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**International
Criminal
Court**

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No: ICC-02/11-01/15

Date: 15 May 2017

THE APPEALS CHAMBER

Before:

Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmanski
Judge Chang-ho Chung

SITUATION IN COTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

Defence Appeal against 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)

Source: Defence of Mr Charles Blé Goudé

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

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I. Introduction

1. On 9 December 2016, a majority of Trial Chamber I (“the Majority”), Judge Henderson partially dissenting, rendered its “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016” (“the Impugned Decision”).¹ Consequently, all the documents for which the Prosecution requested submission to the case record were submitted, in spite of the Majority raising serious concerns as to the authenticity of the said documents. The Majority’s reasoning also implied that the Prosecution had until the end of the trial to provide further evidence on the authenticity of the documents. The Prosecution introduced the above mentioned bar table motions on the basis of paragraphs 43 and 44 of the Amended Directions on the Conduct of the Proceedings (“the Amended Directions”).²
2. The Defence of Charles Blé Goudé (“the Defence”) submitted that the Majority made four fundamental errors in the Impugned Decision.³ Following the issuance of the Impugned Decision, the Prosecution announced that according to its interpretation of the Directions on the Conduct of Proceedings, “the Majority never conditioned the formal ‘submission’ of the evidence on the Parties’ compliance with paragraph 44 of the Amended Directions”.⁴ On 4 May 2017, leave to appeal the Impugned Decision was granted⁵ on the following issue as reformulated by Trial Chamber I (“the Chamber”) and which will be addressed in the present submissions:

¹ ICC-02/11-01/15-773; Dissenting opinion of Judge Henderson, ICC-02/11-01/15-773-AnxI.

² ICC-02/11-01/15-498-AnxI.

³ ICC-02/11-01/15-777, paras. 10-27.

⁴ ICC-02/11-01/15-780, para. 32.

⁵ Decision on request 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-02/11-01/15-901; Partly dissenting opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-901-AnxI.

Whether the Chamber erred by (a) not ruling on the admissibility of certain documents, despite finding that the tendering party did not provide sufficient information to establish their authenticity at the time of submission, and (b) by giving the tendering party an unrestricted opportunity to submit further evidence in this regard.⁶

3. The Defence respectfully requests that the Appeals Chamber reverse the Impugned Decision, and find that the Chamber shall rule immediately on the admissibility of the documents.

II. Procedural History

4. On 7 May 2015, the Chamber issued the “Order setting the commencement date for trial” (“the Order”),⁷ by which it directed the Prosecution to complete its disclosure of incriminatory evidence by 30 June 2015.⁸
5. On 4 May 2016, the Chamber adopted the Amended Directions.⁹
6. On 13 June, on 14 July, on 7 September, on 19 September and on 27 September 2016, the Prosecution submitted five requests for the introduction of documentary evidence under paragraph 43 of the Amended Directions either orally or in writing.¹⁰

⁶ ICC-02/11-01/15-901, paras. 21-22.

⁷ ICC-02/11-01/15-58.

⁸ *Ibid.*, para. 22.

⁹ Decision adopting amended and supplemented directions on the conduct of the proceedings, ICC-02/11-01/15-498; Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings, ICC-02/11-01/15-498-AnxA; Separate Opinion of Judge Henderson, ICC-02/11-01/15-498-Anx1.

¹⁰ ICC-02/11-01/15-583-Conf; with confidential Annex A (ICC-02/11-01/15-583-Conf-AnxA); ICC-02/11-01/15-616-Conf; with confidential Annex A (ICC-02/11-01/15-616-Conf-AnxA) (“Request of 14 July 2016”); ICC-02/11-01/15-T-72-CONF-ENG ET, p. 25, lines 12 et seq; ICC-02/11-01/15-T-74-CONF-ENG,

7. The Defence responded to all of the above mentioned requests, either orally or in writing.¹¹
8. On 9 December 2016, the Chamber decided by Majority to recognise as submitted 161 items of evidence,¹² Judge Henderson filing a partially dissenting opinion (“the Dissent”).¹³
9. On 19 December 2016, the Defence for Mr Laurent GBAGBO (“the Gbagbo Defence”) and the Defence filed their respective requests for leave to appeal the Impugned Decision.¹⁴
10. On 22 December 2016, the Prosecution filed its consolidated response to the two abovementioned requests for leave to appeal (“the Consolidated Response”).¹⁵
11. On 4 May 2017, the Chamber granted by Majority the Defence’s leave to appeal the Impugned Decision on the third issue raised in its request.¹⁶ The

p. 4, line 24 et seq; ICC-02/11-01/15-687-Conf ; with confidential Annex A (“Request of 27 September 2016”).

¹¹ ICC-02/11-01/15-640-Conf; with Annex A (ICC-02/11-01/15-640-Conf-AnxA). The original time limit was extended pursuant to the parties’ request (see ICC-02/11-01/15-T-51-ENG RT, p. 69, lines 6-11 and ICC-02/1101/15-T-50-CONF-ENG ET, pp. 91-92. Thereafter, a further extension of time limit was granted on 18 July 2016 (see e-mail of Trial Chamber I Communications at 10:16), pursuant to the request of the Defence of Mr Blé Goudé (see e-mail from the Defence of Mr Blé Goudé to Trial Chamber I communications of 15 July 2016 at 17:53); ICC-02/11-01/15-665-Conf; ICC-02/11-01/15-717-Conf.

¹² ICC-02/11-01/15-773.

¹³ ICC-02/11-01/15-773-Anx1.

¹⁴ Demande d’autorisation d’interjeter appel de la ‘Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016’, ICC-02/11-01/15-776-Conf, filed by the Gbagbo Defence; Request 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-02/11-01/15-777, filed by the Defence.

¹⁵ 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-02/11-01/15-780.

¹⁶ ICC-02/11-01/15-901.

Chamber reformulated the issue along with the Gbagbo Defence third and fourth issues raised in their request.¹⁷

III. Standard of review

12. The Appeals Chamber does not review appeals de novo, seeing as “its review is corrective in nature.”¹⁸ In regard to clear errors of law, the Appeals Chamber has found that “it will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law.”¹⁹ If the Appeals Chamber finds that such an error was made in the first instance, it “will only intervene if the error materially affected the Impugned Decision.”²⁰

13. While the Appeals Chamber will not interfere with the exercise of the Trial Chamber’s discretion at the first instance for the simple reason that it would have made a different ruling in the first instance, it will interfere with a discretionary decision “where: (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.”²¹

IV. Submissions

14. For the purposes of completeness and concision, subsections (a) and (b) of the issue referred to the Appeals Chamber will be addressed separately even

¹⁷ *Ibid.*, para. 21.

¹⁸ ICC-02/05-03/09-295, para. 20.

¹⁹ *Ibid.*

²⁰ ICC-02/05-03/09-295 OA 2, para. 20.

²¹ ICC-01/05-01/08-1386, para. 78.

though the connections between them will be revealed throughout the present submissions. After exposing some preliminary observations (A), the Defence will show to what extent the Majority erred by not ruling on the admissibility of certain documents, despite finding that the tendering party did not provide sufficient information to establish their authenticity at the time of submission (B), and by giving the tendering party an unrestricted opportunity to submit further evidence in this regard (C).

A. Preliminary observations

15. The Defence submits that it is mindful of the decision issued on 29 January 2016²² whereby the Chamber decided that “any decision on the admissibility and relevance of the evidence submitted will be deferred to the final judgment, except when an intermediate ruling is required under the Statute or otherwise appropriate.”²³ As Presiding Judge Tarfusser noted in his dissent to the Chamber's decision on the present appeal, the Defence did not seek leave to appeal such decision.²⁴ Therefore, the Defence will not use the present appeal to attempt to seek reconsideration of the said decision. The Defence thus deems it necessary to emphasize that the present appeal stems from the Impugned Decision that is related to the Prosecution's submission of four items of documentary evidence in the instant case. Such decision clearly defines the scope of the appeal.

16. The Defence is also mindful of the Appeals Chamber's jurisprudence related to the admissibility or relevance of evidence, expressed *inter alia* in the *Bemba* case:²⁵

²² Decision on the submission and admission of evidence, ICC-02/11-01/15-405.

²³ *Ibid.*, p. 10.

²⁴ Partly dissenting opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-901-Anx.

²⁵ ICC-01/05-01/08-1386.

“[Article 64(9)(a) and article 69(4) of the Statute] accord the Trial Chamber discretion when admitting evidence at trial. As borne out by the use of the word “may” in article 69(4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of article 69(4), taking into account “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness”. 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.”²⁶

17. In sum, the Defence does not challenge the position of the Chamber not to rule, , on admissibility of evidence before the end of the trial as a matter of principle.

B. The Chamber erred by not ruling on the admissibility of certain documents, despite finding that the tendering party did not provide sufficient information to establish their authenticity at the time of submission

18. . In the Impugned Decision, the Majority recognised as submitted on the case record an important amount of documents tendered as evidence by the

²⁶ *Ibid.*, para. 37, mentioning as footnote No. 87: “See Piragoff, Donald, “Evidence”, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), pp. 351-352; Piragoff, Donald, “Evidence” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2nd ed., 2008), p. 1322, marginal number 36.”

Prosecution on 13 June, 14 July, 7 September and 19 September 2016.²⁷ The Defence partially opposed the submission of such documents, raising issues of admissibility and relevance.²⁸

19. In the Impugned Decision, the Majority decided that “although it will not rule on the relevance of admissibility of the evidence submitted at this moment in time, the Chamber considers it appropriate, in light of its responsibility to ensure the proper conduct of the trial, and also in light of paragraph 44 of the Directions on the Conduct of the Proceedings, to make an exception in the established procedure, so as to give some guidance to the parties with respect to submission of documentary evidence”.²⁹ The Defence notes that by “mak[ing] an exception to the established procedure”, the Majority must have intended to actually rule on the admissibility of the documents tendered into evidence. Indeed, given that in the present case, the established procedure is not to rule on admissibility of evidence before the end of the trial, making an exception to such established procedure may have a unique meaning: that the Majority actually intended to rule on such issue.

20. After recalling that the Directions require that the introduction of any item of evidence is accompanied by “succinct information on the relevance and probative value (including authenticity)”,³⁰ the Majority reasoned that succinct information “should not be understood as deficient and incomplete.”³¹ By the same token, it recalled the purpose of such direction: “Parties are expected to fully litigate the relevance and admissibility of each item of evidence at the time it is submitted (cf. Rule 64(1) of the Rules). Unless the relevance of an item of evidence is readily apparent – on its face or from

²⁷ See para. 6.

²⁸ See para. 7.

²⁹ ICC-02/11-01/15-773, para. 36, emphasis added.

³⁰ *Ibid.*, para. 38.

³¹ *Ibid.*

submissions that are already on the record of the case (such as the pre-trial brief) – the party submitting the evidence must make sufficiently detailed and precise submissions, so as to enable the other parties to make informed responses and the Chamber to resolve the matter, including ruling on admissibility if necessary”.³²

21. Moving to the documents that were submitted by the Prosecution, the Majority identified specific concerns with regard to the authenticity of certain items of evidence. The Majority indeed observed that further evidence may be necessary to determine the authenticity of submitted documents that allegedly emanated from the Ivorian Gendarmerie and from other bodies, such as the United Nations.³³ As an illustration of the necessity of further evidence on authenticity, the Majority noted in a footnote that some documents are undated, bear no signature or no name appears on them.³⁴

22. Despite such findings, as the Majority recognized in the decision on the present appeal, it “nevertheless declined to rule on [certain items of evidence's] admissibility”.³⁵ By doing so, the Majority did not attach any legal consequence to its above mentioned findings, which also appears to contradict its expressed intention to “make an exception to the established procedure”.³⁶

23. Furthermore, the Chamber acknowledged that by refusing to rule on admissibility, it implicitly granted to the Prosecution an unrestricted authorization to submit further evidence in relation to authenticity at a later

³² *Ibid.*, emphasis added.

³³ *Ibid.*, para. 39.

³⁴ *Ibid.*, see footnote No. 68.

³⁵ ICC-02/11-01/15-901, para. 21.

³⁶ ICC-02/11-01/15-773, para. 36.

stage of the proceedings,³⁷ which would institute a “go with the flow” administration of evidence that is not embodied by the Decision of admission of evidence and that contravenes the Order, which it directed the Prosecution to complete its disclosure of incriminatory evidence by 30 June 2015.

24. In the above mentioned decision issued in the *Bemba* case,³⁸ the Appeals Chamber, while recalling the discretion of a Trial Chamber to postpone any ruling on admissibility or relevance of evidence until the end of the trial, also ruled that :

“Nevertheless, under article 64(2) of the Statute, the Chamber must always ensure that the 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”. In particular, if a party raises an issue regarding the relevance or admissibility of evidence, the Trial Chamber must balance its discretion to defer consideration of this issue with its obligations under that provision.”

25. Rule 64(1) of the Rules obliges the non-tendering party to raise any issue relating to relevance or admissibility at the time when the evidence is submitted to the Chamber. The Defence holds that the issue certified for the present appeal arises from a contradiction between the Impugned Decision and the obligation put on the non-tendering party by Rule 64(1). Indeed, as an initial situation, a document is tendered into evidence from the bar table and the non-tendering party bears the obligation to immediately raise its objections on the grounds of admissibility and/or relevance to the admission of the document on the case record. When admissibility rulings are made at the end of the trial, one may expect that the result of any objections will be

³⁷ ICC-02/11-01/15-901- para. 21.

³⁸ ICC-01/05-01/08-1386.

made only in the final judgment. At such moment, the Defence does not have any opportunity to respond, while a right to respond is warranted when a decision is rendered on an objection. Moreover, when the Chamber specifically identifies missing information that the tendering party failed to provide in relation to an issue as important as authenticity of the document, the only remedy that would be consistent with its obligations under article 64(2) of the Statute would be to decline the submission of the documents on the case record or at the least, to not defer such decision.

26. Contrary to what Presiding Judge Tarfusser expressed in his dissent, the Defence does not pursue an exceedingly rigid interpretation of Rule 64(1) of the Rules³⁹ as the situation may not be resolved by the second part of the Rule, which reads :

“Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known.”

27. The present situation is not the one where the issues of relevance and admissibility were not known at the time when the evidence was submitted. They were known and efficiently raised by the Defence in due time. They were then identified by the Majority in the Impugned Decision. However, the Impugned Decision formally recognised the submission of the disputed documents to the case record despite a reasoning that should have led to a declaration of inadmissibility. This situation is different from the exceptional one, , where the issues of relevance and admissibility were not known at the time of submission and unfolds later. In this regard, the Defence emphasises that the second part of Rule 64(1) of the Rules is introduced *via* the word “exceptionally”.

³⁹ ICC-02/11-01/15-901-Anx, para. 20.

28. The consequence of such initial situation is described by Judge Henderson in his dissent to the Impugned Decision:

“Regarding the instant requests, the Majority’s tepid expression of concern does little to provide the intended safeguard for the opposing party or impose rigour on the submitting party. It has, instead, only resulted in a cluttered record. Further, as the Majority Decision has informed the submitting party that their evidence is lacking in certain basic indicia of relevance and admissibility, but has regardless allowed the material to be submitted on record, 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. In the context of an adversarial trial this creates unfairness.”⁴⁰

29. In other words, the Majority has implicitly allowed the case record to be polluted, or “cluttered”, by items of evidence, the authenticity of which could have been identified as deficient, which creates unfairness for the non-tendering parties who may not know by the end of the trial whether such items of evidence will be eventually declared admissible for the purpose of the Chamber’s determination of the final judgment. In this regard, the Defence holds that the Majority has drawn a patently incorrect conclusion of fact.

30. Moreover, by deferring ruling on admissibility or relevance until the end of the trial, whereas serious concerns have been expressed by the Majority so as to the authenticity of certain documents, evidence which should have been declared inadmissible or which may potentially be inadmissible, will be put to witnesses. Thus, it will be impossible for the judges and the parties to determine, at the end of the proceedings, the extent to which a witness has

⁴⁰ Dissenting opinion of Judge Henderson, ICC-02/11-01/15-773-AnxI, para. 7.

been led or influenced by inadmissible evidence. This consequence will therefore endanger the truth-finding nature of the trial.

31. It is therefore the view of the Defence that, in the present situation, the Majority, by balancing its discretion to defer consideration of this issue with its obligations under article 64(2) of the Statute to ensure that the trial is fair, expeditious and conducted with respect for the rights of the accused and due regard for the protection of victims and witnesses, should have made “an exception to the established procedure” and should have issued a reasoned ruling on the admissibility of the documents tendered into evidence.

C. Whether the Chamber erred by giving the tendering party an unrestricted opportunity to submit further evidence in this regard

32. From the above mentioned initial situation flows a consequence that constitutes sub-section (b) of the issue certified for the present appeal, i.e. the unrestricted opportunity for the tendering party to submit further evidence on admissibility of documentary evidence.

33. The Defence recalls that, , the Majority raised serious concerns in the Impugned Decision regarding the authenticity of several documents tendered into evidence by the Prosecution. The Majority also acknowledged that “in so doing, [it] implicitly left open the possibility that the Prosecutor might submit further evidence in relation to authenticity at a later stage of the proceedings. This could give rise to additional arguments on behalf of the Prosecutor, and consequently to the need for the Defence to submit further responses.”⁴¹

⁴¹ ICC-02/11-01/15-901, para. 21.

34. Therefore, the Impugned Decision introduced the concept of “go with the flow” substantiation of admissibility of documentary evidence. The tendering party is now authorized to unconditionally provide evidence related to admissibility of items tendered through the bar table motions until the end of the trial. As the Impugned Decision did not put limits to such authorization, the Defence does not see any reason not to conceive such submission of documents as absolute or, as the Chamber said, “unrestricted”.

35. In other words, the tendering party is authorized to retain evidence on relevance and admissibility, including authenticity, of documents submitted from the bar table until the end of the trial. This conception of the administration of evidence appears to be in plain contradiction with the letter and the spirit of Rule 64(1) of the Rules. The only issues that could be raised after the submission of the evidence are the ones that were not known at the time the evidence was submitted. Rule 64(1) is not meant to have the tendering party itself determine the moment when the evidence on admissibility or relevance should be submitted.

36. Such situation where the tendering party is put in a position not to substantiate the authenticity of its documentary evidence, impairs the rights of the Defence and the right to a fair trial on several levels, while, as mentioned, witnesses can be confronted with potentially not authentic documents.⁴²

37. Four reasons reinforce this conclusion: Firstly, as underlined by Judge Henderson in his dissent to the Impugned Decision, “[...] it would mean that it is also impossible for the Defence to make fully informed submissions on relevance or admissibility until the end of the trial”.⁴³ If, as the Impugned

⁴² See para. 30.

⁴³ ICC-02/11-01/15-773-AnxI, para. 11.

Decision authorizes, the tendering party chooses to adopt a selective approach on the disclosure to the non-tendering parties of its evidence relating to relevance or admissibility of documentary evidence, the non-tendering party will find itself in a situation where it will be obliged to respond to every submission of evidence and to every additional argument related to such submission of evidence without gaining the certainty that its response will be achieved on the basis of full information provided by the Prosecution or, on the contrary, if further responses to further arguments that could have been raised immediately will be necessary.

38. In sum, the Defence will not be in a position to raise a founded objection when the document is tendered as evidence as it will not know whether there will be additional arguments on this issue on behalf of the Prosecution or not.
39. Secondly, going further, the Impugned Decision raises direct concern regarding the principle of equality of arms as a derivative of the right to a fair trial. By issuing the Impugned Decision, the Majority gave guidance to the Prosecution on how to better substantiate the authenticity of the documents tendered into evidence. By pointing out the information that was missing, it indicated what information must be provided by the end of the trial. The Defence has no certainty that such a specific guidance will be provided to the Defence's bar table motions. Besides, in a trial before the Court, where the Prosecution presents its case before the Defence may have to present its own, bar table motions are likely to be presented by the Prosecution at an early stage of the proceedings. The argument is not speculative as, in the present case, only the Prosecution has yet tendered considerable evidence through the bar table. Concretely, it means that because of the sequencing of a trial before the International Criminal Court, the Prosecution will have on average more time than the Defence to substantiate the admissibility or relevance of its documentary evidence as such evidence intervenes at an earlier stage of the

proceedings and that the final day of the trial is the only deadline set by the Chamber.

40. Thirdly, as underlined by Judge Henderson in his dissent, the Impugned Decision bears material consequences for the Defence. While “ruling an item inadmissible for lack of relevance or probative value [...] allows the Defence to know which evidence should focus their limited time and resources on”,⁴⁴ the present situation, in which the admissibility may be substantiated on a “go with the flow” basis, the Defence is obliged to allocate a significant part of its resources on the responses to every additional argument to be raised by the Prosecution. As the opportunity to submit further evidence on admissibility of documents has been conceived as “unrestricted” by the Chamber, the issue of allocation of resources is not speculative anymore but highly likely.

41. Such high likelihood is reinforced by the arguments adopted by the Prosecution in its Consolidated Response. The Prosecution indeed considers that “the Majority never conditioned the formal ‘submission’ of the evidence on the Parties’ compliance with paragraph 44 of the Amended Directions.”⁴⁵ The Defence recalls that paragraph 44 of the Amended Directions reads as follows:

“[T]he introduction of any item of documentary evidence shall be accompanied by 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.”⁴⁶

⁴⁴ ICC-02/11-01/15-773-Anx1, para. 9.

⁴⁵ ICC-02/11-01/15-780, para. 32.

⁴⁶ ICC-02/11-01/15-498-AnxA, para. 44.

42. Such assertion by the Prosecution has been deemed a “rather astonishing comment” by the Chamber when granting the authorisation to file the present appeal.⁴⁷ Furthermore, the Defence considers that the Prosecution’s position on admissibility and relevance of documentary evidence is of high concern for the progress of the trial. The fact is that the Prosecution apparently considers itself as not bound by paragraph 44 of the Amended Directions. This observation in combination with the assertion that “the tendering party may not be able to fully substantiate the reliability of a piece of evidence at the time of submission”⁴⁸ portrays the procedural obstacles of non-compliance with paragraph 44 of the Amended Directions which might impair a proper fact-finding based on reliable indicia. Hence, this lack of clarity in compliance does not put the Defence in a position to properly exercise its rights under Rule 64(1) of the Rules. The Defence submits that the respect of the principle of fair trial, of the rights of the Accused and of the standard of good trial management justifies the substantiation of the admissibility and relevance of documentary evidence at the very time of submission. The mere statement of the Prosecution that the Chamber never conditioned the submission of evidence to paragraph 44 of the Amended Directions illustrates the necessity of a clear decision by the Court at the time of submission.

43. Fourthly, the Defence recalls the Order issued by the Chamber on 7 May 2015, by which it directed the Prosecution to “disclose all incriminatory material in the form of witness statements and any other material to be relied on at trial [...] no later than 30 June 2015”.⁴⁹ Therefore, the Prosecution ought to have terminated its investigation by 30 June 2015 and should therefore not be authorized to disclose more incriminatory material.

⁴⁷ ICC-02/11-01/15-901, para. 10.

⁴⁸ ICC-02/11-01/15-780, para. 37.

⁴⁹ ICC-02/11-01/15-58, para. 22.

44. the Defence submits that, , by balancing its discretion to defer consideration of admissibility and relevance of evidence on one hand, with its obligations under article 64(2) of the Statute to ensure that the trial is fair, expeditious and conducted with respect for the rights of the accused and due regard for the protection of victims and witnesses, on the other hand; the Majority should not have granted the Prosecution an unrestricted opportunity to submit further evidence without providing all the information relating to authenticity of evidence. This implies that *de facto* potential exculpatory information could not be disclosed to the Defence. By so doing, the Chamber has erred in law.

RELIEF SOUGHT

45. The Defence respectfully requests the Appeals Chamber to find that the Chamber committed an error of law and to reverse the Impugned Decision.

Respectfully submitted,



Mr. Knoop, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 15 May 2017

At The Hague, the Netherlands