DISSENTING OPINION OF JUDGE HENDERSON

1. At the heart of a decision on whether to grant an application for leave to appeal, the Chamber is obliged to ask the critical question: if the position put forward by the applicant is correct, would the issue arising from the impugned decision significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial? Once this question is answered in the affirmative, the Chamber must also be satisfied that allowing the Appeals Chamber to adjudicate the matter at issue may materially advance the proceedings by ensuring that they follow the right course.[1] As the Appeals Chamber said, 'the object of paragraph (d) of Article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial'.[2] A proper consideration of this request for leave to appeal therefore involves what the Appeals Chamber describes as 'a forecast of its consequences'.[3] At the outset, I note that the Prosecution's present application for leave to appeal is supported by the LRV[4] and unopposed by any party in this case.

2. Given the Majority's rejection of the jointly proposed witness preparation protocol and concomitant dismissal of the notion of witness preparation as a 'right',[5] it is, in my view, indisputable that the First issue 'arose' from the Impugned Decision.

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[1] *See* Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132, para. 3 and footnote 5 thereto.
[2] *See Situation in the Democratic Republic of the Congo*, 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 ('Judgment of 13 July 2006'), para. 19.
[3] *See, inter alia, The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, para. 25.
[4] Response to the "Prosecution's application for leave to appeal the 'Decision on witness preparation and familiarisation'" (ICC-02/11-01/15-363), ICC-02/11-01/15-366, paras 1-2 and 23.
[5] *See* Decision on witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355 ('Impugned Decision'), paras 15-19.

3. I respectfully disagree with the Majority that the First Issue is insufficiently discrete. As the Majority recalls, an 'issue' under Article 82(1)(d) of the Statute is 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.[6] In my respectful view, it is not enough to, without sufficient reasons, perfunctorily conclude that the request is a disagreement. While I concur with my colleagues that the First Issue is of a fundamental and potentially broad-ranging nature, I do not consider this to defeat its ability to be considered as 'an identifiable subject or topic requiring a decision for its resolution'. Indeed, the Prosecution seeks clarification from the Appeals Chamber on whether witness preparation can be considered a 'right' of a party to present its case in a 'meaningful, fair and expeditious manner'.[7] While this would entail consideration of witness preparation as a broader principle, rather than one necessarily and singularly tethered to the *Gbagbo and Blé Goudé* case, in my view, it is of a sufficiently circumscribed and delineated nature to constitute an appealable issue.

4. At the crux of the Impugned Decision is the critical question of what is the most fair and expeditious way to ensure that witness testimony is brought to trial. Indeed, in my Partially Dissenting Opinion, I noted the risk of deciding as the Majority did, that this Chamber – in deciding against the adoption of a witness preparation protocol – may not receive the best evidence possible, and that the need for such preparation is even greater with potentially vulnerable witnesses and/or witnesses whose evidence is of a sensitive nature.[8] These two reasons alone provide the foundation for a finding that the First Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial, and thus for granting an application for leave to appeal on

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[6] Majority Decision, para. 9, referring to Judgment of 13 July 2006, ICC-01/04-168, para. 9.
[7] Request, ICC-02/11-01/15-363, para. 8.
[8] Partially Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-355-Anx1, para. 14.

the central issue of whether 'witness preparation [...] is a critical aspect of a Party's right and ability to present its case in a meaningful, fair and expeditious manner and the Court's truth finding function'.[9] Further, as the Impugned Decision has potentially far-reaching consequences for the presentation of the evidence by each and every witness, in my view, allowing the Appeals Chamber to adjudicate the matter at issue would materially advance the proceedings by ensuring that they follow the right course. Put another way, granting the request, in my view, would pre-empt the repercussions of any erroneous decision on the fairness of the proceedings or the outcome of the trial.

5. In rejecting the First Issue, the Majority also noted the discretionary nature of the decision.[10] In the Impugned Decision itself, the Majority acknowledged that a Chamber 'has a significant degree of discretion concerning the procedures it adopts [...], as long as the rights of the accused are respected and due regard is given to the protection of witnesses'.[11] The Prosecution seeks to challenge on appeal whether, in reaching the Impugned Decision, the Chamber respected the rights of the parties and their ability to effectively present their cases through their witnesses. In my view, this is not a mere disagreement. Nor should leave to appeal be refused simply on the basis of a decision's 'discretionary nature'. Discretionary decisions may give rise to appealable issues no differently from any other decision.

6. Accordingly, I would have found that the First Issue satisfies the requirements of Article 82(1)(d) of the Statute and accordingly would have granted the application for leave to appeal on this issue.

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[9] Request, ICC-02/11-01/15-363, para. 8.
[10] Majority Decision, para. 11.
[11] Impugned Decision, ICC-02/11-01/15-355, para. 15.

7. I also respectfully disagree with the Majority's treatment of the Second Issue. In particular, the Majority held that, '[i]n the absence of identifying any discrete aspects of the Chamber's exercise of its discretion that may require review from the Appeals Chamber, the Chamber considers the Second Issue is also too broad to satisfy the leave to appeal criteria'.[12] I am of the view that, in formulating the Second Issue, the Prosecution in fact identified several discrete factors that it argues the Chamber balanced, or ought to have balanced, in concluding that witness preparation, as a general rule, would not be appropriate in the *Gbagbo and Blé Goudé* case, including: (i) the scope and complexity of the case; (ii) the length of time elapsed between the alleged events and time of testimony; and (iii) that several witnesses are vulnerable and/or will testify about sensitive issues, including sexual violence allegedly occurring at two out of the five crimes bases.[13] While these factors are listed with reference to the 'fairness of the proceedings' component of the leave to appeal test, I am of the view that they also ground the specificity of the Second Issue, and that this issue is thus *not* 'overly broad', as found by the Majority.

8. Further, as it is my view that witness preparation may 'facilitate the focused, efficient and effective questioning of witnesses during the proceedings',[14] then to my mind, it ought to be accepted that a decision that 'witness preparation, as a general rule, is not appropriate in this case' would significantly reduce these potential benefits and thus may negatively affect the fair and expeditious conduct of proceedings or the outcome of the trial.

9. Finally, if the Chamber took into account irrelevant factors, or did not properly weigh those factors that are relevant, in reaching the Impugned Decision, such errors are likely to taint the exercise of discretion in future decisions as to whether witness preparation may be justified on an exceptional and case-by-

[12] Majority Decision, para. 12.
[13] Request, ICC-02/11-01/15-363, paras 26-28.
[14] Partially Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-355-Anx1, para. 16.

case basis. Appellate resolution is therefore necessary to ensure that the proceedings follow the right course.

10. Accordingly, I respectfully disagree with the Majority's assessment of the Second Issue and would have granted leave to appeal on this issue.

11. I recognise that '[i]t follows not necessarily that a dissenting position in an impugned decision should result in a dissenting opinion in the decision on an application for leave to appeal the impugned decision'.[15] However, as in the circumstances in which this was stated, and in light of the above, I find it necessary to respectfully disagree with the Majority's decision to reject the Prosecution's request for leave to appeal the 'Decision on witness preparation and familiarisation' .

Judge Geoffrey Henderson

Dated 13 January 2016

At The Hague, The Netherlands

[15] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido,* Dissenting Opinion of Judge Eboe-Osuji (on 'Decision on Nacisse [sic] Arido's Request for Leave to Appeal the 'Decision on the Submission of Auxiliary Documents'), 22 July 2015, ICC-01/05-01/13-1089-Anx.