PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. I respectfully disagree with my colleagues' decision to reject the joint request of the parties and participants for a witness preparation protocol. This Partly Dissenting Opinion is in respect of paragraphs 13 – 19 of the 'Decision on witness preparation and familiarisation' ('Decision') which rejects the requests for a protocol to prepare witnesses for trial. At the outset, I find it necessary to clarify my understanding of the term witness preparation, namely, preparation of a witness for his or her testimony by the calling party.

2. I agree with the Majority that, in principle, witness preparation carries with it the risks of witness interference and distortion of the witnesses' evidence. However, I respectfully differ in the Majority's conclusion that it is ultimately unnecessary and inappropriate in this case. Rather, I consider that witness preparation can be a useful tool in order to further the Courts' truth finding obligation. In this regard, I fully concur with the reasoning of Judge Ozaki in her dissenting opinion in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*,[1] as well as that of Trial Chamber V(A),[2] Trial Chamber V(B)[3] and Trial Chamber VI[4] in authorising witness preparation, subject to robust safeguards.

3. A trial chamber is under an obligation not only to ensure that a trial is conducted expeditiously and fairly, with full respect for the rights of the accused, but also must do so having due regard for the protection of victims and witnesses.[5] The trial chamber is under a further obligation to confer with the parties and to adopt

[1] Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010, ICC-01/05-01/08-1039.
[2] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V-A, Decision on witness preparation, 2 January 2013, ICC-01/09-01/11-524.
[3] *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on witness preparation, 2 January 2013, ICC-01/09-02/11-588.
[4] *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on witness preparation, 16 June 2015, ICC-01/04-02/06-652.
[5] Articles 64(2), 3(a), 67 and 68(1) of the Statute.

such procedures as are necessary to facilitate the fair and expeditious conduct of proceedings.[6] This provided the basis for the Chamber's request for, *inter alia*, protocols governing the process for all of the witnesses called to testify before the Court. I consider that Article 64 of the Statute provides a sufficient legal basis to allow the calling party to prepare witnesses, should the relevant party wish to do so.

4. At the Court, the parties, not the judges, conduct investigations, which include both the interview of witnesses and taking of witness statements, as is done in an adversarial system.[7] This is in contrast to the process in many inquisitorial systems[8] – including hybrid tribunals based primarily on an inquisitorial model (such as the Extraordinary Chambers in the Courts of Cambodia[9]) – in which an impartial public authority or judge conducts all investigations. In accordance with the Court's framework and the Chamber's 'Directions on the Conduct of the Proceedings',[10] this trial will also be conducted on a basis that is more consistent with the practice and procedure of an adversarial trial than that of one conducted under the inquisitorial system.

5. There is little dispute that the adversarial system depends to a large extent on the ability of the parties calling its witnesses to ensure that all relevant matters are placed before the Chamber. It is counsel who decides what is called into evidence, and it is their role to effectively lead that evidence in a way that is understood by the Chamber. In the Rome Statute system, the Trial Chamber is the finder of fact, and may base its decision only on evidence submitted and

[6] Article 64(3)(a) of the Statute.
[7] Articles 54, 57 and 67 of the Statute.
[8] *See*, *for example*, those referred to in *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 37.
[9] Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Article 5; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Chapter VII.
[10] Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205.

discussed before it at the trial. While it is empowered to request the submission of all evidence it considers necessary for the determination of the truth, the onus is on the Prosecutor to prove the guilt of the accused beyond a reasonable doubt. As well, it is the right of the accused, if he elects to do so, to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[11]

6. While it was the Registry that submitted a 'Unified Protocol on the Practices used to prepare and familiarize witnesses for giving testimony at trial' in the context of the Blé Goudé case, it is noteworthy that the parties and participants to these proceedings have *jointly* requested the adoption of separate protocols for witness preparation and witness familiarisation. This is instructive given the adversarial nature of the proceedings. Accordingly, due weight ought to be given to this joint request in the context of the parties' knowledge of their own investigations, cases, evidence and witnesses and their responsibility to advance their respective cases.

7. In considering the appropriateness and necessity of adopting a witness preparation protocol, it is useful to carefully consider whether the benefits of such a protocol outweigh any risks resulting from its adoption.

8. Without question, the exercise of witness preparation itself may lead to 'impermissible conduct such as rehearsal, practice and coaching',[12] a concern noted by the Majority in its decision, and one with which I fully agree. I note, however, that the Majority does not take into account that witness preparation is not the genesis of such a risk occurring at the Court. In the Court's statutory

[11] In this regard, I note that, in a slightly different context, but still relevant here, the ICTY Appeals Chamber has considered that 'in a situation where the defence is unaware of the precise nature of the evidence which a prospective witness can give and where the defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the defence to use "all mechanisms of protection and compulsion available" to force the witness to give evidence "cold" in court without first knowing what he will say. That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty'. *See* ICTY, Appeals Chamber, *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 8.
[12] Majority decision, para. 17.

framework, such risks exist before witness preparation, insofar as the parties conduct their own investigations.

9. Moreover, the ban on witness preparation, as I understand it, applies to the meeting – between the witness and the counsel (or representative thereof) who plans to question that witness in Court – for the purpose of preparing and familiarising the witness with courtroom procedures and to review the witness's evidence. As a party has a right, and in some circumstances, an obligation, to conduct ongoing investigations – which may relate both to the witness the party intends to call at trial and the evidence that witness is expected to give – it would seem incongruous to conclude that prohibiting witness preparation is the best approach to preventing 'impermissible conduct' generally. Indeed, in the Court's framework, and based on my understanding of 'witness preparation', investigators or counsel other than those who would be questioning the witness in Court could still be in contact with the witness, including in relation to the subject matter of his or her testimony. In the event that I have misunderstood the term 'witness preparation', and a ban thereof prohibits *any* contact with the witness by anyone in the calling party in relation to the subject matter of his or her expected testimony, then I consider this would be an impermissible infringement on the statutory rights of the parties to conduct investigations.

10. In my view, the existing risks of 'impermissible conduct', which are not necessarily prevented or remedied by a ban on witness preparation, should be considered in balancing whether witness preparation should be authorised. It is my respectful view that to conclude, as the Majority does, that the risks connected to witness preparation outweigh any other factor, without more, overlooks the reality of the compromise system created by the drafters of the Rome Statute. It seems to me that, only in a purely inquisitorial system, where the judges bear primary responsibility for gathering and eliciting evidence,

would the risks of witness preparation necessarily, and without more, outweigh other benefits, including those I set out below.

11. In my respectful view, the risks of this Chamber being exposed to and acting on manipulated and/or distorted evidence are mitigated both by the trial process itself, as well as by available sanctions. One such measure is an appropriate protocol that provides robust safeguards for the conduct of witness preparation. In this regard, such a protocol and such safeguards were proposed by the parties and participants.[13] Where the Chamber or the opposing party have concerns, the record of the witness preparation session would be disclosable to counsel representing the opposing party, who, armed with such material, is in a position to conduct a thorough cross-examination to explore any perceived irregularities.[14] It is also open to the Chamber, where it has its own concerns, to itself examine such a witness.

12. The risk of such manipulation is also addressed both in the domestic rules of professional conduct of counsel who appear before the Chamber as well as in the Code of Professional Conduct for Counsel ('Code') for counsel who appear before the International Criminal Court. Article 25(1) of the Code not only obligates counsel to maintain the integrity of the evidence which is submitted to the Court, but also prohibits the introduction of any evidence which counsel knows to be incorrect.[15] The spectre of prosecution under Article 70 of the Statute remains the ultimate sanction.

[13] *Soumissions de l'Accusation et de la Défense relatives à l'adoption du protocole de préparation des témoins*, 26 February 2015, ICC-02/11-01/11-784-Conf, with confidential Annex. *See also*, Defence observations on Witness Preparation and Witness Familiarisation protocols, 30 April 2015, ICC-02/11-01/15-50-Conf *and* Addendum to "Defence Observations on the Witness Preparation and Witness Familiarisation Protocols" (ICC-02/11-01/15-50-Conf), 4 May 2015, ICC-02/11-01/15-54-Conf.
[14] *See also* ICTR, Appeals Chamber, *Prosecutor v. Karemera et al.*, *ICTR-98-44-AR73.8*, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, paras 12-13.
[15] Article 25(1) of the Code of Professional Conduct for Counsel.

13. In considering the benefit and appropriateness of a witness preparation protocol, less obvious, in my respectful view, is a potential hidden barrier that carries with it the risk that the Chamber may not receive the best evidence possible. Unlike the situation in domestic proceedings where arguably the counsel, the witness, the accused and the judicial officers all share the same culture and language (or the same version of that language), the experience in international criminal justice is unique. Peculiar to international proceedings generally, and before this court specifically, is the relative absence of any such shared culture and, in some cases, common language. For this reason alone, it may be necessary and appropriate for lawyers in the proceedings to spend time with their witnesses so as to ensure that they are able to effectively communicate with each other.

14. In this context, the need for such preparation is also greater with potentially vulnerable witnesses and/or witnesses whose evidence is of a sensitive nature, such as those involving allegations of sexual offences. In this regard, the Pre-Trial Brief [16] – which provides the Prosecution's theory of its case – and the confirmation decisions[17] both foreshadow the presence of such witnesses. The evidence in this case includes material in support of charges alleging the commission of crimes against humanity under Article 7(1)(g) of the Statute, for rape as well as other forms of sexual violence against women. A courtesy meeting between such a witness and counsel, in my view, provides insufficient time to address any potential language or cultural barriers which may in turn deprive the Chamber of having placed before it the best evidence that the witness is capable of giving.

15. Relevant also to a consideration on the appropriateness and necessity of adopting a witness preparation protocol is the time that has elapsed between the alleged

[16] Corrigendum to ICC-02/11-01-148-Conf-Anx2, 16 July 2015, ICC-02/11-01/15-148-Conf-Anx2-Corr.
[17] Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red, paras 24-72; Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186, paras 17-25 and 44-50.

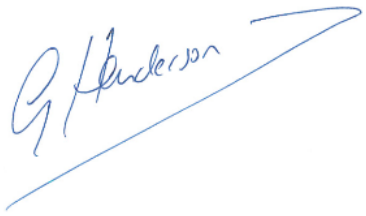
occurrence of facts and the investigation thereon on the one hand, and the time the witness is expected to testify before the Chamber, on the other. Regarding the time that has elapsed, while the events which form the basis of the respective charges took place approximately five years ago, the Prosecution's Pre-Trial Brief suggests that it intends to present evidence that the historical background to the alleged offences exceeds ten years.[18]

16. Relevant also is the expected scope of the case and the evidence that such witnesses are expected to give. As to the size of the proceedings, the Chamber has already acknowledged the scope of this case, noting the Prosecution's intention to call approximately 138 witnesses at trial,[19] 4,862 items of evidence,[20] and estimating that it will need 522 hours total for the presentation of its case.[21] In my respectful view, a witness preparation regime would have enabled the calling entity to properly and appropriately engage with the witnesses prior to their testimony in order to facilitate the focused, efficient and effective questioning of the witnesses during the proceedings.[22]

17. For the reasons set out above, I would have granted the joint request of the parties and participants for a witness preparation protocol.

[18] Corrigendum to ICC-02/11-01-148-Conf-Anx2, 16 July 2015, ICC-02/11-01/15-148-Conf-Anx2-Corr.
[19] Amended version of List of Witnesses, Prosecution's submission of its amended List of Witnesses and List of Evidence, 26 October 2015, ICC-02/11-01/15-314-AnxA.
[20] Amended version of List of Evidence, Prosecution's submission of its amended List of Witnesses and List of Evidence, 26 October 2015, ICC-02/11-01/15-314-AnxC.
[21] Directions on the conduct of proceedings, 3 September 2015, ICC-02/11-01/15-205, para. 15.
[22] *Ruto and Sang* Decision, ICC-01/09-01/11-524, paras 31 and 34; *Ntaganda* witness preparation decision, ICC-01/04-02/06-652, paras 37-38.

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



Judge Geoffrey Henderson, Presiding Judge

Dated 02 December 2015

At The Hague, The Netherlands