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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

Prosecution's Consolidated Response to the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo's applications for leave to appeal the "Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016" (ICC-02/11-01/15-773)

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Introduction

1. Mr Gbagbo's¹ and Mr Blé Goudé's² Applications for leave to appeal the Majority's Decision of 9 December 2016 allowing the submission of the Prosecution's documentary evidence³ should be dismissed.⁴ The Applications largely challenge the 29 January Decision setting out the evidentiary regime of the case,⁵ where the Majority of the Chamber decided, as a general rule, to defer the assessment of the relevance, probative value and potential prejudice of the evidence ("standard evidentiary criteria")⁶ until the Chamber's deliberation of its article 74 decision. This regime, adopted by two other Chambers,⁷ is—as the Appeals Chamber found—consistent with the Rome Statute.⁸

2. Both Applications, by misunderstanding this regime and misreading the Decision, fail to show how any of the eleven purported issues arise from the Decision and are appealable. Nor do they meet the remaining requirements under article 82(1)(d). The Applications should therefore be dismissed.

Submissions

A. The Issues are not appealable issues

3. Gbagbo raises seven issues and Blé Goudé raises four issues.⁹ An "issue" is a subject the resolution of which is "essential for the determination of matters arising

¹ ICC-02/11-01/15-776-Red ("Gbagbo Application").

² ICC-02/11-01/15-777 ("Blé Goudé Application"). Collectively, "the Applications". The Prosecution will refer to "Gbagbo" and "Blé Goudé" or, collectively, "the Defence".

³ ICC-02/11-01/15-773 ("Decision"). The Decision addressed the Prosecution's requests ICC-02/11-01/15-583-Conf; ICC-02/11-01/15-616-Conf; T-72-Conf, p. 25, ln. 12 *et seq.*; and T-74-Conf, p. 4, ln. 24 *et seq.*

⁴ On 13 December 2016, Judge Henderson attached a dissenting opinion. ICC-02/11-01/15-773-AnxI ("Dissenting Opinion").

⁵ ICC-02/11-01/15-405 ("29 January Decision").

⁶ The Prosecution uses the terminology adopted by Trial Chamber IX in the *Ongwen* case. See ICC-02/04-01/15-615 ("Ongwen Intercept Evidence Decision"), para. 4(ii); ICC-02/04-01/15-641 ("Ongwen Intercept ALA Decision"), para. 8.

⁷ In the *Ongwen* case, see ICC-02/04-01/15-497 ("Ongwen Initial Directions"), paras. 24-28. In the *Bemba et al.* case, see ICC-01/05-01/13-1285 ("Bemba et al. Documentary Evidence Decision"), paras. 7-15.

⁸ ICC-01/05-01/08-1386 OA5 OA6 ("Bemba Admissibility Appeal Judgment), para. 37.

⁹ Collectively referred to as "Issues".

in the judicial cause under examination”.¹⁰ The correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). The sole question is whether an issue meets the criteria for leave to appeal.¹¹ As set out below, none of the Issues arise from the Decision. They are not appealable.

a. Issues alleging that the Chamber erred in considering the Defence submissions as requests for reconsiderations

i. Gbagbo’s First Issue and Blé Goudé’s First Issue do not arise from the Decision

4. Both Gbagbo and Blé Goudé—in their First Issues¹²—allege that the Chamber erred in considering their objections on the relevance and admissibility of the evidence as requests to reconsider the Chamber’s evidentiary regime set out in the 29 January Decision. Both Issues misstate the Decision. In doing so, both Defence teams conflate two separate matters: the first is the Parties’ right and obligation—according to rule 64(1) of the Rules of Procedure and Evidence and the 29 January Decision—to raise issues relating to relevance or admissibility at the time the evidence is submitted; the second is the Chamber’s prerogative and preference in this case to defer evidentiary assessments (and consider the issues raised by the Parties) until the end of the case. As such, the Issues are not appealable. Moreover, Gbagbo also advances wide-ranging arguments challenging in general the evidentiary regime of the case set out in the 29 January Decision. Such submissions do not amount to Issues arising from the Decision.

5. First, the Defence teams fail to discern that the parties’ right to raise issues on the relevance or admissibility of documents are distinct from the Chamber’s assessment of those objections.¹³ While the former must be made at the time the

¹⁰ ICC-01/04-168 (“DRC Extraordinary Review Decision”), para. 9.

¹¹ ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision no. ICC-02/04-01/05-5), para. 22.

¹² Gbagbo Application, paras. 17-24 (“*La Chambre a erré en droit en refusant de prendre en compte les arguments mis en avant par la Défense aux motifs qu’il s’agirait d’une demande de reconsidération de sa décision du 29 janvier 2015*” or “Gbagbo’s First Issue”); Blé Goudé Application, paras. 11-15 (“Whether the Chamber erred in law in finding that the Defence submissions in response to the Requests merely sought reconsideration of the Decision of 29 January 2016 whereas the Defence submissions are legitimate applications of the provisions of Rule 64(1) of the Rules of Procedure and Evidence (“the Rules”) and of paragraph 17 of the Decision of 28 January 2016” or “Blé Goudé’s First Issue”).

¹³ Gbagbo Application, paras. 18-21; Blé Goudé Application, paras. 12, 14.

evidence is submitted, the Majority has chosen to defer all evidentiary assessments—barring those concerning procedural bars—to the end of the trial.¹⁴

6. Second, the Defence teams fail to acknowledge the Majority’s finding that, once the Defence objections had been registered, it did not consider it “necessary or appropriate” to rule on the relevance or admissibility of the evidence “in the present instance”.¹⁵ Decisions on the timing of when a Chamber may rule on relevance or admissibility are discretionary in nature.¹⁶ In this case, and consistent with the 29 January Decision,¹⁷ the Majority has exercised its discretion to determine that it will make no decision at this stage. The Defence teams merely disagree with the Majority’s exercise of discretion.

7. Third, to the extent that Gbagbo advanced arguments on their preferred evidentiary regime,¹⁸ these are no more than a belated challenge to the 29 January decision. The Defence teams have failed to read the Chamber’s rejection of “general submissions made by the parties seemingly seeking reconsideration of its previous decision” in its proper context.¹⁹ The Chamber’s statement was a response to these “general submissions”. Nor can either Defence team challenge the adoption of the submission regime, as set out in the 29 January Decision at this stage.²⁰ Any challenge on the merits of the system should have been made immediately following the 29 January Decision, which the Defence did not seek to appeal.

8. For these reasons, Gbagbo’s First Issue and Blé Goudé’s First Issue should be dismissed.

¹⁴ See 29 January Decision, paras. 12-17. See also, Decision, para. 33 (referring to article 69(7) and rule 68, where “a preliminary evaluation of the evidence is required”).

¹⁵ Decision, para. 35.

¹⁶ *Bemba* Admissibility Appeal Judgment, para. 37.

¹⁷ 29 January Decision, para. 17 (noting that “the Chamber in the exercise of its discretion, may rule on admissibility of certain items whenever this may be necessary or appropriate in order to preserve the expeditiousness and fairness of the proceedings [...]”).

¹⁸ See e.g., Gbagbo Submissions: ICC-02/11-01/15-641-Conf (“29 July 2016 Gbagbo Response”), paras. 15-17; ICC-02/11-01/15-664-Conf (“9 September 2016 Gbagbo Response”), paras. 10-12; ICC-02/11-01/15-716-Conf (“7 October 2016 Gbagbo Response”), 10-12.

¹⁹ Decision, para. 33.

²⁰ See e.g., Gbagbo Application, paras. 22-23.

b. Issues challenging the findings related to the impact on expedition of the proceedings

9. Although Gbagbo's Second Issue and Blé Goudé's Second Issue differ slightly, both Issues contest the Majority's finding that the submission of documentary evidence would expedite the proceedings.²¹ Both Issues must fail. They are largely based on a misreading of the Decision, and do not arise from it.

i. Gbagbo's Second Issue does not arise from the Decision

10. Gbagbo's Second Issue—on the Chamber's purported finding that the submission of documents without a witness should become 'common practice'²²—rests on a misreading of the Decision and fails to recognise that the Amended Directions already allow for this practice.²³ It does not therefore arise from the Decision.

11. First, regarding Gbagbo's arguments on "*le principe de l'oralité*", the Majority addressed, and "attached [no] consequence", to Gbagbo's similar prior submissions that the principle of orality was undermined by submitting documents without a witness.²⁴ Gbagbo's arguments were indeed inapposite: the documentary evidence submitted is not "witness testimony", and is thus not governed by article 69(2), expressing that witness testimony shall, barring the exceptions provided for in the Statute and the Rules, be given in person. As a result, documentary evidence other than prior recorded witness testimony can be submitted in ways other than through a witness without affecting the principle of orality enshrined in article 69(2).

12. In any event, the Majority further added that "the Appeals Chamber [has] reiterated that [this] principle [...] is not absolute".²⁵ Contrary to Gbagbo's suggestion, the Majority did not use the recent Gbagbo Rule 68 Appeal Judgment to

²¹ Decision, para. 34. See Gbagbo Application, paras. 25-35 and Blé Goudé Application, paras. 16-20.

²² "*La Chambre a erré en estimant que l'introduction d'éléments de preuve sans passer par le truchement d'un témoin devait devenir une 'common practice' dans la présente affaire*". ("Gbagbo Second Issue"). See Gbagbo Application, paras. 25-35.

²³ See ICC-02/11-01/15-498-AnxI ("Amended Directions").

²⁴ Decision, para. 34. See 29 July 2016 Gbagbo Response, paras. 2-18, referred to in Decision, para. 21.

²⁵ Decision, para. 34 citing ICC-02/11-01/15-744 OA8, para. 77 ("Gbagbo Rule 68 Appeal Judgment"). *Contra* Gbagbo Application, para. 27.

justify its Decision.²⁶ The Judgment was only quoted to address Gbagbo's misplaced arguments.

13. Second, the Majority did not state that submission of documents without a witness should become the "rule".²⁷ Instead, the Majority encouraged this practice where it is not prejudicial to the rights of the accused.²⁸ Gbagbo's claim that the Decision "abolishes" the principle of orality is similarly misplaced and unfounded.²⁹

14. Third, Gbagbo fails to acknowledge that the Amended Directions allow for the introduction of documentary evidence without a witness. Paragraph 43 expressly allows for such introduction.³⁰ Thus, to the extent that the Gbagbo's application expresses its general discontent with such introduction, the challenge does not arise from this Decision, but from the earlier Amended Directions rendered on 4 May 2016. This is a belated and impermissible challenge.

15. Fourth, Gbagbo's submissions that the Chamber has expedited the trial without considering, or at the expense of, the accused's rights are speculative.³¹ To the contrary, the Chamber has properly considered the accused's rights. The Defence is allowed to contest the submission of documentary evidence, and register its objections on the record. It has done so. Moreover, it can raise further objections when the Prosecution supplements its prior submissions, either orally or in writing, and in its closing arguments. Likewise, since the same evidentiary regime governs the presentation of the defence case, the Defence is not prejudiced.

16. Finally, the Majority was not required to provide support for its statement that the submission of documentary evidence "may ultimately reduce the amount of time

²⁶ Gbagbo Application, para. 27.

²⁷ Gbagbo Application, para. 27.

²⁸ Decision, para. 34.

²⁹ *Contra* Gbagbo Application, para. 34.

³⁰ Amended Directions, para. 43: "In the interests of the efficiency of the proceedings, the parties are encouraged to introduce documentary evidence other than testimonial (i.e. documents and audio-visual material), whenever feasible. They may introduce documentary evidence directly, *without producing it by or through a witness.*" (emphasis added).

³¹ Gbagbo Application, para. 28.

devoted to hearing evidence in court.”³² The statement was merely a proposition of common sense. Indeed, submitting and discussing documents with a witness in court would take longer. And Gbagbo’s co-accused acknowledges that this is so.³³ Gbagbo merely disagrees with this finding.³⁴

17. For these reasons, Gbagbo’s Second Issue should be dismissed.

ii. Blé Goudé’s Second Issue does not arise from the Decision

18. Blé Goudé’s Second Issue—whether the Chamber contradicted itself by encouraging the Parties to introduce documentary evidence so as to reduce the amount of time devoted to hearing evidence in court while at the same time causing delay postponing any rulings on the relevance or admissibility of evidence until the end of the trial—does not arise from the Decision.³⁵ Rather, it is an unsupported contrary opinion about the likely consequences of the Decision.

19. First, Blé Goudé’s view that “[the] goal [of reducing delay] is rendered materially impossible [in these circumstances]” is ³⁶ simply conjecture.

20. Second, Blé Goudé fails to recognise that deferring evidentiary assessments to the deliberations stage could expedite the proceedings.³⁷ At the least, such deferral assists in eliminating interlocutory litigation on individual pieces of evidence. As this Chamber has previously explained, “[deferral] will prevent (or at least significantly circumscribe) the need for multiple—and possibly contradictory—rulings on one and the same item of evidence and thus contribute to the expeditiousness of the trial.”³⁸ Other Chambers have also echoed this assessment.³⁹

³² *Contra* Gbagbo Application, para. 29.

³³ Blé Goudé Application, para. 18.

³⁴ Gbagbo Application, para. 30.

³⁵ Blé Goudé Application, paras. 16-20 (“Blé Goudé’s Second Issue”).

³⁶ Blé Goudé Application, para. 19.

³⁷ Blé Goudé Application, para. 20.

³⁸ 29 January Decision, para. 14.

³⁹ See e.g., *Bemba et al.* Documentary Evidence Decision, para. 11 (“[A] significant amount of time is saved by not having to assess an item’s relevance and probative value at the point of submission and again at the end of the proceedings. [...] An extensive discussion and ruling on admissibility of evidence also risks infringing the

21. For these reasons, Blé Goudé's Second Issue should be dismissed.

c. Issues challenging the findings on relevance

22. Although Gbagbo's Sixth Issue and Blé Goudé's Fourth Issue are differently phrased, both Issues dispute the Chamber's finding that the documentary evidence submitted was relevant. Both Issues, however, fundamentally misinterpret the Decision. They do not, therefore, arise from the Decision.

i. Gbagbo's Sixth Issue does not arise from the Decision

23. Gbagbo's Sixth Issue suggests that the Chamber made a general finding that a document is 'relevant' once a witness discusses it.⁴⁰ This is based on a misunderstanding of the Decision.⁴¹ In fact, the Chamber found that the documents submitted were relevant to the charges quite independent of any discussion by the witness. Moreover, the Issue suggests that, when submitting documentary evidence, the Prosecution must go beyond the requirements set out in the Amended Directions. The Issue therefore does not arise from the Decision.

24. First, in claiming that documents related to P-0048 and P-0321 were not related to the charges, Gbagbo misstates the Decision.⁴² The Decision's plain text shows that both sets of documents—although related to the witnesses—were also related to the charges. With respect to the documents relating to P-0048, the Majority found that "[it did] not see a basis to deem them irrelevant to the charges".⁴³ Moreover, the Majority found that that the documents further related to "[the] background information that has also been extensively referred to by witnesses during the questioning by both Defence teams (*i.e.* peace agreements)."⁴⁴ Likewise, with respect to the documents pertaining to P-0321, the Majority found that they

principle of expeditious proceedings and the accused's right to be tried without delay."; *Ongwen* Initial Directions, para. 25.

⁴⁰ "La Chambre a erré en droit en considérant que le critère de pertinence pour l'admission d'une pièce était rempli à partir du moment où un témoin avait, dans le cours d'un interrogatoire, traité d'un thème dans lequel pouvait être place la pièce." ("Gbagbo Sixth Issue").

⁴¹ Gbagbo Application, paras. 49-51.

⁴² Gbagbo Application, para. 50.

⁴³ Decision, para. 42.

⁴⁴ Decision, para. 42.

were relevant to “[the] purchase of weapons and police equipment and the role of FDS officers in alleged commission of crimes.”⁴⁵ All of this information falls within the scope of the confirmed charges in the case. Gbagbo’s misreading of the Decision undermines its argument.

25. Second, although it claims that the Prosecution should explain “*l’élément juridique des charges (élément contextuel, crimes, modes of responsabilité, etc.)*” when seeking submission of documentary evidence,”⁴⁶ the Gbagbo Defence’s argument overlooks the requirements of the Amended Directions. These Directions require a party to provide “[...] succinct information indicating (i) the item’s relevance, its probative value (including authenticity); and (ii) the date on which it was disclosed to the other parties.”⁴⁷ No further information is required. Thus, Gbagbo’s submissions are a disagreement with the Amended Directions, rather than an issue arising from the decision. Moreover, in disclosing incriminatory material, the Prosecution informs the Defence to which aspect of the charges the material relates.

26. For these reasons, Gbagbo’s Sixth Issue should be dismissed.

ii. Blé Goudé’s Fourth Issue does not arise from the Decision

27. Blé Goudé’s Fourth Issue—whether the Chamber put an unfair burden on the Defence by obliging them to devote their scarce resources and attention in responding to any document submitted to the case record regardless of the actual relevance of such document⁴⁸—is speculative. Possible future unfairness cannot be an issue for appellate resolution now. It also, in effect, challenges the evidentiary regime as set out in the 29 January Decision. The Issue therefore does not arise from the Decision.

⁴⁵ Decision, para. 43.

⁴⁶ Gbagbo Application, para. 50.

⁴⁷ Amended Directions, para. 44.

⁴⁸ Blé Goudé Application, paras. 24-27.

28. First, in contesting “the Chamber’s methodology of assessing evidence”,⁴⁹ Blé Goudé merely disagrees with the evidentiary regime set out in the 29 January Decision. In doing so, it disregards article 69(4) of the Statute and the *Bemba* Appeals Chamber’s jurisprudence which permit a Chamber to follow such a system.⁵⁰ The time for expressing such disagreement was at the time of the 29 January Decision. It cannot be re-litigated now.

29. In any event, the Majority exceptionally provided guidance in this case and considered the materials “relevant”, or at the least, “not irrelevant”.⁵¹ For these reasons, Blé Goudé’s Fourth Issue should be dismissed.

d. Issues alleging non-compliance with the Amended Directions and related topics

30. Both Defence teams raise several Issues disputing the “submission” of the documents in the circumstances of this case. All Issues must be dismissed because they fundamentally misunderstand the evidentiary regime adopted in this case.

i. Gbagbo’s Third Issue does not arise from the Decision

31. Gbagbo argues that the Majority erred by not rejecting the Prosecution’s requests to submit documentary evidence⁵² despite its purported non-compliance with paragraph 44 of the Amended Directions.⁵³ This Issue is no more than a mere disagreement with the Majority’s Decision allowing the submission of the evidence. Further, Gbagbo misunderstands again the Amended Directions and the submission evidentiary regime.

⁴⁹ Blé Goudé Application, para. 24.

⁵⁰ See *Bemba* Admissibility Appeal Judgment, para. 37 (stating “[...] alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person.”)

⁵¹ See Decision, para. 39 (noting for the 131 documents allegedly relating to the Gendarmerie and/or CECOS that “[the] Chamber cannot, at the present time, adhere to the submissions of the Defence that the items are irrelevant.”; para. 42 (noting for the documents related to P-0048 that “[it] does not see a basis to deem them irrelevant to the charges [...]”); para. 43 (noting for the documents related to P-0321 that “[it] was of the view that these items are relevant [...]).

⁵² See above, fn. 3.

⁵³ “La Chambre a erré en droit en ne rejetant pas les demandes du Procureur visant à déposer au dossier de très nombreux documents sans passer par le truchement d’un témoin alors que ces demandes n’étaient pas suffisamment étayées, contrairement aux exigences des paragraphes 43 et 44”. (“Gbagbo’s Third Issue”). See Gbagbo Application, paras. 32-34 (referring to Dissenting Opinion, para. 6) and 35.

32. First, the Majority never conditioned the formal “submission” of the evidence on the Parties’ compliance with paragraph 44 of the Amended Directions.⁵⁴ Other Chambers endorsing the same evidentiary regime as Trial Chamber I have not required such link either.⁵⁵

33. Second, it falls within the Chamber’s discretion to determine the consequences of the Parties’ non-compliance with the Amended Directions. In this case, the Majority decided it was sufficient to provide the Parties with guidance.⁵⁶

34. Moreover, the fact that the Chamber recognises evidence as “submitted” does not mean that the Chamber will, in its article 74 decision, find that the relevance and probative value of the evidence (including its authenticity) is automatically established and thus give weight to it. Rather, if the standard evidentiary criteria are not established, the Chamber will not rely on the evidence, even if “submitted”.

35. Accordingly, Gbagbo’s Third Issue does not arise from the Decision and should be dismissed.

ii. Gbagbo’s Fourth Issue does not arise from the Decision

36. Likewise, Gbagbo’s Fourth Issue—on the need for the Chamber to make a ruling on admissibility and authenticity at the time of submission⁵⁷— misrepresents the evidentiary regime established by the 29 January Decision.⁵⁸ Gbagbo argues that the Chamber must rule on the admissibility and authenticity of evidence when it is

⁵⁴ See *above*, para. 25. The Amended Directions and the 29 January Decision did not indicate that the evidence would not be considered as “submitted” if paragraph 44 of the Amended Directions was not complied with.

⁵⁵ See *Ongwen* Initial Directions, paras. 27-28. Also, ICC-02/04-01/15-615 (“*Ongwen* Interception Evidence Decision”), para. 10. In the *Bemba et al.* case, Trial Chamber VII similarly did not require the tendering party to establish a minimum evidentiary threshold to have the evidence submitted. See *Bemba et al.* Documentary Evidence Decision for Admission and ICC-01/05-01/13-1209 (“*Bemba et al.* Directions”).

⁵⁶ Decision, paras. 36-43.

⁵⁷ “*La Chambre a erré en droit en estimant qu’elle ne pouvait se prononcer sur l’admissibilité des pièces présentées ici par l’Accusation – et plus particulièrement sur leur authenticité – qu’à la fin du procès*” (“Gbagbo’s Fourth Issue”).

⁵⁸ Gbagbo Application, para. 6 refers to Decision, paras. 33 (where the Chamber simply rehearsed the well-established principle that evidence must not be assessed in isolation but as a whole) and 35 (where the Chamber refused to exceptionally rule on the admissibility of the evidence and decided to follow its general approach presented in the Decision of 29 January. See *Bemba* Admissibility Appeal Judgment, para. 37.

submitted.⁵⁹ This is incorrect. As the Appeals Chamber has found, a Chamber may decide not to rule *at all* on the admissibility of the evidence at that time, but rather defer the consideration of the standard evidentiary criteria to its deliberations of the article 74 decision.⁶⁰ The *Bemba et al.* Trial Chamber has followed this approach⁶¹ and considered, as a general rule, these criteria in its article 74 decision—without issuing ‘interlocutory’ decisions on the admissibility of the evidence.⁶²

37. In fact, the tendering party may not be able to fully substantiate the reliability of a piece of evidence at the time of submission. Estimations of evidentiary value (taking into account relevance, probative value and prejudice to the accused) will become more apparent as the trial proceeds.⁶³ This is consistent with the Chamber’s obligation to conduct a “holistic evaluation and weighing of all the evidence” in its article 74 decision, once all evidence has been submitted and discussed,⁶⁴ and explains the *rationale* of the evidentiary regime adopted by this and other chambers.⁶⁵ Indeed, the reliability of a piece of evidence (as well as other evidentiary criteria) can only be adequately determined at the end of trial when all relevant submissions and

⁵⁹ Gbagbo Application, para. 37.

⁶⁰ *Bemba* Admissibility Appeal Judgment, para. 37.

⁶¹ ICC-01/05-01/13-1989-Red (“Article 70 Judgment”), paras. 189-193. *Contra* Gbagbo Application, paras. 38 and 41.

⁶² Article 70 Judgment, paras. 195 (“In the same vein, the Chamber has carefully assessed the probative value including indicia of reliability and, where applicable, potential prejudice of the evidence upon which it relies.”) and 208 (“For non-oral evidence [...] the Chamber assessed, where appropriate, the content of the particular evidentiary items, their provenance, source or author (including the author’s role in the relevant events), and any other relevant material. The indicia of reliability have been assessed on a broad basis and the Chamber has borne in mind that a document, while having sufficient indicia of authenticity, may be unreliable”). *Contra* Gbagbo Application, para. 38.

⁶³ *Contra* Gbagbo Application, para. 39.

⁶⁴ ICC-01/05-01/08-3343 (“*Bemba* Judgment”), para. 225. Also ICC-01/04-01/06-3121-Red A5 (“*Lubanga* Appeal Judgment”), para. 22; and ICC-01/04-02/12-3 (“*Ngudjolo* Trial Judgement”), para. 45. *See also* [Ntagerura Appeal Judgment](#), para.174. The Chamber cannot not consider individual items of evidence (such as the testimony of different witnesses or documents) in isolation. *See* [Ntagerura Appeal Judgment](#), para.171.

⁶⁵ 29 January Decision, para. 13 (“it is only at the end of the trial, once the submission of the evidence will have been completed that the Chamber will be in the best position to meaningfully assess each item of evidence as submitted throughout the course of the proceedings. 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 to amend its assessment if and as required”); *Bemba et al.* Documentary Evidence Decision, para. 10 (“the Chamber is able to more accurately assess the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial. The relevance of a particular piece of evidence may not be possible to determine without consideration of other items of evidence, or even the totality of the evidence”); *Ongwen* Initial Directions, para. 25 (“Such an approach has been adopted in recent cases of this Court and is done, inter alia, because: (i) the Chamber is able to assess more accurately the relevance and probative value of a given item of evidence after having received all of the evidence being presented at trial [...]”).

objections have been heard and in the context of the evidence as a whole.⁶⁶ Thus, even if the Prosecution provides the information required by paragraph 44 of the Amended Directions (or even establishes *prima facie* the relevance and probative value of the evidence),⁶⁷ the Chamber does not have “all the information necessary to make a fully informed ruling on relevance and admissibility”.⁶⁸ The necessary information would only be available at the time of deliberations.⁶⁹

38. Accordingly, Gbagbo’s Fourth Issue does not arise from the Decision.

iii. *Blé Goudé’s Third Issue does not arise from the Decision*

39. Blé Goudé’s Third Issue⁷⁰ —stating that he cannot meaningfully raise objections pursuant to rule 64(1) due to the Prosecution’s deficient requests⁷¹ and the Chamber’s deferred evidentiary assessment⁷²— misunderstands the law and ignores the Appeals Chamber’s jurisprudence.

40. Rule 64(1) requires and permits a party to raise objections to the admissibility and relevance of the evidence at the time when the evidence is submitted. Exceptionally, objections may be raised later than this time, when they become known. However, the raising of objections under the rule is not conditioned upon the quantity and quality of the information provided by the tendering party to substantiate its submission, or upon the evidence meeting a certain evidentiary

⁶⁶ *Bemba* Judgment, para. 237: “the Chamber stressed that ‘[i]n its final assessment of the evidence [it would] consider all submissions and testimonial evidence related to the authenticity of [such evidence]’”. *Above*, fn. 64. *Contra*, Application, para. 37.

⁶⁷ This is the evidentiary standard applied by other Chambers to admit the evidence when it was submitted by the Parties. *See for example*, in *Lubanga* (ICC-01/04-01/06-1399, paras. 27-32) and *Katanga* (ICC-01/04-01/07-2635, para. 14).

⁶⁸ *Contra*, Gbagbo Application, para. 42 citing Dissenting Opinion, para. 10.

⁶⁹ *Above*, fns. 64 - 65.

⁷⁰ “Whether the chamber erred in law in finding that the evidence could not be assessed at this stage of the proceedings while considering at the same time that pursuant to Rule 64(1) of the Rules, the Defence has the obligation to raise any issue of relevance or admissibility of evidence at the time when the evidence is submitted to the Chamber”. (“Blé Goudé’s Third Issue”).

⁷¹ Blé Goudé Application, para. 22 referring to Decision, para. 35.

⁷² Blé Goudé Application, paras. 21, 23 referring to Decision, para. 38.

threshold at the time of submission. Neither the Rules nor the Appeals Chamber in interpreting rule 64(1) established such a connection.⁷³

41. Further, the Defence's right to raise issues pursuant to rule 64(1) is not undermined by any purported deficiency in the Prosecution's requests for submission. Due to its disclosure obligations, the Prosecution will have anyway disclosed any information in its possession relevant to the reliability of the evidence.

42. In fact, in this case, the Defence did challenge the relevance and reliability of most of the evidence submitted, despite now claiming that deficiencies in the Prosecution's requests for submission prevented it from doing so. Moreover, rule 64(1) also allows them to raise additional challenges, if other issues become known, throughout the trial and in their closing submissions.

43. Much less is the Chamber obliged to rule on the admissibility or relevance of the evidence when an objection under rule 64(1) is raised. This question has already been settled by the Appeals Chamber in its Bemba Admissibility Appeal Judgment.⁷⁴

44. Because of the foregoing, Blé Goudé's Third Issue does not arise from the Decision.

iv. Gbagbo's Fifth Issue does not arise from the Decision

45. Gbagbo's Fifth Issue—suggesting that the Defence is being wrongly required to prove the lack of authenticity of the documents provided by the Ivorian authorities⁷⁵—misinterprets, and disagrees with, the Decision and must consequently be dismissed. The Majority did not relieve the Prosecution from establishing the standard evidentiary criteria (including authenticity) of the evidence

⁷³ The Appeals Chamber never conditioned the exercise of rule 64(1) to the provision of information that meets a certain evidentiary threshold. In its *Bemba* Admissibility Appeal Judgment, on the one hand, it found that the Chamber's assessment of the evidentiary criteria may be deferred to the article 74 judgment (para. 37) and, on the other, it found that rule 64 objections must be primarily made when the evidence is "submitted" (paras. 48-49).

⁷⁴ *Bemba* Admissibility Appeal Judgment, paras. 37 and 48-50. See above, fns. 60 and 73.

⁷⁵ "La Chambre a erré en droit en estimant qu'il appartenait à la Défense de démontrer l'absence d'authenticité des pièces fournies par les Autorités ivoiriennes". ("Gbagbo's Fifth Issue").

submitted.⁷⁶ To the contrary, the Majority provided guidance to the Parties and identified certain aspects of the Prosecution's requests that must be addressed if the Prosecution wishes the Chamber to rely on the submitted evidence in its article 74 decision.⁷⁷

46. Further, the Majority noted that Gbagbo's submissions as to the alleged lack of authenticity are simply not backed by evidence.⁷⁸ Regardless of the Prosecution's burden to prove the accused's guilt beyond reasonable doubt, any party advancing an argument must substantiate its allegations.⁷⁹ The Majority noted that Gbagbo had not substantiated his allegations as to the fabrication and tampering of evidence⁸⁰ and concluded that there were no procedural bars (or other indication) requiring an admissibility ruling at that stage.⁸¹

47. In any event, as the Chamber did not need to consider the standard evidentiary criteria in the Decision, and will do so in its article 74 deliberations, Gbagbo still has the opportunity to substantiate his allegations.

48. Gbagbo's Fifth Issue does not arise from the Decision and should be dismissed.

v. Gbagbo's Seventh Issue does not arise from the Decision

49. Gbagbo argues that the Chamber erroneously noted that he had not challenged the authenticity of the documents related to P-0048.⁸² However, the Decision's procedural background reveals the opposite. Indeed, the Chamber was aware, and in fact considered, Gbagbo's objections to the authenticity of the documents. Indeed, in paragraph 23 of the Decision, the Chamber noted that "the

⁷⁶ *Contra* Application, para. 46.

⁷⁷ Decision, paras. 37-39.

⁷⁸ Decision, para. 40.

⁷⁹ ICC-01/05-01/13-1964 OA13 ("Mangenda Compensation Appeal Judgment"), para. 28; *Lubanga* Appeal Judgment, paras. 29-34.

⁸⁰ *Contra*, Application, para. 45 referring to Decision, para. 40.

⁸¹ Decision, para. 35.

⁸² "La Chambre a erré en droit en considérant que le critère de pertinence pour l'admission d'une pièce était rempli à partir du moment où un témoin avait, dans le cours d'un interrogatoire, traité d'un thème dans lequel pouvait être placée la pièce." ("Gbagbo's Seventh Issue"). See Gbagbo Application, para. 52 referring to Decision, para. 42.

Defence repeats the general submissions made in the context of the Request of 13 June 2016 [and] contests the authenticity (including the chain of custody) and the relevance of the said documents” and referred to Gbagbo’s Response of 29 June 2016 (paragraphs 47-48), the same paragraphs that Gbagbo alleges the Chamber had ignored.⁸³

50. The Chamber’s subsequent comment in paragraph 43 (generally noting that the Defence had not raised concerns as regards authenticity of the documents related to P-0048) must be read in context and cannot therefore imply that the Chamber ignored Gbagbo’s objections.⁸⁴ In any event, Gbagbo’s Seventh Issue does not constitute an appealable Issue because, even if the Chamber erred, it had no impact on the Chamber’s decision to have the evidence “submitted”.⁸⁵ Indeed, as the Chamber did not assess or rule upon the evidentiary criteria of the evidence submitted (including any objections), any oversight at this stage can be amended by considering the objections in its article 74 deliberations —as in any event the Chamber plans to do.

51. Accordingly, Gbagbo’s Seventh Issue does not arise and should therefore be dismissed.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

52. Even if the Chamber finds that any of the eleven Issues do arise from the Decision, the Applications fail to show how they meet the remaining requirements of article 82(1)(d).

53. First, neither of the Applications addresses how each Issue meets these remaining conditions. Indeed, Gbagbo fails to address—let alone show—the alleged impact of the Issues on the expedition of the proceedings and Blé Goudé only addresses such impact with respect to his Second Issue. Neither Application directly

⁸³ Gbagbo Application, para. 54.

⁸⁴ *Contra* Gbagbo Application, para. 55.

⁸⁵ Thus, the purported issue had no impact on the Decision. See ICC-02/04-01/15-428 (“*Ongwen Confirmation ALA Decision*”), para. 6.

addresses the impact on the outcome of the trial. Both Applications should thus be dismissed *in limine*.

54. *Second*, such limited arguments as the Defence do present on these matters fail to meet the article 82(1)(d) requirements.

i. The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

55. As the Defence arguments are premised on misunderstandings of the evidentiary regime and the Decision, they fail to show how the Issues would significantly affect the fairness of the proceedings, or the outcome of the trial. Many of their arguments impermissibly contest the Appeals Chamber's settled law.

56. First, Blé Goudé's cryptic argument that the Issues raised "relate to the core of the case: its evidence and the way it is assessed by the Chamber", does not help the Chamber to understand how the fairness of the proceedings is significantly affected.⁸⁶

57. Second, the Majority did not prevent Blé Goudé from exceptionally requesting a ruling on the admissibility of the Prosecution's evidence submitted (nor does the Decision preclude the Defence from making similar requests in the future).⁸⁷ Blé Goudé requested such a ruling, and the Majority rejected the request since a ruling was considered not necessary or appropriate.⁸⁸ Thus, Blé Goudé's First Issue does not significantly affect the fairness of the proceedings.⁸⁹

58. Third, there is no "legal uncertainty for the Defence, which is unfair *per se*" from having the evidence "submitted".⁹⁰ Indeed, since the "submission" of evidence does not require an evidentiary assessment, the Majority's Decision did not create uncertainty or cause unfairness. Rather, the Decision was consistent with this

⁸⁶ Blé Goudé Application, para. 28.

⁸⁷ *Contra*, Blé Goudé Application, para. 31.

⁸⁸ Decision, para. 35. *See above*, para. 6.

⁸⁹ *Contra*, Blé Goudé Application, paras. 31-32.

⁹⁰ *Contra* Blé Goudé Application, para. 33.

Chamber's evidentiary regime where the Majority generally defers the assessment of the evidentiary criteria to its article 74 deliberations.⁹¹ Further, the evidence submitted is plainly part of the record.⁹² Consequently, the Chamber may rely on it in its article 74 decision and both Parties are expected to "conduct their investigations and prepare their [...] cases in light of all evidence submitted".⁹³ There is neither ambiguity nor unfairness. And the only "uncertainty" relates to the Chamber's final evidentiary assessment and weight to be given to the evidence—one that is inherent to all trial proceedings, where evidence is assessed as a whole and not in isolation at the end of the trial, and does not result from the Decision.⁹⁴ The Parties would be placed in the same position (and cannot know with certainty the Chamber's final evidentiary assessment) even if the evidence had been assessed for admissibility on a rolling basis.

59. Moreover, in its article 74 decision, the Chamber would not rely on, and give weight to, evidence that, after a holistic evaluation, does not satisfy the standard evidentiary criteria. Thus, there would be "consequences" if the Prosecution does not supplement the submitted documents.⁹⁵ However, since the Chamber has yet to assess the evidence, any allegation of unfairness is premature at this stage. As the *Ongwen* Trial Chamber noted, "[t]he ultimate prejudice which the Defence may suffer depends on the nature of the material, how the material is discussed during trial, whether the Chamber relies on it in its judgment and—if so —how it relies on it".⁹⁶

60. Blé Goudé's arguments with respect to expedition further show his misunderstanding of the Chamber's evidentiary regime. By deferring the evidence

⁹¹ *Contra* Gbagbo Application, para. 58 quoting Dissenting, para. 7: "[...] it has created uncertainty for both the submitting party, as well as those objecting, as to whether the items will ultimately be admitted or not[...]"'. However, the Chamber has already explained that it may not rule at all on the admissibility and instead defer the assessment of the evidentiary criteria to the article 74 decision. See 29 January Decision, paras. 9-10.

⁹² *Contra* Gbagbo Application, para. 56.

⁹³ 29 January Decision, para. 18.

⁹⁴ In addition, the Majority did not find the documents unauthenticated. Rather, it noted that it needed more information to make such determination. This is consistent with the trial proceedings when one item of evidence is discussed throughout the trial and only at the end of the trial, the TC is in a position to determine its reliability. *Contra* Gbagbo Application, para. 57.

⁹⁵ *Contra* Gbagbo Application, para. 57 ; Blé Goudé Application, para. 33.

⁹⁶ *Ongwen* Interception Evidence Decision, para. 10.

assessment to the article 74 deliberations,⁹⁷ the Chamber does not postpone *prima facie* admissibility rulings to a later stage of the proceedings. Rather, it skips them altogether.⁹⁸ As in its deliberations the Chamber must nevertheless holistically assess all the evidence submitted and discussed at trial to establish the accused's guilt or innocence, this system effectively saves time.

ii. *The Appeals Chamber's immediate resolution of the Issues would not materially advance the proceedings*

61. Finally, both Applications fail to show how an immediate resolution by the Appeals Chamber of any of the purported Issues would materially advance the proceedings. As noted above, since the Decision does not prevent the Parties from exceptionally seeking admissibility rulings in the future, resolution by the Appeals Chamber would not materially advance the proceedings.⁹⁹

62. Similarly, because the "submission" of the evidence does not require an assessment of the standard evidentiary criteria and, at this stage, it is unknown whether the Chamber would rely on—and what weight it would give to—the evidence submitted by the Prosecution, the Appeals Chamber's intervention is premature and unwarranted.¹⁰⁰ Even more so since the Prosecution will supplement its original requests for submissions of the evidence so as to fully comply with paragraph 44 of the Amended Directions.

63. Likewise, since the Defence exercised its right pursuant to rule 64(1), the Appeals Chamber need not decide whether the Defence has been "prevented from discharging" it.¹⁰¹ Consideration of possible prejudice to the accused is at this stage premature and speculative, because the Prosecution will supplement its request, additional evidence will be presented and rule 64(1) permits additional objections to be raised after submission when new issues become known.

⁹⁷ Blé Goudé Application, para. 29.

⁹⁸ 29 January Decision, para. 14. *See also Bemba et al.* Documentary Evidence Decision, para. 11 and *Ongwen* Initial Directions, para. 25.

⁹⁹ *Contra* Blé Goudé Application, para. 36.

¹⁰⁰ *Contra* Blé Goudé Application, paras. 37, 39.

¹⁰¹ *Contra* Blé Goudé Application, para. 38 and Gbagbo Application, para. 60.

In fact immediate intervention by the Appeals Chamber would not “materially advance the proceedings” at this stage. Rather, it would only cause unnecessary delay.

Relief Requested

64. For the above reasons, the Prosecution requests the Chamber to dismiss the Applications.



Fatou Bensouda, Prosecutor

Dated this 22nd day of December 2016

At The Hague, The Netherlands