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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

***IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public document with Public Annex A

Corrected Version of "Prosecution's request to clarify the scope of the Chamber's oral decision of 17 March 2016 limiting the use of documents in re-examination and in the alternative, leave to appeal the decision, 23 March 2016, ICC-02/11-01/15-469"

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 17 March 2016, the Chamber issued an oral decision allowing Witness P-0625's re-examination, but limiting the use of material (including documents, videos and photos) during this re-examination to those "which are already submitted to the Chamber during the testimony of the witness, meaning without the possibility to use new documents."¹ The Chamber further confirmed that this Decision would apply to all witnesses, including those to be heard during the Defence case.² Nevertheless, despite the plain language of this Decision, the Chamber has shown some flexibility in interpreting it to respond to situations as they unfold in the courtroom.³
2. Given the Chamber's rejection of the Prosecution's request for reasoning⁴ and its demonstrated flexibility in interpreting the Decision in practice, the scope of the Decision remains unclear. Indeed, as the re-examination of Witness P-0625 showed, a case-by-case assessment of the use of material in re-examination is more appropriate.
3. To assist the Chamber, the Prosecution, by way of this filing:
 - i. Highlights the need for the Chamber's flexibility and case-by-case assessment of the use of material in re-examination, and underscores that implementing this Decision in its plain terms will hinder the Chamber's obligation to determine the truth, will undermine its goal to expedite the proceedings, and, risks being inconsistent with several other decisions from this Chamber. Accordingly, the Prosecution seeks to clarify the scope of the Decision; and

¹ ICC-02/11-01/15-T-32-ENG, p. 54 lns. 11-17: "[t]he Chamber on the issues raised by the Defence of Mr Gbagbo and having heard the other parties decides as follows: The re-examination by the calling party is allowed and the documents he can use is limited to the documents which are already submitted to the Chamber during the testimony of the witness, meaning without the possibility to use new documents." ("Decision"); p. 55 lns. 2-4: the Presiding Judge stated "[y]ou can question on this but without new documents, documents which are not yet already submitted to the Chamber."; ICC-02/11-01/15-T-33-ENG, p. 5 lns. 2-13.

² ICC-02/11-01/15-T-32-ENG, p. 55 lns. 5-12.

³ ICC-02/11-01/15-T-32-ENG, p. 65 lns. 5-18: despite the Defence's repeated objections and its initial Decision, the Chamber allowed the Prosecution to show the witness a different extract of the same video; p. 62 lns. 11-13: the Presiding Judge suggested that the Decision could be set aside if there was "consensus".

⁴ ICC-02/11-01/15-T-32-ENG, p. 55 lns. 5-12: the Prosecution's request "[a]nd can we know why, the reasoning behind this? Because right now there is no reasoning[...]" and the Presiding Judge's response "[a]bsolutely is."

- ii. In the alternative, seeks leave to appeal the Decision under article 82(1)(d) of the Statute.

4. Further, the Prosecution notes that the Chamber intends to amend the existing Directions on Conduct of Proceedings⁵ and has already departed from these Directions on prior occasions on an *ad hoc* basis.⁶ If the Chamber is minded to further depart from these Directions, the Prosecution requests that the Parties are provided with adequate notice of the portions of the Directions to be further amended and that the Parties are allowed to make further detailed submissions on them, as required by rule 134(2).⁷ Hearing the Parties' considered submissions on fundamental issues on the conduct of proceedings will both assist the Chamber and ensure the fair and expeditious conduct of the proceedings.

Submissions

A. Request to clarify the scope of the Decision

- (i) *As the questioning of Witness P-0625 showed, the Chamber's flexibility and case-by-case determination of the use of material in re-examination is required*

5. As the circumstances in the courtroom following the Decision demonstrate, despite the plain language of the Decision, the Chamber should remain flexible to allow the use of any relevant material, even if not previously submitted, during re-examination. Not only was the Chamber's re-interpretation of the Decision necessary to elicit important information and avoid a skewed and one-sided presentation of P-0625's evidence, the Chamber was also required to respond to unanticipated developments, including the witness's requests to view certain "new" materials.

6. In particular,

⁵ ICC-02/11-01/15-T-13-Red-ENG, p. 1 lns. 17-21, "[t]his Chamber is fully committed to uphold the principle of expeditiousness of the proceedings. [...] requires some amendments to the directions previously given by the Chamber in filing number 205."

⁶ ICC-02/11-01/15-T-13-Red-ENG, p. 2 lns. 3-5; *Contra* ICC-02/11-01/15-205, paras. 34-36, permitting leading questions.

⁷ When a Trial Chamber is considering significant amendments to the existing conduct of proceedings, as in this case, rule 134(2), and not rule 134(3), should apply and Parties should be consulted before such amendments are authorised.

- First, notwithstanding the Defence's submissions upon which the Decision was based,⁸ and its continuing objections, the Chamber further clarified its Decision to permit the Prosecution to show an excerpt of a video during re-examination, other than the excerpt (of the same larger video) shown by the Defence during its questioning of the witness. The Defence sought to limit the Prosecution in re-examination to only the limited excerpt that it had previously shown the witness. However, as the Presiding Judge stated, the Chamber cannot be "[...] limited to show a piece which the parties wants (*sic*) us to see and not the rest. [...] The document is a document as such in its entirety and it's not the piece we have seen."⁹
- Second, when the witness requested to see the 3 March 2011 RTI video (not previously shown during the testimony), the Chamber indicated its willingness to "set aside" the Decision with the consensus of the Parties.¹⁰

7. As the two circumstances above illustrate, the Chamber should retain its flexibility to deal with situations in re-examination as they arise. Significantly, the Chamber should consider situations where disallowing the use of material "not already submitted to the Chamber during the testimony" could have a direct impact on the credibility of the witness evidence and thus the Chamber's truth seeking mandate, as well as the effectiveness of the re-examination and therefore the expedition of the proceedings as a whole. The need to allow material "not already submitted to the Chamber during the testimony" is only further heightened, when its use by the non-calling party could not have been anticipated or reasonably foreseen, and/or such material includes information to demonstrate the patently incomplete, incorrect, contradictory or false nature of the evidence provided. The Decision cannot be read to deprive the Chamber of the very tools it needs to employ to determine the truth in the context of these proceedings.

⁸ ICC-02/11-01/15-T-32-ENG, p. 50 lns. 10-17: "[...] the Prosecution may only use that which has been used by the Defence[...] a specific video extract from such a time code to such a time code and may not go beyond that, beyond what has been used and this only when it has been used."; p. 64 lns. 12-21.

⁹ ICC-02/11-01/15-T-32-ENG, p. 65 lns. 5-18.

¹⁰ ICC-02/11-01/15-T-32-ENG, p. 61 ln. 6-p. 62 ln. 13.

- (ii) *Allowing the use of material, including those not previously submitted, in re-examination assists the Chamber's conduct of the proceedings*

8. The Chamber's efficient conduct of the proceedings will be enhanced if it allows the use of all material in re-examination, including those not previously submitted to it. To the contrary, and as shown below, if certain documents/videos affecting the credibility of the evidence are not permitted, the Chamber's statutory obligation and mandate to determine the truth in the proceedings will be adversely affected. Likewise, the proceedings will be ineffectively conducted, thereby unduly prolonging them. Moreover, if the plain language of the Decision remains, its implementation risks contradicting several other decisions already rendered in these and other proceedings.

- a) *The use of material in re-examination, including that not previously submitted, is critical to determining the truth*

9. All Chambers of this Court are obliged to determine the truth in the proceedings before them.¹¹ Indeed, this Chamber has been cognisant of its obligation to determine the truth. In the words of the Presiding Judge, "[t]he truth has to come out [in the trial]."¹² Yet, limiting the use of documents and videos to only those already submitted encumbers this Chamber in its mandate to find the truth.

10. First, the Decision not only precludes the Chamber from eliciting important and relevant evidence, but also hinders it from assessing if the evidence presented is reliable and genuine. To the contrary, even though the Chamber's obligation under article 69(3) is broader and empowers the Chamber "to request the submission of *all evidence that it considers necessary [to determine the truth]*",¹³ the Chamber is artificially limited in this case to only documents and evidence used by the Parties during the testimony. By placing the Chamber's ultimate determination in the hands of the

¹¹ Article 69(3); ICC-01/04-02/12-271-Corr A, para. 256, where the Appeals Chamber held that "the core functions" of the Trial Chamber includes "the objective of establishing the truth[...]"; ICC-01/04-02/12-271-AnxA A, paras. 3, 5, 21, 25-27, noting *inter alia* the Trial Chamber's "core judicial duty" to establish the truth; ICC-01/05-01/08-3343, para. 232.

¹² ICC-02/11-01/15-T-13-Red-ENG, p. 18 ln. 13- p. 19 ln. 5.

¹³ Article 69(3) (emphasis added); ICC-02/11-01/15-T-14-ENG, p. 2 lns. 17-18.

Parties, the Decision—in its plain terms—curbs the Chamber’s independent judicial function.

11. Indeed, if a Party were so minded, and as the Defence foreshadowed,¹⁴ it could limit its list of evidence to only those minute and self-serving extracts that are favourable to its case and use only those extracts during the testimony. Moreover, because the Chamber cannot go beyond the Parties’ lists of evidence to access material, it would be deprived of the larger context within which the extract fits. This, in turn, will adversely affect its article 74 decision. Indeed, although the Chamber re-interpreted its Decision to find that the entire document was deemed to be available to the Chamber—even if the Party used only an extract—, this ruling could be perceived not to include a situation where the limited excerpt *itself* is the only material available on the list of evidence.¹⁵

12. Moreover, and critically, the Decision permits distorted, or one-sided, evidence led in examination by the non-calling party, to remain effectively unchallenged on the record. Indeed, even if the calling party were in possession of information that it knew patently contradicted or demonstrated the falsity of the evidence, it would not be able to present it to the Chamber. For instance, a party would not be able to show to the witness a copy of a train ticket in its possession showing that the witness was actually kilometres away from where he or she had claimed to be on a given day. Not only would this contravene counsel’s ethical obligations;¹⁶ it prevents the Prosecution from achieving its article 54(1)(a) mandate to establish the truth and undermines the integrity of the proceedings and the Chamber’s own search for the truth.

¹⁴ ICC-02/11-01/15-T-32-FRA, p. 68 lns. 1-3 : “[d]ans le cas, ça forcera les parties à (sic) tirer des extraits, à (sic) faire des screen shots, ou vous voyez?”

¹⁵ *Contra* ICC-02/11-01/15-467, para. 10, which assumes that the “item” “submitted by a party” is the entire video, not the limited excerpt, and can therefore be considered by the Chamber. However, the ruling, if reasonably interpreted, should equally cover a situation where a Party chooses to list a limited excerpt. In such cases, the Party should provide the entire video.

¹⁶ Code of Professional Conduct for counsel, article 24(3); Regulations of the Office of the Prosecutor, regulation 17.

13. Second, the Decision hinders the presentation of genuine and undistorted evidence thus detracting from the Chamber's previous emphasis on orality and spontaneity as essential for the purposes of determining the truth. As the Chamber has previously noted, the witness is the protagonist, and is expected to speak the truth. In doing so, the witness should speak to "the facts [which] he has witnessed", "facts which are interesting to him", and "what he wants to speak out here."¹⁷ Yet, because of the Decision, Witness P-0625 was prevented from viewing and commenting on the 3 March 2011 video that, in his own words, "[w]ould be good because before actually showing the women they showed the march itself [...] and in the midst of the march there were armed men [...]."¹⁸ Witness P-0625 was prevented from spontaneously providing evidence to assist the Chamber and the Parties.

14. Third, the Decision prevents the Parties from presenting their best case and therefore, from assisting the Chamber to their fullest abilities. Indeed, in conducting its examination, a party makes several strategic decisions on appropriate subjects to cover, to ensure that the questioning is focussed and efficient, so it may present its best case, spare the witness unnecessary trauma and time, and save the Court's time and resources. However, following the Decision, the Parties are now compelled to be over-inclusive in their initial examination of topics and are prevented from exercising any proper forensic discretion in streamlining such examination. When the initial examination is less focussed, this will have a domino effect on the examination by the non-calling party, and consequently the re-examination. Contrary to the Directions of Conduct of Proceedings,¹⁹ this will water down the exceptional nature of any re-examination *per se*.

15. Likewise, even though the Parties are not precluded from questioning the witness on topics not raised in its initial examination, such questioning will in most circumstances be of little or no effect without the necessary documentary or visual

¹⁷ ICC-02/11-01/15-T-13-Red-ENG, p. 18 lns. 13-20; ICC-02/11-01/15-T-14-ENG p. 2 lns. 14-16, stating that "[w]itnesses are called in front of the Chamber [...] with the precise obligation, under the threat of perjury, to tell the truth (Articles 69, 70 and Rule 140)."

¹⁸ ICC-02/11-01/15-T-32-ENG, p. 61 lns. 8-16.

¹⁹ ICC-02/11-01/15-205, para. 38.

support. The documents and videos provide the essential basis for questioning. Without them, both counsel and witness will be compelled to engage in speculation. And since this process may be unfair to the witness, the Chamber will likely put an end to such questioning, rendering any re-examination incomplete and ineffective.

b) The use of material in re-examination, including those not previously submitted, expedites the proceedings

16. This Chamber has consistently underscored the need to conduct these proceedings in an efficient and expedited manner. Indeed, the Chamber “is fully committed to uphold the principle of expeditiousness of the proceedings.” To this end, it will not permit “an inefficient examination of a witness”, nor will it allow “unfocused or repetitious questioning”.²⁰ Yet, the Decision does just that. Not only does it unnecessarily prolong proceedings; it also encourages counsel’s examination of the witness to be ineffective and compels the Chamber to make interlocutory rulings on the relevance of individual pieces of evidence.

17. First, albeit an unintended consequence, the Decision needlessly expands the time required for the calling party’s examination. As a rule, the calling party is expected to focus its examination of an individual witness on distinct topics and material. However, because it is difficult to anticipate and predict, with precision, what lines may be explored by the non-calling party, the calling party would have to unnecessarily broaden its initial examination—an undesirable result for both the Chamber and the Parties. In particular, to be able to use certain material in re-examination such that they are not considered “new”, the calling party would have to anticipate, include in its list and to take the witness through every conceivable document, photo and video in its initial examination itself. Indeed, the calling party is placed in an impossible situation: it cannot rely on the non-calling party’s use of material—only notified 24 hours before its questioning—especially when its choice of such material could be selective and favour the non-calling party’s case. To

²⁰ ICC-02/11-01/15-T-13-Red-ENG, p. 1 lns. 14-24.

compensate, the non-calling party is likely to equally lengthen its examination. Moreover, because of the sheer volume of the documents and materials used in the testimony, both parties will thus require additional time to prepare for and complete their witness examinations.

18. Second, if the Decision's express terms are continued, counsel's examination and witness testimony will not benefit from a focussed presentation. Rather, they would be repetitive and time-consuming. Proceedings will also be interrupted by frequent objections questioning the relevance and unfocussed nature of the testimony.

19. Finally, although this Chamber has already deferred its determinations of the relevance and admissibility to the end of the case and will rule on admissibility during the trial only exceptionally,²¹ these frequent objections will require the Chamber to intervene more often to provide direction and restore order in the proceedings. Significantly, the Chamber will need to make spot decisions on the relevance of a particular line of testimony or document/video, so the proceedings may continue. In these circumstances, contrary to its expressed preference, not only will the Chamber be compelled to make premature, multiple and contradictory decisions on particular pieces of evidence, the evidence will not be uniformly treated.²² And once again, contrary to the Chamber's preference, these "intermediate rulings on evidence, by their very nature based on a partial knowledge of the case, might themselves become the subject matter of additional interlocutory litigation thereby further disrupting the course of the proceedings."²³ The trial proceedings will be extended.

²¹ ICC-02/11-01/15-405, paras. 12-18.

²² *Contra* ICC-02/11-01/15-405, paras. 14, 15.

²³ ICC-02/11-01/15-405, para. 14.

c) *Prohibiting the use of material, not previously submitted, contradicts the Chamber's prior principles and decisions*

20. The Decision, prohibiting the use of material not previously submitted during re-examination, is inconsistent with no less than four key principles that this Chamber has consistently recognised. Indeed, the unintended consequences of this Decision contradict:

- *The principle of expedited proceedings*: despite the Chamber's repeated emphasis on conducting expedited and efficient proceedings, this Decision has the effect of unduly prolonging them.²⁴
- *The principle of eliciting genuine, undistorted evidence and spontaneity of evidence*: despite the Chamber's repeated emphasis that evidence should be brought before it in "a genuine and undistorted manner" to preserve the witness's "helpful spontaneity",²⁵ this Decision prevents witnesses from offering spontaneous evidence.²⁶
- *The principle of deferred admissibility determinations*: despite the Chamber's express ruling that it will determine the admissibility of individual pieces of evidence only at the end of the trial, the Decision compels the Chamber to make isolated decisions on the relevance of individual pieces of evidence, without a sense of the totality of the evidence.²⁷
- *The principle of fairness*, requiring counsel to put the basis of their questions to the witness: despite the Chamber's decision to ensure fairness to the witnesses by requiring counsel to put the basis of their questioning to those witnesses,²⁸

²⁴ See paras. 16-19.

²⁵ ICC-02/11-01/15-355, para. 16.

²⁶ See paras. 9-15.

²⁷ See para. 19.

²⁸ ICC-02/11-01/15-T-14-ENG, p. 3 lns. 15-22, noting that parties are allowed "[t]o confront a witness with facts or circumstances (such as documents, prior statements of the witness or other persons, et cetera) [...]."

the Decision encourages counsel to question witnesses without the underlying documentary supporting material and is unfair to the witnesses.²⁹

21. To conclude, as the Chamber's practice during the questioning of P-0625 has already shown, the Chamber should consider the use of material in re-examination on a case-by-case basis. In its absence, and as explained above, the Chamber's core mandate to determine the truth and conduct expedited proceedings will be adversely affected.

22. If the Decision is interpreted in its plain terms, it results in several challenges identified above. However, as it appears from the Chamber's practice, it meant to be flexible to respond to situations as they unfold in the courtroom. The Prosecution requests the Chamber to confirm its flexible, case-by-case approach, and clarify the Decision's plain terms accordingly.

B. Request to seek leave to appeal

23. In the alternative, the Prosecution seeks leave to appeal the Decision on one discrete Issue: "whether the Trial Chamber, in limiting the use of material during re-examination by the calling party to only that already submitted with that witness, prevented the presentation of genuine, undistorted and effective *viva voce* evidence which is relevant to the Chamber's determination of the truth." The Issue arises from the Decision,³⁰ and is appealable. It also meets the remaining article 82(1)(d) criteria.

24. The Prosecution is mindful of the extraordinary nature of interlocutory appeals³¹ and appreciates the discretion afforded to the Trial Chamber in managing the conduct of the proceedings.³² However, this discretion is not unfettered and the Appeals Chamber's intervention is necessary when the discretion is abused, even if

²⁹ See para. 15.

³⁰ Decision.

³¹ ICC-01/12-01/15-T-1-ENG, p. 12 lns. 7-16; ICC-01/05-01/13-T-10-CONF-ENG, p. 3 lns. 3-12; ICC-02/11-01/15-T-15-Red-ENG, p. 16 lns. 1-3.

³² ICC-02/11-01/15-355, para. 15.

an error of law or fact has not been identified.³³ The Decision, when taken with its plain terms, amounts to one of those exceptional cases requiring the Appeals Chamber's immediate intervention.

(i) The Issue arises from the Decision

25. The Issue relates to the material and related testimony disallowed in re-examination. Because the Decision limits the use of material in re-examination to that already submitted to a witness, it precludes spontaneous and genuine testimony on areas relevant to the case. The Issue is based on two premises: first, new material that the calling party intends to use in re-examination—as well as the related testimony that it seeks to elicit from the witness—are relevant to the Chamber's truth-seeking function;³⁴ second, relevant testimony will still be disallowed even if the calling party can question the witness on areas related to the material: by not showing the material to the witness, relevant oral evidence will be omitted or presented in a distorted manner. Both premises flow as real consequences of this Decision, and thus arise from it.

26. First, the evidence adduced in re-examination is relevant to the Chamber's truth-seeking function. Re-examination is already limited to new topics raised in the non-calling party's examination.³⁵ The calling party thus needs to make a judgement call on the need for re-examination and the Trial Chamber must authorise this questioning. Because of these two filters, any re-examination *per se* will generally lead to evidence relevant to the case and to the Chamber's determination of the truth.

27. Second, even if witnesses can be questioned on new topics, their responses—in substance but also in demeanour—would have been different had they been shown directly related material. Showing supporting material to witnesses will focus their answers and will assist them to recall further information they would have otherwise omitted. On the other hand, if the material contradicts their testimony, the

³³ ICC-01/09-02/11-1032 OA5, para. 25.

³⁴ See paras. 9-15.

³⁵ ICC-02/11-01/15-205, para. 38.

witnesses will have to explain the discrepancies. This evidence will also be relevant to determine the material's reliability. In addition, the Chamber will not benefit from the witnesses' spontaneous reaction and demeanour if confronted with the material, which is highly relevant to assess the witnesses' testimony.³⁶

28. On 17 March 2016, and during the questioning of Witness P-0625, the Prosecution (calling party) did not address one of the incidents charged (the 3 March 2011 incident). However, the Defence (non-calling party) questioned the witness on this topic.³⁷ The incident was thus a new topic raised in cross-examination which then fell squarely within the scope of re-examination.³⁸ The Trial Chamber permitted the Prosecution to conduct re-examination.³⁹ Neither the Chamber nor the Parties questioned the appropriateness and relevance of this topic in re-examination. Rather, the Defence only objected to using material which had not been previously submitted to that witness.⁴⁰ In the Decision, the Chamber granted the Defence's request and ruled that material not previously submitted with a witness could not be used in the re-examination of that witness.⁴¹ While the Prosecution could question the witness on the topic,⁴² it was prohibited from showing him any related new material—even when the witness expressly asked to see it.⁴³ Therefore, the Prosecution had to stop its questioning on this topic and moved to another subject.⁴⁴ As a result, the Prosecution—and the Chamber—were deprived of genuine *viva voce* evidence from the witness on a relevant topic.

29. Because the Decision is the determinative ruling on the material not permitted in re-examination and, therefore, on the excluded testimony relating to that material, the Issue arises from the Decision. Further, the Issue also meets the remaining article 82(1)(d) criteria.

³⁶ ICC-01/05-01/08-1386 OA5 OA6, para. 76; ICC-01/05-01/08-3343, para. 230.

³⁷ ICC-02/11-01/15-T-31-ENG, p. 34 ln. 4-p. 38 ln. 4; p. 39 lns. 3-21.

³⁸ ICC-02/11-01/15-205, para. 38.

³⁹ ICC-02/11-01/15-T-32-ENG, p. 42 lns. 16-22.

⁴⁰ ICC-02/11-01/15-T-32-ENG, p. 49 ln. 17-p. 52 ln. 11; p. 65 ln. 22-p. 68 ln. 4; ICC-02/11-01/15-T-33-ENG, p. 3 ln. 22-p. 4 ln. 25.

⁴¹ Decision.

⁴² ICC-02/11-01/15-T-32-ENG, p. 55 lns. 2-4.

⁴³ ICC-02/11-01/15-T-32-ENG, p. 61 lns. 8-16; p. 62 lns. 11-14.

⁴⁴ ICC-02/11-01/15-T-32-ENG, p. 62 ln. 16.

(ii) *The article 82(1)(d) test is met*

(a) *The Issue significantly affects the fairness of the proceedings*

30. The Issue significantly affects the fairness of the proceedings. First, the Issue will have an impact on the Trial Chamber's duty to determine the truth. The Trial Chamber has been—and will be—deprived of *viva voce* evidence relevant to its truth-seeking function.⁴⁵ The spontaneous and undistorted response of witnesses when shown the material in the courtroom will be missing. This omission will not be cured by permitting the Prosecution to question the witnesses on the relevant topics; the witnesses' answers, including omissions or contradictions, reaction and demeanour will necessarily be different had they been shown the material. As a result, evidence will not be adduced, or will be available in a selective and/or distorted manner. As noted above,⁴⁶ this goes against the principles of orality and immediacy that this Chamber pursues;⁴⁷ and leads to scenarios where the witnesses are prohibited from speaking their truth.⁴⁸

31. Similarly, fairness is not restored by introducing the document through a bar table motion. Indeed, the Chamber will assess the totality of the evidence and decide on its relevance, probative value and weight at the end of the trial.⁴⁹ However, even if the bar table motion is allowed, the Chamber may consider that the lack of authentication or corroboration through a witness adversely affects the material's reliability and probative value.⁵⁰ Moreover, the Parties (in their final submissions) and the Chamber (in the article 74 judgment) will have to review hundreds of transcripts to identify passages which may relate to a particular document or video—without an explicit reference to that material in the transcript as it was not shown in the courtroom. Not only is this an unnecessarily onerous manner of proceeding, the

⁴⁵ See fn. 11.

⁴⁶ See para. 13.

⁴⁷ ICC-02/11-01/15-355, para. 16.

⁴⁸ ICC-02/11-01/15-T-32-ENG, p. 61 lns. 8-16. *Contra* ICC-02/11-01/15-T-13-Red-ENG, p. 18 lns. 13-20; p. 19 lns. 4-5.

⁴⁹ ICC-02/11-01/15-405, para. 12, p. 10.

⁵⁰ ICC-01/05-01/08-1386 OA5 OA6, para. 76; ICC-01/04-01/07-2635, para. 12; *Akayesu* Appeal Judgement, para. 134.

piecemeal approach may lead to misapprehending the material's true relevance, probative value and weight.

32. Second, the Issue significantly affects the Prosecution's duty to establish the truth under article 54(1)(a). By barring the use of material in re-examination and the ensuing spontaneous evidence, the Prosecution's truth-seeking duty will be seriously undermined. A calling party cannot predict which topics will be raised by the non-calling party.⁵¹ This is particularly so, as in this case where cross-examination is not limited to topics raised by the calling party.⁵² Moreover, fresh evidence may be uncovered during cross-examination, and the Prosecution will be unable to effectively anticipate and respond to it, especially in the absence of witness preparation in this case.

33. Further, the Prosecution will not be able to adequately restore a witness's credibility which may have been challenged in the non-calling party's examination, or to confront a witness whose evidence does not correspond with available material. As noted above, the Prosecution may thus be placed in an untenable legal and ethical position, at odds with its own statutory and code of conduct obligations.⁵³

34. The Issue also affects the calling party's discretion to present and argue its best case.⁵⁴ As developed above,⁵⁵ the Decision eliminates the possibility of strategic choices that a party may make to limit its examination to key issues and save the Court's time. Rather, it will extend the party's questioning, and submission of material. Moreover, the party's questioning during re-examination will be unfocused, hypothetical and unsupported. In such cases, the Trial Chamber may stop the questioning as speculative and unfair to the witness. In fact, the calling party will

⁵¹ ICC-01/04-01/06-T-138-Red-ENG, p. 23 lns. 7-21.

⁵² Rule 140(2)(b); ICC-02/11-01/15-205, para. 36.

⁵³ See para. 12.

⁵⁴ ICC-02/04-01/15-220, para. 8.

⁵⁵ See paras. 16-19.

be prohibited from questioning a hostile witness in re-examination altogether—as doing so without supporting material is already considered unfair.⁵⁶

35. Third, the Issue is also unfair to the witnesses. The calling party will be unable to properly restore witness credibility challenged in cross-examination. This may have an impact on the psychological and even physical well-being of the witnesses. The witnesses will leave the Court feeling unfairly treated because the calling party did not use all available material to adequately present the facts. The public may also erroneously perceive the witnesses and their testimony which may have adverse consequences for the witnesses themselves.

36. As shown above, the fairness of the proceedings is undoubtedly affected. This Court's jurisprudence also highlights the need for such intervention when such unfairness occurs: leave has been granted where issues have a direct impact on the way the evidence is assessed, how the parties can challenge the credibility and consistency of the evidence presented,⁵⁷ and whether the Prosecution's evidence meets the required burden of proof.⁵⁸

(b) The Issue significantly affects the expedition of the proceedings

37. The Issue will also affect the timely and efficient conduct of proceedings⁵⁹ because, as noted above,⁶⁰ it will unnecessarily complicate and delay the Chamber's determination of the Accused's responsibility.⁶¹

38. First, the calling party, unable to benefit from the use of supporting material, will conduct longer and convoluted re-examinations to properly address new issues raised during cross-examination. Second, the calling party will be forced to include in the list of material to be used with a witness, and to submit during its questioning, a large amount of materials, some of them with no apparent link to the witness. This

⁵⁶ *Contra* ICC-02/11-01/15-T-14-ENG, p. 3 lns. 10-22.

⁵⁷ ICC-01/04-01/10-487, paras. 11, 24, 39.

⁵⁸ ICC-01/04-01/10-487, para. 39.

⁵⁹ *Norman* Decision, paras. 6, 25; *Milosevic* Decision 6 May 2003.

⁶⁰ *See* paras. 16-19.

⁶¹ *Milosevic* Decision 22 September 2004, paras. 56, 64-65, 70; *Brima* Decision, paras. 21-22; *Kallon* Decision, para. 34.

would entail additional litigation and premature, multiple and contradictory admissibility rulings⁶² as well as broader and longer examinations by the non-calling party.⁶³ Third, the calling party may request to call additional witnesses to tender documents through them, which could have been submitted with prior witnesses in re-examination.

39. Finally, procedural vehicles such as rule 68(2)(a) and (b) allowing the introduction of prior recorded testimony in *lieu* of oral evidence will be stripped of their purpose. The calling party will have to still submit materials in its examination in order to use them in re-examination.

(c) The Issue significantly affects the outcome of the trial

40. The Issue significantly affects the amount and type of evidence to be considered by the Trial Chamber in reaching its article 74 decision,⁶⁴ and thereby the outcome of the trial.

41. First, relevant *viva voce* evidence will not be adduced in Court, or will be presented in a selective, distorted or simply different manner. Second, documentary evidence may be defectively assessed. As noted above, and in order to determine the relevance, probative value and weight of a piece of material, the Parties and the Chamber will have to review the entire record to identify *viva voce* evidence relevant to that material. As there will be no explicit reference to the material, there is a risk that relevant testimony is overlooked and that the material is not adequately assessed. Further, and even if a bar table motion is allowed, the material may be given less weight than if it had been submitted through a witness who could have directly vouched for its reliability or corroborated its content.⁶⁵

⁶² See para. 19.

⁶³ See para. 17.

⁶⁴ ICC-01/05-01/08-1169, para. 35.

⁶⁵ See fn. 49.

(d) The Appeals Chamber's immediate intervention is necessary

42. The Decision affects the questioning and the use of material by both Parties in the entire trial. Because this trial is at an early stage, and noting the different practices of the Chambers,⁶⁶ it is essential that the rules on the submission of evidence and questioning of virtually all the witnesses are fair, clear and predictable. While acknowledging and respecting the Chamber's discretion to determine its directions for the conduct of proceedings, the Appeals Chamber will provide guidance on the parameters of how such discretion is exercised and will ensure that the trial continues "along the right lines provid[ing] a safety net for the integrity of proceedings."⁶⁷

Relief Requested

43. For the above reasons, the Prosecution requests the Chamber to clarify the scope of its Decision prohibiting the use of materials not previously submitted to it, and confirm that it intends to maintain a flexible and case-by-case determination of the material that may be used in re-examination. If the Chamber intends to further amend the existing Directions on Conduct of Proceedings, the Prosecution requests the Chamber to provide notice of potential amendments and to hear the Parties' submissions on them.

44. In the alternative, the Prosecution requests the Chamber to grant its Application to seek leave to appeal the Decision. The Issue meets the article 82(1)(d) criteria. The Prosecution requests the Chamber, under article 64(3)(a),⁶⁸ to stay the Decision's implementation until the Trial Chamber rules on the Application (and if leave is granted, until the Appeals Chamber rules on the Prosecution's request for

⁶⁶ ICC-01/04-01/06-T-138-Red-ENG, p. 22 ln. 10-p. 24 ln. 10 where the *Lubanga* TC permitted material not originally in its list as long as it addressed an issue raised in cross-examination; ICC-01/05-01/13-T-12-Red-ENG, pp. 81-87, where the *Bemba et al.* TC permitted a document not in its list for that witness in re-examination. However, while the same TC allowed the Prosecution to use a new document (ICC-01/05-01/13-T-35-CONF-ENG, p. 80 ln. 12-p. 81 ln. 8), it did not later allow two documents (p. 81 ln. 14-p. 83 ln. 9).

⁶⁷ ICC-01/04-168 OA3, paras. 14-15, 18.

⁶⁸ ICC-02/11-01/11-809, para. 38; ICC-01/04-01/06-T-314 ENG, p. 21 ln. 25-p. 22 ln. 5.

suspensive effect).⁶⁹ In the interim, the Trial Chamber should rule on a case-by-case basis on any request by the calling party to use new material during re-examination. If the Decision is not suspended, there is a risk that relevant testimony is lost, material is incompletely assessed or witnesses may need to be recalled for questioning.



Fatou Bensouda, Prosecutor

Dated this 30th day of March 2016

At The Hague, The Netherlands

⁶⁹ Request for suspensive effect would then be made before the Appeals Chamber.