

DISSENTING OPINION OF JUDGE HENDERSON

I. Introduction

1. I respectfully dissent from the majority 'Decision on the submission and admission of evidence' ('Majority Decision') to, as a general rule, defer its decision on admissibility of evidence to its final deliberations under Article 74 of the Statute. The Appeals Chamber has cautioned that a 'Trial Chamber must balance its discretion to defer consideration of [admissibility] with its obligation under [Article 64(2) of the Statute]',¹ namely, to 'ensure that a trial is fair and expeditious and conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses'. The Majority appears to have concluded that it has achieved such a balance.² For the reasons that follow, I do not agree.

II. Submissions

2. At the outset, I emphasise that the parties and LRV, whose oral submissions were a model of clarity and succinctness, were unanimous in their request that the Chamber would best ensure that the proceedings are both fair and expeditious by ruling on the admissibility of evidence contemporaneously with its submission by the tendering party.³
3. In summary, the Prosecution requests that, where a party seeks the admission of documentary evidence, the Chamber make a contemporaneous

¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386 OA5 OA6 ('*Bemba Appeal Decision*'), para. 37.

² Majority Decision, para. 12.

³ Transcript of the hearing on 14 January 2016, ICC-02/11-01/15-T-8-CONF-ENG-ET, page 56, line 5 to page 60, line 2.

determination of that item's admissibility.⁴ Such an approach would have the benefit of providing both the parties and the Chamber with an evidential record prior to the parties making their final submissions.⁵ Such an approach also permits the Chamber, during its deliberations, to assess the weight that would attach to such evidence and would enable the parties to better discharge their functions.⁶

4. In distinguishing admissibility from the assessment of the probative value of such admitted evidence, the Gbagbo Defence argues that the two are quite distinct stages, the one following the other.⁷ It submits that the Chamber must determine admissibility at the earliest opportunity, failing which uncertainty would exist.⁸ The impact on the defence could be considerable should the Chamber fail to make contemporaneous decisions, particularly if such are not made before the defence presents its evidence and makes its representations.⁹ The Blé Goudé Defence concurs with this approach and drew the Chamber's attention to the relevant ICTY jurisprudence.¹⁰
5. The LRV submitted that the approach requested by the Prosecution was a reasonable one and noted that there was consensus.¹¹

III. Analysis

6. While there is little dispute that a trial chamber may defer its consideration on the relevance and admissibility of evidence submitted by a party until the

⁴ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 57, lines 3 to 5.

⁵ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 57, lines 5 to 8, and page 58, lines 2 to 4.

⁶ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 57, lines 9 to 14, and page 58, lines 1 to 2.

⁷ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 58, lines 8 to 18.

⁸ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 58, lines 13 to 18.

⁹ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 58, line 19 to page 59, line 5.

¹⁰ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 59, lines 19 to 23.

¹¹ ICC-02/11-01/15-T-8-CONF-ENG-ET, page 60, lines 1 to 2.

deliberations stage of proceedings,¹² in exercising this discretion, and in the context of adversarial proceedings, due weight ought to be given to the unanimous views of the parties and LRV.¹³ A careful consideration of their concerns assists the Chamber in striking the right balance so as to ensure that the trial is both fair and expeditious, recognising that expeditiousness is an important component of a fair trial, but not the only one.

7. Although the legal architecture of the Court blends aspects of both civil and common law systems, as highlighted by my learned colleague in the Appeals Chamber, the Rome Statute provides for key aspects of the proceedings to be conducted in an adversarial nature, insofar as Articles 66(2) and Article 67(1)(e) of the Statute confine the discharge of the burden of proof to the Prosecutor and provide for the confrontation of the evidence by the accused.¹⁴ In accordance with this Chamber's 'Directions on the Conduct of Proceedings',¹⁵ this trial was also to be conducted on a basis more consistent with the practice and procedure of an adversarial trial, in which the phases of trial provide for each *party* to present its case and its evidence to the Chamber.¹⁶
8. While the Chamber is empowered to request the submission of all evidence it considers necessary to determine the truth, it is the Prosecution that bears the burden of proving the guilt of the accused beyond a reasonable doubt.¹⁷ A

¹² Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386 OA5 OA6, para. 37.

¹³ I have expressed similar opinions in relation to recent decisions of the majority of the Chamber. See Partially Dissenting Opinion of Judge Henderson, 3 December 2015, ICC-02/11-01/15-355-Anx1, paras 1 and 6; and Dissenting Opinion of Judge Henderson, 13 January 2016, ICC-02/11-01/15-388-Anx, para. 1.

¹⁴ Appeals Chamber, Separate Opinion of Judge Georgios M. Pikis on the 'Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber"' of 2 February 2007, para. 18.

¹⁵ Directions on the conduct of proceedings, 3 September 2015, ICC-02/11-01/15-205.

¹⁶ Directions on the conduct of proceedings, 3 September 2015, ICC-02/11-01/15-205, para. 12.

¹⁷ Article 66 of the Statute.

decision that as a general rule defers the admission of the evidence to the deliberation stage hardly assists the Prosecution in determining whether it has discharged its evidential burden at the close of its case, let alone at the conclusion of the evidentiary stage of proceedings.

9. In my respectful view, the rights of the accused are also undermined where decisions on admissibility are deferred. The notion of a fair hearing goes beyond the terms catalogued in Article 67 of the Statute, which identifies those listed as minimum guarantees. At the close of the case for the Prosecution, the accused must make an informed decision on how he elects to proceed; options which include whether to stay silent or to give evidence and if so, to what he would wish to respond. In the context of adversarial proceedings, this requires a proper assessment of the evidence led and admitted, not what may be admitted. Lack of certainty impedes the ability of the accused to prepare their cases, undermining the fairness of the proceedings.¹⁸
10. The parties and LRV have also identified the impact on their ability to make representations should the Chamber defer its decision on admissibility to the deliberation stage of the trial. Rule 141(2) of the Rules requires that, at the close of the evidentiary stage of proceedings, the Presiding Judge invite the parties to make closing statements. Counsel for each party is then entitled to address the Chamber in an attempt to persuade its members to its understanding of the facts and evidence and, in so doing, make reference to

¹⁸ Chambers at the *ad hoc* tribunals have expressly and implicitly acknowledged the impact and importance of timely and contemporaneous admissibility decisions in order to enable the parties to adequately prepare their respective cases at all stages of the proceedings. See, e.g. ICTY, *Prosecutor v. Tolimir*, Trial Chamber, IT-05-88/2-T, Consolidated Decision on Prosecution's Bar Table Motions and the Accused's Motion for Extension of Time, 14 May 2012 ('*Tolimir* Decision'), para. 48; *Prosecutor v. Popović et al.*, Trial Chamber, IT-05-88-T, Consolidated Decision on Motion on Behalf of Milan Gvero Seeking an Adjournment and Popović's Request for an Extension of the Deadline for the Final Brief, 27 May 2009; *Prosecutor v. Prlić et al.*, Trial Chamber, IT-04-74-T, Decision on Motion for Extension of Time for the Commencement of the Defence Case and Adopting a New Schedule, 28 January 2008, pages 5 to 6; *Prosecutor v. Hadžihasanović & Kubura*, Trial Chamber, IT-01-47-T, Order Amending the Scheduling Order Further to the Motion by Defence for Enver Hadžihasanović to Obtain an Extension of Time to File His Final Trial Brief, 29 June 2005; and ECCC, Trial Chamber, Case 002/01, Decision on Adjusted Schedule for Closing Submissions, E295/4, 22 August 2013, para. 2.

the most cogent parts of their respective cases, while at the same time identifying evidential gaps and weaknesses in their opponents' case. In particular, the accused, who have the last say, must know the evidence that has been admitted in the respective cases against them. Just how the parties can meaningfully achieve this objective in the absence of certainty as to what evidence is or is not being considered as admitted into evidence is questionable at the very least. Indeed, in the context of these proceedings, not only does such an approach undermine the effectiveness of the closing speeches, it renders them inefficient, as parties will be forced to address the Chamber in such a manner so as to cover all eventualities concerning the evidence.

11. In this respect, I also note that the Majority Decision creates an expectation that the parties and LRV will devote precious time and resources to conduct investigations and prepare their respective cases in light of all evidence submitted, even though such evidence may – after the conclusion of the trial – be considered inadmissible. Such a consideration has minimal impact where the anticipated body of evidence in a case is limited. However, in this trial, where the Prosecution's case alone anticipates approximately 138 witnesses and 5,376 exhibits, the benefit to the parties of admissibility decisions on a rolling basis and before the closure of the hearing cannot be underestimated. Such decisions enable a party to plan and focus their investigations, preparations, examinations, and submissions, and to identify the witnesses they will call and the evidence they will adduce. Thus, time and resources spent on preparations and submissions relating to evidence which is ultimately ruled inadmissible by the Chamber after the closure of the evidentiary hearing would have been diverted from preparation, examination and submissions in relation to other evidence that the Chamber ultimately

finds admissible and relies upon in its judgment under Article 74 of the Statute.¹⁹

12. I also consider that, in relation to procedural matters in international criminal cases of great scope and size, a Chamber should have due regard for the lessons learned from the ample experience and jurisprudence of the Court, as well as the *ad hoc* tribunals. With the exception of the *Bemba et al.* case (a case of limited scope and anticipated duration),²⁰ issuing admissibility decisions *before* the closure of evidence has been the settled and uncontroversial practice in international criminal proceedings, both at the Court and the *ad hoc* tribunals. This includes both those international and hybrid courts founded on the common law tradition, as well as those applying a primarily inquisitorial system.²¹
13. Nowhere in the Majority Decision is there any assessment as to why the *Gbagbo and Blé Goudé* case is unique from the dozens of other international cases where admissibility decisions have been issued before the closure of evidence. Nor is there any discussion as to how such practice is misguided, let alone an assessment of the impact on the respective parties' ability to efficiently and adequately prepare (issues specifically raised in the parties' submissions).
14. I must emphasise that, in my view, deferring inadmissibility rulings to the Chamber's final judgment as a general rule unfairly forecloses the opportunity

¹⁹ In this regard, *see, e.g., Tolimir* Decision, para. 48 (acknowledging that the defence had devoted resources to 'preparing for the contingency that [certain proposed evidence] might be admitted' and accordingly, finding that an extension of time was warranted for the defence to adapt his final submissions in light of the recent decision excluding that proposed evidence).

²⁰ *The Prosecutor v. Bemba et al.*, Trial Chamber VII, Decision on Prosecution Requests for the Admission of Admission of Documentary Evidence, 24 September 2015, ICC-01/05-01/13-1285.

²¹ Considering the amount of admissibility decisions issued before the closure of the hearing of evidence in various trials at the Court and *ad hoc* tribunals, I am unable to cite to each and every one. Instead, I refer the reader to the court records available on the websites of the ICC, ICTY, ICTR, MICT, SCSL, ECCC and STL. *See also* the decisions and orders cited in this Opinion.

for the submitting party to seek the admission of other evidence in place of that which was excluded. In such circumstances, there is a risk arising primarily from the admissibility regime adopted by the Majority of either the Chamber and parties wasting valuable time and resources on duplicative evidence, as explained in more detail below, or the Chamber rendering a perverse verdict.

15. By way of illustration, I note that Chambers at the Court and *ad hoc* tribunals have declined to admit, or have provisionally admitted, evidence absent, *inter alia*, sufficient indicia of reliability, such as information concerning their provenance or authenticity, adequate translations, or attestations.²² If such decisions had only been made after the closure of the evidentiary stage of proceedings, the parties in those cases would have been prevented from the possibility to remedy such defects by providing the Chamber the information required in order for it to properly consider those items. While parties certainly have a responsibility to be fully prepared for all eventualities,²³ the Chamber also has an obligation under Article 64(2) of the Statute to take such decisions that ensure that the Chamber does not deprive itself of the best chances of learning the truth. A Chamber acting pursuant to its statutory

²² See, *inter alia*, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353 ('*Ruto and Sang* Admission Decision'), paras 42, 61, and 64-65; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, 8 October 2012, ICC-01/05-01/08-2299, paras 24, 113, and 159; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, paras 12, 22-25 and 36; ICTY, *Prosecutor v. Karadžić*, Trial Chamber, IT-95-5/18-T, Decision on Prosecution Motions on Exhibit-Related Matters, 28 April 2014; *Prosecutor v. Karadžić*, Trial Chamber, IT-95-5/18-T, Decision on Accused's Motions to Admit Intercepts Previously Marked for Identification, 28 February 2014; *Prosecutor v. Karadžić*, Trial Chamber, IT-95-5/18-T, Decision on Accused's Motions to Admit Documents Previously Marked for Identification and Public Redacted Version of D1938, 7 December 2012; *Prosecutor v. Mladić*, Trial Chamber, IT-09-92-T, Decision on Prosecution's Twenty-First Motion to Admit Evidence Pursuant to Rule 92bis, 16 October 2013; *Prosecutor v. Stanišić & Simatović*, Trial Chamber, IT-03-69-T, Decision on the Admission of the Proposed Expert Report by Renaud Theunens the Admission of Theunens Related Documents, 1 April 2011; *Prosecutor v. Tolimir*, Trial Chamber, IT-05-88/2-T, Decision on Prosecution's Motion for Admission of Written Evidence Pursuant to Rules 92bis and 94bis, 7 July 2010; *Prosecutor v. Milošević*, Trial Chamber, IT-02-54-T, Order Formally Admitting Exhibits Tendered Through Witness Hrvoje Sarinić, 31 March 2004.

²³ See Majority Decision, para. 18.

obligations cannot threaten the impartiality of the proceedings, a position the Majority appears to have taken.²⁴

16. In making its determination that, as a matter of principle, it was appropriate to defer until deliberation the assessment of both admissibility and the relevance or probative value of evidence, the Majority identified five considerations: (1) the Chamber is best able to assess the relevance and probative value of a given item of evidence at the end of the proceedings ('First Consideration');²⁵ (2) not having to assess relevance and probative value until the end of the proceedings would prevent multiple determinations on the same item of evidence at different stages of the trial and is therefore more expeditious ('Second Consideration');²⁶ (3) deferral of admissibility decisions will ensure that all evidence is subjected to uniform treatment ('Third Consideration');²⁷ (4) there is no reason for the Chamber to make admissibility assessments in order to screen itself from considering materials inappropriately ('Fourth Consideration');²⁸ and (5) the Chamber may always decide to consider admissibility issues up front when appropriate ('Fifth Consideration').²⁹ In the circumstances of this case, it is my view that none of these considerations justify deferral of admissibility decisions to the judgment as a general rule.
17. In relation to the First Consideration, I cannot but agree with the Majority that an item's ultimate relevance and probative value cannot be assessed until the conclusion of the trial and in light of the totality evidence. However, this does not detract from the Chamber's ability to determine *prima facie* relevance and probative value for purposes of admissibility, or to determine at the outset that an item of evidence is patently irrelevant or unreliable.

²⁴ See Majority Decision, para. 18.

²⁵ Majority Decision, para. 13.

²⁶ Majority Decision, para. 14.

²⁷ Majority Decision, para. 15.

²⁸ Majority Decision, para. 16.

²⁹ Majority Decision, para. 17.

18. Indeed, as noted by Trial Chamber V(A), an ‘assessment of items of evidence for the purposes of admissibility is a distinct question from the evidentiary weight which the Chamber may ultimately attach to the admitted evidence in its final assessment once the entire case record is before it’.³⁰ For the same reasons, the Third Consideration is, in my view, unfounded as decisions on admissibility of and ultimate weight to be afforded to evidence do not risk inconsistent treatment of such evidence, as the standards are distinct.

19. Having said this, I also note with concern that *this* Chamber has already ruled, as follows:³¹

Pursuant to Article 69 of the Statute and Rule 63(2) of the Rules, the Chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility. In accordance with Rule 64(3) of the Rules, the Chamber will not admit evidence that it considers is *prima facie* without relevance or probative value. In line with Article 69(4) of the Statute, in ruling on the admissibility of evidence, the Chamber will also take into account any prejudice that such evidence may cause to a fair trial or the fair evaluation of the testimony. Likewise, the Chamber will not admit evidence where a determination has been made under Article 69(7) of the Statute. It is for the submitting party to demonstrate the admissibility of the evidence and proffer reasons why it is relevant to and probative of the facts in issue.

20. These directions provided for a procedure during the trial whereby the Chamber may exclude evidence where a *prima facie* assessment determined that the evidence was without relevance or probative value. Therefore, I cannot agree that a significant departure from these directions issued on the eve trial – when the parties have prepared on the basis of these directions – is commensurate with this Chamber’s obligation to ensure that the trial is fair, expeditious, and conducted with full respect for the rights of the accused.

21. The Second Consideration is founded on expeditiousness. However, rather than expediting proceedings, I consider that the effect of the Majority Decision

³⁰ *Ruto and Sang* Admission Decision, ICC-01/09-01/11-1353, para. 18

³¹ Directions on the conduct of proceedings, 3 September 2015, ICC-02/11-01/15-205, para. 51.

threatens to significantly prolong them. I have already noted above the impact on the ability of the parties and LRV to prepare. As a corollary, I note that, without admissibility decisions on a rolling basis, the Chamber, parties and LRV are inhibited in any effort to limit the overall amount of evidence presented. Some of the items of evidence on the Prosecution's list of evidence may be repetitive and cumulative of other items of evidence. Similarly, the Prosecution may not be certain as to exactly which items of evidence it will ultimately submit. As the Appeals Chamber has acknowledged, this is consistent with the Prosecution's 'discretion, as the case unfolds, to rely on some [of this evidence] and to abandon the rest.'³² Such a discretionary right, as they are the chiefs of their respective cases, applies with even more force to the defence and, to a certain extent, the LRV. However, a party or participant cannot be expected to whittle down their evidence lists, to identify and abandon repetitive, unduly cumulative or other items of evidence, if they are uncertain as to which items of evidence will be admitted.

22. In addition, this lack of certainty concerning the evidence, in my view, compromises the Chamber's authority to request the submission of all evidence it considers necessary for the truth (Article 69(4) of the Statute) in a timely fashion, because it would only know at the deliberations stage whether it will declare evidence inadmissible. Should the Chamber be aware that other evidence of a similar nature is available after it has declared one item inadmissible for whatever reason, it would have to re-open the trial to hear the evidence and have it 'discussed' and 'confronted' for the purposes of Articles 67 and 74 of the Statute. While this may appear speculative, in my view its possibility carries with it the risk that either efficiency or the Chamber's truth finding function may be compromised, and cannot be remedied, by simply

³² *Bemba* Appeal Decision, ICC-01/05-01/08-1386 OA5 OA6, para. 45.

keeping the evidence under ‘continuous consideration’.³³ If this phrase means that the Chamber will be assessing admissibility throughout the proceedings, then it is not actually deferring its consideration until deliberations and its decisions on admissibility ought to be made known to the parties for the reasons I have set out above. In such circumstances, I cannot understand why such assessments would not be shared with the parties, considering the obvious impact they could have on fairness and expeditiousness.

23. The only discernible benefit of the Majority Decision to the expeditiousness of the proceedings would be the time the Chamber saves in not having to devote resources to issuing admissibility decisions and the fact that proceedings are not impeded by any time spent preparing such decisions or any attendant leave to appeal litigation.³⁴ However, as already noted, the Majority also indicates that it will keep the entire body of submitted evidence under ‘continuous consideration’ and that it will consider party requests to decide upon the admissibility of a given item or category of evidence at an earlier stage of the proceedings.³⁵ Although the Majority Decision has, in principle, eliminated interlocutory admissibility decisions, the Chamber will still, as it must and should, devote resources and time to a new category of filings and decisions, namely requests for early admissibility decisions. Of course, the Chamber must still assess the entirety of the evidence during deliberations. Therefore, in seeking to strike the correct balance, I remain unpersuaded by the line of reasoning that concludes that expeditiousness has been enhanced by postponing a reasoned decision that still must be made without examining the prejudicial impact of such an approach on the accused, an issue directly raised in the parties’ submissions. The limited benefit of the Majority Decision to the expeditiousness of the proceedings, if any, on balance, cannot justify the

³³ Majority Decision, para. 17.

³⁴ Majority Decision, para. 14.

³⁵ Majority Decision, para. 17.

prejudice caused, or the risk thereof, to the parties, LRV, and overall fairness and expeditiousness of the proceedings.

24. In relation to the Fourth Consideration, I acknowledge that, in many domestic, common law jurisdictions, one benefit of rendering admissibility decisions prior to the conclusion of the trial is screening irrelevant or unduly prejudicial evidence from the jury and that no such risk arises in these proceedings. In this respect, the Majority Decision acknowledges the statutory admissibility criterion of potential prejudice, but only in passing.³⁶ Nowhere in the Majority Decision is there discussion as to why this criterion is best considered after the closure of the evidentiary hearing. It is clear to me, however, that potential prejudice is best assessed before the trial concludes. Indeed, this is the only way that such potential prejudice can be averted or, depending on the circumstances, adequately remedied. After the conclusion of the hearing, exclusion is the most readily available remedy. However, exclusion cannot change the course of the trial once it has concluded.
25. Finally, the Fifth Consideration concerns the ability of the Chamber to exceptionally rule on admissibility matters before the conclusion of the trial. Indeed, I note that the 'general rules' adopted so far by the Chamber in relation to the preparation and submission of evidence in the *Gbagbo and Blé Goudé* case safeguard the discretion of the Chamber, above all else.³⁷ However, the discretion of the Chamber is never unfettered. It must be exercised subject to the Chamber's obligations under the Statute, in particular, Article 64(2). For this reason, even assuming *arguendo* that I otherwise agreed with the Majority's approach to the admissibility of evidence – which I respectfully do not – I still could not join the unlimited and undefined 'general rule' adopted.

³⁶ Majority Decision, para. 10.

³⁷ See Majority Decision, paras 7, 12 and page 9; and Decision on witness preparation and familiarisation, 3 December 2015, ICC-02/11-01/15-353, para. 19.

26. Despite the Majority's hint that the Chamber may still assess objections made under Article 69(7) of the Statute before the conclusion of the evidentiary hearing,³⁸ there is no certainty that would allow the parties to properly prepare their cases, or at least with any real foresight as to which items may be assessed prior to the conclusion of the trial. This is especially true in light of its statement that a 'determination on the admissibility or the relevance of a given item of evidence upon its submission would unduly restrict the Chamber's power to assess that particular piece of evidence in light of all the others pieces which are yet to be submitted' and, 'would result in unnecessarily restraining the Chamber's right and duty "to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69" as provided in Rule 63(2) of the Rules'³⁹. Nevertheless, the Majority indicates that it may also 'rule on admissibility of certain items whenever this may be necessary or appropriate', 'including upon a request of the parties relating to a specific item of evidence, or category of evidence'.⁴⁰ Yet, the Majority does not identify any relevant criteria or the applicable procedure governing such circumstances. This, in my view, creates further uncertainty and ambiguity about the procedure to be followed in respect of the evidence. Similarly ambiguous 'general rules' have already created uncertainty in these proceedings.⁴¹

IV. Conclusion

27. Accordingly, I would have granted the unanimous request of the parties and LRV that the Chamber rule on the admissibility of evidence on a rolling basis and before the close of the evidentiary stage of the proceedings.

³⁸ Majority Decision, para. 17.

³⁹ Majority Decision, para. 13.

⁴⁰ Majority Decision, para. 17.

⁴¹ Transcript of the hearing on 21 January 2016, ICC-02/11-01/15-T-8-CONF-ENG ET, page 43, line 19 to page 49, line 8. *See also* Partially Dissenting Opinion of Judge Henderson, ICC-02/11-01/15-355-Anx1, 3 December 2015, paras 6 and 9.

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

A handwritten signature in blue ink, appearing to read 'G. Henderson', is written over a horizontal line.

Judge Geoffrey Henderson

Dated 01 February 2016

At The Hague, The Netherlands