision identifies the correct standard for the exercise of discretion, the Chamber nevertheless failed to apply it correctly.

20. For instance, the Decision notes the Chamber's preference that:

“additional information from a witness, who has been afforded an opportunity to review their statement, is first presented in court rather than only in the presence of the Calling Party. This permits all the participants in the courtroom to react to and examine a witness's testimony immediately and on an equal footing”.¹²

Although this stance advances the importance of evaluating the immediacy of a witness's testimony, it also underscores that the Decision goes to the very heart of a Calling Party's right to prepare its case. The role of the Calling Party in an *adversarial process* is normatively active — not reactive. Thus, as noted by Trial Chamber V, “[i]n order to elicit focused and structured testimony and to ensure that all probative evidence is presented, *it is also important that counsel, particularly counsel of the calling party, are well prepared and fully acquainted with each witness's evidence*”.¹³

21. Rather than placing the Parties on an ‘equal footing’, the Decision potentially deprives the Calling Party of significant or even dispositive information in advance of presenting the witness on which it relies—information which may affect the Party's decisions and strategies in how to present the witness's evidence, or more fundamentally, whether to call the witness at all. The absence of such information could be (in the worst case scenario) fatal to a Party's position or case. This is quintessentially what the statutory right to *prepare* concerns, and it underscores the significance of the Decision.

¹² [Decision](#), para. 23.

¹³ [ICC-01/09-01/11-524](#), para. 34 (emphasis added).

22. In failing to consider reasonable and viable alternatives to accommodate the Prosecution's right to prepare and to present its case, the Decision fails to apply the appropriate standard for the exercise of the Chamber's discretion in view of the competing statutory rights and interests. The Second Issue thus arises from the Decision.

23. The Second Issue is also appealable. The Decision's erroneous balancing of the statutory rights and interests at stake, and the Chamber's further failure meaningfully to consider and/or identify alternatives to extinguishing the Prosecution's ability to avail itself of Witness Preparation at all in preparing its case and presenting evidence was determinative.

24. While the Decision focusses on the purportedly "inherent risk of rehearsing and distorting witnesses' evidence", the "risk that the Calling Party might indirectly convey its expectations about the witness's evidence to the witness",¹⁴ the "principle of immediacy",¹⁵ and the Parties' lack of agreement concerning the practice of Witness Preparation,¹⁶ the Decision does not balance these concerns against the countervailing *statutory* interests served by the practice, as has been recognised by other Chambers of the Court. For instance, that Witness Preparation may advance "clear and focused testimony" in furtherance of article 69(2),¹⁷ that it "is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial",¹⁸ or that "[a] witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber's truth finding function".¹⁹

¹⁴ [Decision](#), para. 21.

¹⁵ [Decision](#), para. 23.

¹⁶ [Decision](#), para. 25.

¹⁷ [ICC-01/09-02/11-588](#), paras. 35-40.

¹⁸ See [ICC-01/09-02/11-588](#), para. 36 (citing *Prosecutor v. Limaj, et al*, Case No. IT-03-66-T, [Decision on Defence Motion on Prosecution Practice on "Proofing" Witnesses](#), 10 December 2004, p. 2).

¹⁹ [ICC-01/09-01/11-524](#), para. 31.

25. Moreover, the Decision fails to engage the Court's prior jurisprudence favouring the practice of Witness Preparation without distinguishing the particular circumstances of this case. For instance, in the *Al Hassan case*, Trial Chamber X found that "the procedure for witness preparation set out in the protocol will contribute to the fair and expeditious conduct of the trial proceedings".²⁰ Likewise, the Decision does not engage with the findings of Trial Chambers VI or X that "witness preparation is particularly well-suited for the introduction of previously recorded testimonies under Rule 68(3) of the Rules",²¹ or more generally that "the process will assist the Chamber in its search for the truth".²²

26. Additionally, as noted the Decision neither provides, nor explores any viable solution toward preserving the potential availability of Witness Preparation for the benefit of the Parties. For instance, the Decision does not substantively address the impact of precluding Witness Preparation on the Prosecution's preparation, in light of the serious and severe limitations on its ability to meet with witnesses in advance of trial because of the prevailing COVID-19 pandemic, or because of well-known budgetary constraints affecting its capacity. Unlike the circumstances in the *Ongwen* case — which informed Trial Chamber IX's disposition of the question of Witness Preparation — the Prosecution's ability to meet with witnesses in advance of their handover to the Victim and Witnesses Section is seriously constrained in the circumstances of this case. The Witness Familiarisation Protocol adopted in the *Ongwen* case²³ is inapposite and cannot therefore accommodate the interests at stake in this case to the same extent. It is not a viable alternative in the current circumstances. Thus, in the absence of Witness Preparation altogether — which results from the Decision — the Prosecution's right to prepare and present its case effectively is substantively impeded.

²⁰ [ICC-01/12-01/18-666](#), para. 15 (referring to a 'protocol' materially identical that proposed in this case).

²¹ [ICC-01/12-01/18-666](#), para. 16 (citing [ICC-01/04-02/06-652](#), para. 18); *contra* [Decision](#), para. 23.

²² [ICC-01/12-01/18-666](#), para. 18; [ICC-01/09-02/11-588](#), paras. 11-12.

²³ See [ICC-02/04-01/15-504-Anx1](#); see also [Decision](#), para. 43, p. 31.

27. The Decision fails to meaningfully engage or address these concerns in balancing the competing *statutory* rights involved, including as relates to the Prosecution's ability to prepare and present its case. And again, it reverses the burden in remarking:

"The Chamber is mindful of the potential impact of the Coronavirus Pandemic on the trial proceedings. However, the Chamber does not consider that the absence of 'pre-testimony sessions in the field' – which is invoked by the Prosecution as a consequence of the budgetary constraints and to justify the need for Witness Preparation – presents a risk to the fairness and integrity of the proceedings.

28. The Second Issue is therefore not a mere disagreement, as the varying applications of the practice of Witness Preparation in different cases before the Court further show. Rather, it goes to the core issue of interpreting the extension of a procedural right such as to inform the scope and propriety of a Chamber's exercise of discretion. This should be settled at the appellate level.

29. For these reasons, the Second Issue arises from the Decision and is appealable within the meaning of article 82(1)(d).

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

i. The Issues significantly affect the fairness of the proceedings

30. The Issues significantly affect the fairness of the proceedings. The First Issue concerns the degree to which Witness Preparation derives from a Party's rights to prepare and present their cases. The Second Issue concerns the application of the appropriate balancing of interests in the exercise of discretion in the context of

competing statutory rights and interests. As such, both Issues relate to a critical procedural feature that cuts across the fairness of the proceedings and affects the Parties, the Chamber, the witnesses, and indeed the stakeholders, *i.e.*, the victims and the international community – all of whom hold a vested interest.²⁴

31. The Prosecution has a right to prepare and present its case in the manner it deems best suited to establish the truth.²⁵ Precluding the Prosecution from meeting with witnesses prior to their testimony fundamentally impacts on its right to prepare and present its case. This is particularly more acute in a case where the Prosecution intends to rely extensively on introduction of prior statements at trial via rule 68 (3) in order to streamline and reduce in length the direct examination of its witnesses.²⁶ Without Witness Preparation, the Prosecution’s preparation and presentation of its case will be impeded.

32. As the party bearing the burden of proof beyond reasonable doubt,²⁷ the unavailability of Witness Preparation disproportionately impacts the Prosecution and the fairness of the proceedings as a whole. Although the Decision references the determination of whether to allow Witness Preparation as within the Chamber’s article 64 obligations to “ensure that the trial is fair and expeditious”,²⁸ the Chamber failed to recognise the Prosecution’s entrenched and established right to fairness in the conduct of the proceedings.²⁹

33. In the circumstances of this case, the integrity of the Prosecution’s intended evidence, and in turn, its case, will be compromised by the Court’s lack of recourse.³⁰

²⁴ See [Aleksovski Evidence Admissibility Decision](#), para. 25.

²⁵ See *e.g.*, articles 54(1), 64(2), and 69(3).

²⁶ [ICC-01/14-01/18-655](#), para. 2.

²⁷ See Article 66(2).

²⁸ [Decision](#), para. 17.

²⁹ [ICC-01/04-02/12-271-AnxA](#), paras. 5-6.

³⁰ 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.

Critical witness testimony may lack precision, completeness, cohesion or structure, impeding the Chamber's ability to understand the case and to establish the truth.

34. Separately, the protection of witnesses requires the Chamber to consider their physical, emotional, and psychological well-being.³¹ For witnesses appearing in an international criminal trial, not having a Witness Preparation procedure is simply unfair, and could adversely affect their well-being.

35. 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.³² 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). These concerns equally exist in this case.

36. The concerns expressed in the Decision about the risks inherent to Witness Preparation are speculative in general, and empirically unsupported—particularly at the Court itself. Notably, in the *Bemba* trial, where witness preparation was specifically not permitted, the risks which the Decision identifies were realised in fact.³³ This goes to the substantiation of the Chamber's assessment of the true risks of Witness Preparation versus the *benefits* of prohibiting the practice. If anything, the *Bemba* trial demonstrates empirically that there is, at least an equal chance, that proceedings before the Court may be tainted in the absence of Witness Preparation.

37. In any case, the Decision does not reasonably consider mitigating factors concerning the possible implementation of the practice, so as to preserve the Parties' exercise of their statutory right to prepare and present their cases and evidence. For

³¹ See Jackson J.D., pp. 613-615; article 68, Statute.

³² 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)*.

³³ [Decision](#), para. 21 (noting the “an inherent risk of rehearsing and distorting witnesses' evidence” or “contaminat[ion] the witness's recollection of the events”).

instance, that the Prosecution and Counsel are bound by their ethical obligations and codes of conduct, in addition to the safeguards as proposed in respect of the procedure for Witness Preparation in this case, including the audio and video recording of preparation sessions. The Decision also fails to acknowledge the essential distinction drawn in the Prosecution's proposed procedure³⁴ and the concept of "witness proofing" discussed in previous cases including *Lubanga*, and as carried out at the *ad hoc* tribunals.

38. Further, the Decision does not take adequate account of the absence of the realisation of any of the purported risks identified by the Chamber in any case in which Witness Preparation has been permitted – namely the *Al Hassan, Ntaganda, Ruto and Sang*, and *Kenyatta* cases – not to mention, the numerous cases tried to final appeals judgements before the *ad hoc* tribunals, which permitted a variation of the practice. Rather, the Decision does not rely on any concrete evidence of the risks identified in respect of Witness Preparation in general, or more importantly, its application as has been known at this Court and in particular, as proposed by the Prosecution in this specific case. Thus, implicating an incorrect balance of interests in the exercise of the Chamber's discretion.

ii. *The Issues significantly affect the expedition of the proceedings*

39. Both Issues significantly affect the expedition of the proceedings. As has been demonstrated time and again, when witnesses testify without adequate preparation, their testimony becomes much more time-consuming. 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 obviously assists in conducting better focussed examinations in chief, dispensing with irrelevancies, and saving the Court's valuable time by, *inter alia*,

³⁴ See [ICC-01/14-01/18-476-AnxA](#), paras. 11-29.

obviating the need for the Chamber's frequent intervention to assist witnesses and to bring order to the testimony.

40. Where the effectiveness and efficiency of the Court's proceedings remain under scrutiny,³⁵ the two Issues underscore a practice in the extension of the Parties' statutory rights that the Court's legal framework does not prohibit, and which may serve to expedite the proceedings. Its preclusion, absent a substantiated justification and reasoned consideration of alternatives (even beyond those proposed by the Parties), necessarily impacts the expedition of the proceedings.

iii. The Appeals Chamber's immediate resolution may materially advance the proceedings

41. The Appeals Chamber's immediate resolution of the two Issues would materially advance the proceedings. As the Appeals Chamber 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."³⁶

42. The Appeals Chamber's timely intervention will avert the danger of irreparable harm. 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".³⁷ And, if the Decision in the case is incorrect, the evidence in the case

³⁵ 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.

³⁶ [ICC-01/04-168 OA3](#), paras. 14-15, 18.

³⁷ [ICC-01/04-168 OA3](#), para. 14. The Prosecution notes that the Appeals Chamber refers to "possible mistakes that might taint" (emphasis added).

may be seriously affected; the preparation and conduct of trial would have proceeded on a flawed basis.³⁸ The Issues cannot be reserved for the stage of the final appeal.

43. Importantly, the nature of the issues — that is, the scope of a Party's right to prepare and present its case *vis-à-vis* the limits of judicial discretion when abridging the extension of such right in a manner not prohibited by the Statute, demands the intervention of the Appeals Chamber. This will help to ensure that the Court's jurisprudence evolves in a coherent and standardised manner, and that this Chamber and other Trial Chambers are appropriately and clearly guided as to the correct interpretation of the law.³⁹

44. Only the Appeals Chamber can provide the most authoritative and final resolution of the Issues, especially given that judicial opinion on the merits of Witness Preparation remains divided, as the Decision and the recent disposition of the issue in the *Al Hassan* case, clearly show. Whether a Party may exercise its right to prepare and present its case should not depend on the particular composition of the assigned chamber.

45. Given the scope and nature of this case, it is appropriate, even necessary at this stage, to bring finality to the matter at the Court.⁴⁰ 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,

³⁸ 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).

³⁹ 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>.

⁴⁰ *Contra* the practice at the other international criminal tribunals (ICTR, ICTY, SCSL and STL), where witness proofing or preparation is allowed.

as a whole. In contrast, timely intervention by the Appeals Chamber, and unification of conflicting jurisprudence, will promote stability and predictability of the Court's procedural regime, as opposed to a fragmented "Chamber-by-Chamber" approach, thereby benefitting the efficiency of proceedings as a whole.⁴¹

III. CONCLUSION

46. For the above reasons, the Prosecution requests the Chamber to grant it leave to appeal the Decision on the two Issues.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart, Deputy Prosecutor

Dated this 14th day of October 2020

At The Hague, The Netherlands

⁴¹ On the importance of promoting predictability and legal certainty in the Court's jurisprudence, see the recent Final Report of the Independent Expert Review of the Rome Statute, 30 September 2020, pp. 196 et seq.