Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **11 February 2013**

TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding**
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public

Decision on the joint defence request for leave to appeal the decision on witness preparation

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek

Legal Representatives of Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V ("Chamber") of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* pursuant to Article 82(1)(d) of the Rome Statute ("Statute"), renders the following Decision on the joint defence request for leave to appeal the decision on witness preparation.

I. Procedural History

1. On 2 January 2013, the Chamber issued the "Decision on Witness Preparation" ("Decision")[1] with corresponding protocol ("Protocol").[2]

2. On 9 January 2013, the defence for Mr Ruto and Mr Sang (together "defence") filed the "Joint Defence Request for Leave to Appeal the Decision on Witness Preparation" ("Request"),[3] requesting leave to appeal the Decision on three issues.

3. On 14 January 2013, the Office of the Prosecutor ("prosecution") filed its response to the Request ("Response").[4]

II. Requirements for Granting Leave to Appeal

4. The Chamber recalls that Article 82(1)(d) of the Statute sets out the following requirements to the granting of a request for leave to appeal:

> (a) whether the issue at hand would significantly affect:
>
> (i) The fair and expeditious conduct of the proceedings or
>
> (ii) The outcome of the trial; and
>
> (b) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

[1] ICC-01/09-01/11-524 (notified on 3 January 2013). Judge Eboe-Osuji appended a partially dissenting opinion.
[2] ICC-01/09-01/11-524-Anx.
[3] ICC-01/09-01/11-539.
[4] Prosecution's Response to William Samoei Ruto's and Joshua Arap Sang's "Joint Defence Request for Leave to Appeal the Decision on Witness Preparation", 14 January 2013, ICC-01/09-01/11-549.

5. With respect to the particular question of the meaning of the term "issue" in the context of the first limb of the test under Article 82(1)(d) of the Statute, the Appeals Chamber has stated:

> An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.[5]

6. The Chamber observes that the Appeals Chamber's reasoning in that regard is fully consistent with the jurisprudence of the *ad hoc* tribunals, which rejects the mere dispute over the correctness of a Chamber's reasoning as a proper course of submissions for leave to appeal an interlocutory decision.[6] The parties seeking leave for interlocutory appeal have to clearly demonstrate an appealable issue, in the sense of showing, in concrete terms, how the decision in question raises issues that *would significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

III. First Issue

7. The defence requests leave to appeal the Decision on the basis of the following issue:

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[5] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

[6] *See* ICTY, Trial Chamber, *Prosecutor v. Karadžić*; Decision on Accused's Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 *Bis*, 18 July 2012, IT-95-5/18-T, para. 6 (further citations therein); ICTR, Trial Chamber III, *Prosecutor v. Nzabonimana*, Decision on Defence Motion for Leave to Appeal the Trial Chamber's Decision on the Defence Request to Call Prosecution Investigators, 10 May 2011, ICTR-98-44D-T, para. 12 (further citations therein); ICTR, Trial Chamber II, *Prosecutor v Bizimungu et al.*, Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision dated February 8, 2007, in Relation to Condition (B) Requested by the United States Government, 22 May 2007, ICTR-99-50-T, para. 7; ICTY, Trial Chamber, *Prosecutor v Slobodan Milosević*, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, IT-02-54-T paras 3-5.

> The Chamber erred in departing from the established ICC Witness Familiarization Protocol which prohibited contact between the witness and the calling party after the witness arrived to give evidence, in finding that "it is neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witness they will call to testify at trial" up to 24 hours prior to that witness's testimony ("First Issue").[7]

A. Relevant part of the Decision and Protocol

8. As quoted by the defence, the Chamber concluded in the Decision that "it is neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witnesses they will call to testify at trial."[8] The Chamber ordered the Registry to update the witness familiarisation protocol applicable to this case[9] in view of the Chamber's conclusion.[10]

B. Submissions of the Parties

9. In the Request, the defence argues that the First Issue arises directly from the decision "as it results in the Trial Chamber's determination to allow witness preparation and put a Protocol into place establishing guidelines for such conduct".[11] The defence also emphasises that the Decision is "completely contrary" to all prior Trial Chamber jurisprudence on this topic.[12]

10. In the Response, the prosecution argues that the First Issue should be rejected because "[e]ven if the Defence believes that the prohibition *is* practical and reasonable, it has been consistently stated by the jurisprudence of this Court that a mere disagreement or conflicting opinion does not constitute an appealable issue".[13]

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[7] Request, ICC-01/09-01/11-539, para. 1(i).
[8] Decision, ICC-01/09-01/11-524, para. 50.
[9] *See* Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony, 12 August 2011, ICC-01/09-01/11-259-Anx.
[10] Decision, ICC-01/09-01/11-524, para. 52.
[11] Request, ICC-01/09-01/11-539, para. 10.
[12] Request, ICC-01/09-01/11-539, para. 10.
[13] Response, ICC-01/09-01/11-549, para. 12.

C. Analysis and Conclusions of the Chamber

11. The Chamber recalls that an appealable issue must be "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".[14] The Chamber considers that this definition requires the parties to articulate discrete issues for Appeals Chamber resolution and that it is generally insufficient to argue that the entirety of the Chamber's reasoning is erroneous when requesting leave to appeal.[15]

12. Bearing these legal principles in mind, the Chamber does not consider that the First Issue qualifies as an appealable issue. The defence requests leave to appeal whether it is "practical" and "reasonable" to prohibit witness preparation in this case. The Chamber considers that the First Issue is merely an attempt to challenge the overall disposition of the Decision and that this issue is formulated too generally to be described as a discrete issue which could be the subject of an appeal to the Appeals Chamber. As the defence has not presented the Chamber with an "identifiable subject or topic" arising from the Decision, the Chamber rejects the request for leave to appeal the First Issue.

IV. Second Issue

13. The defence additionally requests leave to appeal the Decision on the basis of the following issue:

> The Chamber erred in finding that "judicious witness preparation aimed at clarifying a witness's evidence" up to 24 hours prior to that witness's testimony

[14] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.
[15] *See* Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307, para. 70 (the parties cannot "seek leave to litigate *ex novo* before the Appeals Chamber the entire decision").

could be "carried out with full respect for the rights of the accused" ("Second Issue").[16]

A. Relevant part of the Decision and Protocol

14. As quoted by the defence, the Chamber found in the Decision that "judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence, and so to assist in the Chamber's truth finding function."[17] The Chamber relied upon Articles 64(2) and (3)(a) of the Statute as its authority for allowing witness preparation in this case, reasoning that "Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected [...]".[18] The Chamber considered that the risk of witness preparation being conducted improperly could be adequately addressed by certain safeguards, namely: (i) cross-examination, (ii) clear guidelines establishing permissible and prohibited conduct in the Protocol and (iii) video recording of all preparation sessions.[19] The Protocol provides that the calling party shall "endeavour to complete its preparation sessions as early as possible and in any event at least 24 hours before the witness's testimony is due to commence".[20]

B. Submissions of the Parties

15. In the Request, the defence submits that witness preparation "almost inevitably produces new information requiring disclosure" and that the issue of whether such

[16] Request, ICC-01/09-01/11-539, para. 1(ii).
[17] Decision, ICC-01/09-01/11-524, para. 50.
[18] Decision, ICC-01/09-01/11-524, paras 27-29.
[19] Decision, ICC-01/09-01/11-524, paras 43-47.
[20] Protocol, ICC-01/09-01/11-524-Anx, para. 11.

sessions "at such a late juncture" can be allowed while fully respecting the rights of the accused arises directly from the Decision.[21]

16. In the Response, the prosecution argues that, at this stage, the Second Issue does not arise from the proceedings and constitutes an abstract or hypothetical concern.[22] The prosecution argues that, because it is unknown whether any additional evidence will arise from witness preparation sessions and whether its use will be allowed by the Chamber, leave to appeal should be rejected and the defence can re-litigate the issue if any prejudice arises.[23]

C. Analysis and Conclusions of the Chamber

17. The Chamber considers that the Second Issue does not qualify as an appealable issue. The defence seeks to challenge whether witness preparation can be done consistently with "full respect for the rights of the accused". This formulation is so general that it is essentially a challenge as to whether witness preparation is fair in the abstract. As noted above,[24] this kind of challenge to the entirety of the Chamber's reasoning is not sufficiently discrete as to qualify as an appealable issue. Moreover, the Second Issue presents a conflicting view on whether the unfairness to the defence can be addressed by appropriate safeguards. The Chamber thinks that such safeguards can sufficiently mitigate the risk of any unfairness to the accused, and the defence does not. As such, the defence states a disagreement with the Chamber's finding without specifying why the safeguards adopted are insufficient. A mere disagreement of this kind cannot qualify as an appealable issue.[25]

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[21] Request, ICC-01/09-01/11-539, para. 15.
[22] Response, ICC-01/09-01/11-549, para. 16.
[23] Response, ICC-01/09-01/11-549, para. 18 (in the context of discussing the requirement of material advancement).
[24] *Supra*, para. 11.
[25] *See* Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

18. For these reasons, the Chamber considers that this issue does not qualify as an appealable issue and rejects the request for leave to appeal the Second Issue.

V. Third Issue

19. Finally, the defence requests leave to appeal the Decision on the basis of the following issue:

> The Chamber erred in requiring, without considering the unique position of the defence (who does not have an obligation to take and/or disclose statements from witnesses) and without hearing the defence directly on the issue, both that (1) the calling party shall conduct its preparation session after witness statements have been taken and disclosed to the opposing party, and (2) the calling party shall video record the preparation session.[26]

A. Relevant part of the Decision and Protocol

20. In the Decision the Chamber, after noting the defence's submission that witness preparation should not be regulated in the same way for the prosecution and the defence,[27] decided that the Protocol would apply to both parties.[28] In the section labelled "Timing", the Protocol provides that "[t]he calling party shall conduct its preparation session after witness statements have been taken and disclosed to the opposing party."[29] In the section labelled "Record Keeping", the Protocol provides that "[t]he calling party shall video record the preparation session."[30] In the section labelled "Disclosure", the Protocol provides that "Where the calling party obtains information during a preparation session *that is subject to disclosure*, it shall disclose that information to the non-calling party [...]."[31]

B. Submissions of the Parties

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[26] Request, ICC-01/09-01/11-539, para. 1(iii).
[27] Decision, ICC-01/09-01/11-524, para. 22.
[28] *See* Decision, ICC-01/09-01/11-524, para. 49.
[29] Protocol, ICC-01/09-01/11-524-Anx, para. 10.
[30] Protocol, ICC-01/09-01/11-524-Anx, para. 12.
[31] Protocol, ICC-01/09-01/11-524-Anx, para. 30 (emphasis added).

21. In the Request, the defence argues that "[w]ithout hearing the defence perspective", the Protocol included the two points identified in the Third Issue without adequately considering "the unique position of the defence versus the prosecution in terms of its disclosure obligations".[32] The defence asserts that paragraph 10 of the Protocol "seems to imply that the calling party shall conduct its preparation session after witness statements have been taken and disclosed", but observes that "ordinarily at the ICC, the defence has no obligation to take or disclose witness statements".[33] The defence also points to the video recording requirement in paragraph 12 of the Protocol and argues that "the defence does not ordinarily have an obligation to audio or video record witness interviews [...] [p]resumably this is because the accused has a right against self-incrimination".[34]

22. In the Response, the prosecution argues that the Third Issue, which it breaks down into three sub-issues, does not arise from the decision because: (i) the defence was heard on the matters identified in the Third Issue, (ii) the Decision "does not impose any obligation on the Defence to take and disclose witness statements" and (iii) the defence's arguments that the Protocol should only apply to the prosecution constitutes a mere disagreement with the Chamber's decision.[35]

C. Analysis and Conclusions of the Chamber

23. The Chamber considers that the Third Issue does not fairly arise from the Decision.

24. On the subject of being given an opportunity to be heard, the defence was afforded a full opportunity to make submissions on the subject of witness preparation and

[32] Request, ICC-01/09-01/11-539, para. 19.
[33] Request, ICC-01/09-01/11-539, para. 21.
[34] Request, ICC-01/09-01/11-539, para. 22.
[35] Response, ICC-01/09-01/11-549, para. 20.

these submissions[36] were fully considered by the Chamber. The Chamber did not accept some of the defence's arguments, such as the argument that the Protocol should not apply to the defence,[37] but did accept others, like the argument for requiring video recording as a safeguard against improper witness preparation.[38]

25. With respect to disclosure, the Chamber emphasises that the Decision does not impose any additional disclosure obligations on the defence. The reference in the Protocol to preparation sessions occurring "after witness statements have been taken and disclosed" is in relation to the "Timing" section, not the "Disclosure" section. The reference raised by the defence is only intended to delineate the difference between interviews that form part of the "investigation" and interviews which qualify as "witness preparation" and are, as such, covered by the Protocol. The Protocol does not impose, as a prerequisite to conducting witness preparation, any disclosure obligations above and beyond what is normally required for the defence. On the subject of video recording, the Protocol requires this step only as a record keeping measure and it does not necessarily require disclosure of the video recordings. As indicated in the Protocol and the Decision, the defence is only required to disclose the video recordings if: (i) it considers them to be subject to disclosure in accordance with its disclosure obligations[39] or (ii) the Chamber orders disclosure on application of the prosecution and after considering the need to, among other things, protect privileged information on the recording.[40]

26. As the defence has not presented an issue arising from the Decision, the Chamber rejects the request for leave to appeal the Third Issue.

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[36] Joint Defence Response to Prosecution Motion Regarding Scope of Witness Preparation, 4 September 2012, ICC-01/09-01/11-452.
[37] Decision, ICC-01/09-01/11-524, paras 22, 49.
[38] Decision, ICC-01/09-01/11-524, paras 21, 47.
[39] Protocol, ICC-01/09-01/11-524-Anx, para. 30.
[40] Decision, ICC-01/09-01/11-524, para. 47.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief sought in the Request.

Judge Eboe-Osuji appends a separate opinion.

Done in both English and French, the English version being authoritative.

Judge Kuniko Ozaki, Presiding

Judge Christine Van den Wyngaert **Judge Chile Eboe-Osuji**

Dated 11 February 2013

At The Hague, The Netherlands

CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I concur with the Chamber's decision denying leave to appeal the Chamber's decision of 2 January 2013 on witness preparation. I do, however, wish to complement my own reasoning regarding the first and second issues indicated by the Defence in justification of their request for leave to appeal.

2. It may be recalled that the statutory basis for interlocutory appeals in this Court is article 82(1)(d) of the Rome Statute. It provides as follows:

> Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
> ...
> (d) 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.

3. Defence Counsel in this case have succinctly captured the analytical schema of that provision when they submitted as follows:

> Chambers have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if it meets the following two cumulative criteria:
>
> a) it must be an issue that would significantly affect
>
> (i) both the fair and expeditious conduct of the proceedings; or
> (ii) the outcome of the trial; and
>
> b) it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may material advance the proceedings.[1]

4. In a decision of Trial Chamber IV in the *Banda and Jerbo* Case,[2] I issued a dissenting opinion elaborating on the different elements of article 82(1)(d). It is not necessary to repeat the exercise here. It suffices only to reiterate, first, that the provision *requires* that the first of the two cumulative criteria is that the appellate issue presented must be seen to be one that 'would significantly' affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It bears emphasis, perhaps, that the requirement is not that the issue 'could'—or even merely 'would'—affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The requirement, rather, is that the issue *would* do so in a *significant* way. This suggests that the issue in

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[1] Joint Defence Request for Leave to Appeal the Decision on Witness Preparation, ICC-01/09-01/11-539, para3.
[2] See *Prosecutor v Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (Decision on the "Defence Application for Leave to Appeal the 'Decision on the Defence request for a temporary stay of proceedings'")*, Dissenting Opinion of Judge Eboe-Osuji, dated 17 December 2012.

question should have a clear propensity to produce the result contemplated in the provision—and to do so in a significant way. And, secondly, the demonstration of an appealable issue must be done in a manner capable of swaying the discretion of the Trial Chamber to grant leave, as the grant of leave ultimately depends on the Chamber's own *opinion* that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. Given those requirements, it is clear that speculative arguments or propositions that do not rest upon solid factual foundations are insufficient to (a) demonstrate that an issue 'would significantly' affect fair and expeditious conduct of proceedings or the outcome of the trial, or (b) sway the opinion of the Trial Chamber that an immediate resolution of such a speculative 'issue' may materially advance the proceedings.

6. In light of the standards reviewed above, I am of the view that the Defence's submissions in relation to their first issue do not present a proper issue for interlocutory appeal. They are wholly speculative as to the existence of an appealable issue. The Defence contends that the first issue is one 'that significantly affects the fair conduct of the proceedings', because 'it allows the calling party to meet and have substantive discussions with a witness on the eve of his or her testimony before the court.' What is wrong with this, it is argued, is that '[t]his is the time when the calling party will have noted the weaknesses of its case and the places where there are evidentiary gaps that need to be filled. Furthermore, it is at this time that the witness will be *perhaps* his or her most vulnerable, and at the same time the most earnest to please the calling party.' According to the Defence, '[t]his threatens the adversarial nature of the proceedings …'.[3]

7. In my view, this is merely speculation, based upon a presumption of bad faith on the part of both the counsel preparing a witness and the witness being interviewed. The argument is not persuasive at all. And the persuasive quality of the argument is depressed further by the assertion of a threat to 'the adversarial nature of the proceedings'. The submission assumes, of course, that threats to the adversarial nature of the proceedings are something that must be avoided. Even so, the adversarial nature of criminal proceedings has not been threatened in Canada and the United States where witness preparation has not only been permitted, but has been encouraged as a matter of competent legal representation and courtroom advocacy. Nor was the adversarial nature of the proceedings threatened at the *ad hoc* tribunals where witness preparation was always permitted.

8. Similarly, for their case that the first issue would significantly affect the expeditious conduct of the proceedings, the Defence argued that the Chamber determined 'that essentially there is no other time and place that is conducive for conducting witness preparation': in the result, they argued, the Chamber 'has almost certainly lengthened the proceedings.' This, argued the Defence, is

[3] Request, ICC-01/09-01/11-539, para 11.

because '[a]s the Chamber notes, both parties agree that witness preparation meetings typically result in the disclosure of additional evidence to the opposing party.' According to the Defence, such late disclosure 'will typically require an adjournment for the opposing party to investigate the new information.' Continuing, the Defence further argue that it is 'less likely that the new information would emerge from the witness spontaneously on the stand, in the absence of the witness having discussed it with the calling party first, so there is less likelihood of delay and adjournment if this approach is adopted.'[4]

9. Once more, these arguments are mere speculation, also based on assumptions that are not factually supported. For one thing, the Chamber did not recognise that witness preparation meetings 'typically' result in new disclosures. Indeed, there is no basis for such a proposition. Counsel did not point to any empirical information in its support, considering particularly that the practice of witness preparation is thus far unknown in this Court. Quite to the contrary, counsel who have practiced law in jurisdictions that permit witness preparation know that the 'typically' operates in the opposite direction. Nor is it correct to contend that any new disclosure that '*may* result'[5] from witness preparation would 'typically' result in adjournment of proceedings. Indeed, such an adjournment, where unavoidable, may be ordered; and *may* thus delay trial. It is, however, also the case that any resulting new disclosure may not cause delay. Such is the case when the disclosure may involve information that the opposing counsel is well able to take in stride, as a matter of fact or of experience, thus requiring no adjournment. The remedy of exclusion of the evidence in question may also be considered instead of adjournment, should adjournment in the circumstances not be viewed as consonant with the interests of justice. And when an adjournment is considered unavoidable or appropriate, it may be made concurrently with other coinciding adjournments that arise from other unrelated reasons.

10. What is more, the impermissibly speculative nature of the Defence's submissions in relation to this issue is evident in the supposition that new material for disclosure will typically result from witness preparation, but do not typically result from spontaneous questioning. I cannot possibly form a positive opinion on leave to appeal based on such a proposition; particularly as it fails to consider that the very essence of spontaneity—indeed, its chief value—lies in the tendency or expectation that it will produce something new and hopefully exciting for the party that values spontaneity.

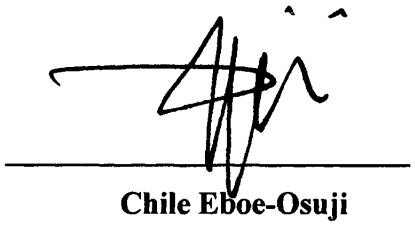
11. The arguments employed by the Defence in support of their second issue are essentially the same arguments of late disclosure and resulting delay to the proceedings that were used to support

[4] Request, ICC-01/09-01/11-539, para 12.
[5] Decision, ICC-01/09-01/11-524, para 42 (emphasis added).

the first issue.[6] And, they are similarly based on the same doubtful assumptions, such as 'the reality is that witness preparation ... almost inevitably produces new information requiring disclosure.'[7]

12. For the same reasons as to the Defence's first issue, I concur with the Chamber's decision that this issue does not qualify as an appealable issue and reject the request for leave to appeal the second issue.

Done in both English and French, the English version being authoritative.



Chile Eboe-Osuji
Judge

Dated 11 February 2013

At The Hague, The Netherlands

[6] Request, ICC-01/09-01/11-539, para. 17.
[7] Request, ICC-01/09-01/11-539, para. 15.