SEPARATE OPINION OF JUDGE HENDERSON

1. I have been in two minds about whether or not I should write separately on this decision. On the one hand I fully accept the need for the Chamber to manage the trial proceedings in such a way that ensures that the proceedings are conducted expeditiously. On the other, I am troubled that changing the rules after the trial begins, creates unhelpful confusion and uncertainty, which in the end may have an impact on the fairness of the proceedings.

2. It is, of course, right, appropriate and necessary to keep a constant eye on whether the procedures that have been put in place provide the optimal balance between guaranteeing fairness towards the parties and the need to ensure that the trial progresses expeditiously. I therefore agree that directions on the conduct of proceedings are subject to modification in light of how the proceedings actually develop. However, there are limits to this procedural malleability.

3. First and foremost, article 64(3)(a) of the Statute confers on the Trial Chamber the responsibility for adopting such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. It therefore goes without saying that changing the rules should not create unfairness for the parties. It should be stressed, in this regard, that although a change to the rules may not worsen the position of the parties from a substantive point of view, the fact of the change itself may negatively affect them. This is because parties prepare, months in advance of the actual trial, with a particular set of rules in mind. This right to prepare is borne in the Prosecution's obligation to prove the guilt of the accused under Article 66 and the accused's right to have adequate time and facilities for the preparation of his defence under Article 67. If a change to the rules renders some of that preparation useless, this may cause unfairness, because the party could have used its limited resources to better effect otherwise. Similarly, if a

change in the rules requires parties to prepare in a manner differently from what would have been reasonably required under the original rules, making such changes after the trial has begun may cause unfairness, as it creates delays and uncertainty for which the parties bear no responsibility.

4. It is no response to say that the parties are aware of the open-textured nature of the Court's procedural framework. It is neither reasonable nor realistic to expect parties to prepare for every eventuality. This is precisely why on 3 September 2015 this Chamber issued its Directions on the conduct of the proceedings ("Directions of 3 September 2015"),[1] several months before the start of the trial and adopted a set of rules that was largely inspired by the systems used by other Trial Chambers in previous cases before this Court. It is true that the Chamber was not obliged to follow their lead and that it had a large measure of discretion in this regard. It cannot be denied that the Chamber made certain choices on 3 September 2015 and that it could just as well have opted for another procedural approach. But those choices were made and the mere fact that the Chamber issued the Directions of 3 September 2015 entitled the parties to expect that the Chamber would stand by its choices, unless there were very serious reasons to diverge from them. After all, if decisions by a Trial Chamber of this Court are no more reliable than Dutch weather, then parties may legitimately complain of a breach of the principle of legal certainty.

5. This brings me to the question of whether there ought to be some criteria that must be met before a Chamber may start amending the procedural system it has

[1] ICC-02/11-01/15-205.

adopted.[2] To be clear, I am not concerned here with changes to deadlines for disclosure and other day-to-day minutiae which can of course be adjusted as necessary in light of the realities of the moment.[3] However, as soon as a Chamber starts tinkering with the way in which parties can present their evidence or respond to the evidence of other parties, a more conservative approach is required. My position, in this regard, is that a Chamber should only make changes to the rules on the conduct of the proceedings if it has been demonstrated that (i) the original rules, when properly applied, would significantly and negatively affect the fair and expeditious conduct of the trial, and (ii) that the only way to preserve the fairness and expeditiousness of the trial is by amending the rules on the conduct of proceedings.

6. It is my respectful opinion that it is premature to conclude that the Directions of 3 September 2015 are not fit for purpose. I note, in this regard, that my colleagues point to requests for clarification/leave to appeal, but that these relate, without exception, to unsolicited changes that were made to the Directions of 3 September 2015 *proprio motu* by the Chamber, after it was reconstituted and a new Presiding Judge was elected on 11th January 2016.

7. In my respectful view, it is those changes in the rules after the trial had begun, that unhelpfully led to the need for clarification and not the Directions of

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[2] In this context, it is relevant to refer to the jurisprudence of the Court on the reconsideration of prior decisions. Earlier decisions on 'matters of substance as regards the law or on the facts of the case' can only be reconsidered when certain standards are met, in light of the fairness of the proceedings. It has been stated, correctly in my view, that: *"[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice."* See Trial Chamber VI, Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, at para. 12; Trial Chamber V(A), The Prosecutor v. William Sarnoei Ruto and Joshua Arap Sang, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11- 1813, at para. 19.

[3] Trial Chamber I, The Prosecutor v. Lubanga, Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010, 30 March 2011, IOCC-01/04-01/06-2705, at para. 13.

3 September 2015 themselves. For example, on 29th January 2016, the Chamber, by majority, issued its Decision on the submission and admission of Evidence;[4] a decision which had implications for the implementation of certain aspects of the Directions of 3 September 2015 and in particular, paragraphs 42-46.[5] Then, on the morning of 3rd February, 2016 and prior to the first witness giving evidence for the Prosecution, the Presiding Judge, in an oral decision - *proprio motu* and without receiving the parties' submissions - announced several new rules on how witnesses were to be questioned, which were at variance from the Directions of 3 September 2015.

8. The parties have openly expressed their concerns that these unsolicited and unforeseen changes were severely disruptive to their trial preparations.[6] In light of

[4] ICC-02/11-01/15-405.

[5] Following the decision on the submission and admission of evidence which by implication changed the procedure whereby parties would submit their evidence, the manner of submitting evidence and what will be considered by the Chamber as submitted has been a recurring source of confusion to the parties and has consumed time. Even during the examination of the fifth witness, the parties were still unclear leading to the following from the Gbagbo Defence during the hearing of 10 March 2016:

> *Mr O Shea: Yes, I'm sorry, your honours, but I…I really need to address this issue with your honours. I know your Honours want to proceed with this trial, but we need to understand the protocol that we're following in this trial otherwise this problem is going to keep coming up… We have to have some procedures in this trial for it to be fair [footnote].* ICC-02/11-01/15-T-28-CONF-ENG ET, at pp 37-8.

And later during submissions on that same point, the Prosecution's own uncertainty was apparent from the following submission by Mr MacDonald, the Prosecution's Senior Trial Lawyer:

> *Mr Mac Donald : Listen, your honour, I'm trying, we're trying, we're at the beginning of a long trial, I'm trying to understand…well, it is very simple, I come from a legal background that is maybe , and with its own rules, and I'm trying to adapt to also the Chamber's perspective on these rules…So I'm in your hands. If you tell me that I can use this document and just put the information to witness right now, I'll do it.* ICC-02/11-01/15-T-28-CONF-ENG ET, at p. 50.

[6] For example, the amendment prohibiting the use of leading questions by the parties and LRV prompted the first of several requests for clarification made to this Chamber. See, e.g. the submissions by Mr O'Shea during the hearing of 3 February 2016:

these concerns, the question can legitimately be asked whether there was a genuine need for them.

9. It is quite obvious that the changes to the Directions of 3 September 2015 resulted from the Presiding Judge's expressed commitment to furthering the expeditiousness of the proceedings. Far be it from me to question my colleague's sincere and profound commitment to conducting this trial as fairly and expeditiously as possible. However, the fact that these changes were made before

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> *"Now, naturally, before coming here today ... there is a fair amount of preparation which takes place beforehand and the preparation which I have conducted for the purposes of this cross-examination has been no different from the way I have done it in the last 23 years, both before national courts and international courts and tribunals. And I've also, of course, prepared on the basis of the protocol which was set out by this Chamber in advance of the trial. And I note in particular in the protocol in question that it was stated that in accordance with Rule 142(b) of the Rules, the non-calling party may question a witness concerning any relevant matters. Unless otherwise directed by the Chamber, leading questions by the non-calling party will be permissible.*
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> *Now, as far as I am aware, since this decision was reached until today, there has been in invitation to the parties to make observations or arguments on the specific point in the decision. However, I heard this morning, you Mr President, when you were going through the procedures that we should follow during the course of this trial, I heard and I hope I heard correctly- and it's on that I wish clarification- I heard your Honour say that whether one is dealing with the calling party or the non-calling party, there will be no leading questions.*
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> *... I know Your Honour has made a ruling this morning, but of course a previous ruling was made by the same Chamber which appears to be inconsistent. It may be that it's not inconsistent. It may be that Your Honour can provide some clarification on this immediately.* ICC-02/11-01/15-T-13-CONF-ENG ET, at pp. 65-8.

The Chamber also created uncertainty by permitting leading questions in circumstances that might raise fairness issues. In accordance with the Chamber's Directions of 3 September 2015, cross-examination of witnesses by the calling party was only allowed under exceptional circumstances [Directions of 3 September 2015, at para 12]. Yet, after having prohibited leading questions as a matter of principle, the Chamber allowed the calling party to do just that, drawing objections from both Defence teams. This led to the following observations by Mr O'Shea for the Gbagbo Defence during the hearing of 7 March 2016,:

> *Mr O 'Shea: These ... I'm sorry if this disturbs you, your Honour, but I'm only defending my client. These answers which have been given by the witness illustrates the exact dangers that I was referring to. If one is going to be fair in these proceedings this gentleman can write a list today because he is here to testify ... but it cannot be fair, in my respectful submission, to allow my learned friend to essentially lead this witness on the names of person which is the case of the Prosecution are responsible for events in Ivory Coast and placing this list in front of him which was proposed on the request of the Prosecutor after the events is essentially that ... it would be inherently unfair to allow the Prosecution to rely on this list and allow this witness simply to confirm the names on the list.* ICC-02/11-01/15-T-25-CONF-ENG ET, at pp 74-75.

the taking of evidence had properly started, shows that the justification for them could not have been any real problem with implementation of the Directions of 3 September 2015. Rather, the changes appear to have been based on the presumed shortcomings of the common law-inspired approach of conducting adversarial criminal trials and the assumption that abandoning this approach would *ipso facto* make things more efficient.

10. In my respectful view, it would have been more prudent and in keeping with the Chamber's obligation under article 64(3)(a) of the Statute to withhold making changes until a demonstrated need for them had arisen during the trial. Moreover, and on the same basis, I think it would only have been fair to provide the parties with an opportunity to make informed submissions in this regard.

11. In order not to be misunderstood, I want to state clearly that I am not wedded to the adversarial approach for conducting criminal trials. I acknowledge that the Court is still young and that there is still room for the Court to assess the effectiveness of the different procedural models that the architecture of the Rome Statute undoubtedly permits. My point is rather that this is not the right moment to implement such changes. On the one hand, it is too late, as the appropriate moment to adopt a different approach would have been when the Chamber issued its Directions in September of last year. On the other hand, it is too soon, as it has not yet been shown, in my respectful view, that the Directions have caused any unfairness or hampered the trial from proceeding expeditiously.

12. Despite these concerns, I have not dissented as I do not wish to hinder these proceedings and it is really for the parties and the LRV to assess whether and, if so, to what extent, such changes that are being made have any beneficial or adverse impact on the way they conduct their respective cases. However, I strenuously hope that the new directions we issue today will not be further

amended unless it is objectively demonstrated to be necessary and that today's decision will provide the much-needed clarity, certainty and stability that the parties, by their applications, have been craving for.

Judge Geoffrey Henderson

Dated 4 May 2016

At The Hague, The Netherlands