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THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Confidential

Consolidated response to Mr Gbagbo's and Mr Blé Goudé's documents in support of the appeal against the "Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016"

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s and Mr Blé Goudé’s appeals against the “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016” (the “Impugned Decision”)² should be dismissed.

2. The Legal Representative contends that the appeals should be dismissed *in limine* because they (i) impermissibly challenge the Decision of 29 January 2016 and the Amended Directions on the Conduct of Proceedings applied in the Impugned Decision; (ii) are contrary to the Defence’s position on analogous decisions on the admissibility of documentary evidence; and (iii) do not clarify sufficiently which discerned errors in the Impugned Decision amount to an impermissible exercise of discretion resulting in prejudice to the Defence.

3. Assuming *arguendo* that the Appeals Chamber will entertain the substance of the Defence’s arguments, the Legal Representative argues that the Defence fails to show that Trial Chamber I (the “Chamber”) committed any error when issuing the Impugned Decision. In particular, contrary to the Defence’s contentions, the Chamber (i) did draw a legal consequence from the insufficiency of the Prosecution’s demonstration of the authenticity of the documents at hand; (ii) did not fail to indicate the documents for which it duly decided not to rule on admissibility and had no intention to actually rule on their admissibility; (iii) did not leave open the possibility for the Prosecution to freely submit evidence into the record, did not

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

² See the “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016” (Trial Chamber I), No. ICC-02/11-01/15-773, 9 December 2016 (the “Impugned Decision”).

presume the authenticity of the submitted evidence, and did not deprive the Defence of its opportunity to effectively challenge the admissibility of the evidence at hand; (iv) did not clutter the record with dubious evidence that may influence upcoming witnesses without the Chamber's knowledge; (v) did not mistake the weight of the evidence with its admissibility, did not make its admissibility decision dependent on factors different from the evidence at hand, and did not make it impossible for the Defence to discuss the admissibility of the evidence at the time of its submission; (vi) did not authorize the Prosecution to unconditionally retain further evidence in relation to authenticity and submit it in contravention of the established deadline for the disclosure of evidence; and (vii) did not give any advantage to the Prosecution *vis-à-vis* the Defence, and did not set an undue burden on the latter when it comes to challenging the admissibility of the evidence submitted by the Prosecution.

II. Confidentiality

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially because it makes reference to submissions and decisions filed under the same classification. A public redacted version will be filed in due course.

III. Background

5. On 3 September 2015, the Chamber issued the directions on the conduct of the proceedings (the "Directions on the Conduct of Proceedings"),³ concerning, *inter alia*, the admissibility of evidence.⁴

6. On 28 January 2016, the Chamber adopted the "Decision on the submission and admission of evidence" (the "Decision of 29 January 2016"),⁵ Judge Henderson

³ See the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015 (the "Directions on the Conduct of Proceedings").

⁴ *Idem*, para. 51.

dissenting (the “Decision of 29 January 2016 Dissent”),⁶ ruling, *inter alia*, that any decision on the admissibility and relevance or probative value of the evidence submitted at trial is deferred to the final judgment, except when an intermediate ruling is required under the Rome Statute or otherwise appropriate.⁷

7. On 4 May 2016, the Chamber adopted the amended and supplemented directions on the conduct of the proceedings (the “Amended Directions on the Conduct of Proceedings”),⁸ including those on the introduction of documentary evidence.⁹

8. On 9 December 2016, the Chamber issued the Impugned Decision,¹⁰ Judge Henderson dissenting (the “Impugned Decision Dissent”),¹¹ whereby 161 items of evidence were recognised as submitted.¹²

9. On 19 December 2016, Mr Gbagbo and Mr Blé Goudé sought leave to appeal the Impugned Decision pursuant to article 82(1)(d) of the Rome Statute (the “Requests for Leave to Appeal”).¹³

⁵ See the “Decision on the submission and admission of evidence” (Trial Chamber I), No. ICC-02/11-01/15-405, 29 January 2016 (the “Decision of 29 January 2016”).

⁶ See the “Dissenting Opinion of Judge Henderson”, No. ICC-02/11-01/15-405-Anx, 1 February 2016 (the “Decision of 29 January 2016 Dissent”).

⁷ See the Decision of 29 January 2016, *supra* note 5, para. 12 and p. 10.

⁸ See the “Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-498-AnxA, 4 May 2016 (the “Amended Directions on the Conduct of Proceedings”).

⁹ *Idem*, paras. 43-47.

¹⁰ See the Impugned Decision, *supra* note 2.

¹¹ See the “Dissenting Opinion of Judge Henderson”, No. ICC-02/11-01/15-773-AnxI, 13 December 2016 (the “Impugned Decision Dissent”).

¹² See the Impugned Decision, *supra* note 2, p. 15.

¹³ See the “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-02/11-01/15-773)”, No. ICC-02/11-01/15-776-Conf, 19 December 2016; and the “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-02/11-01/15-773)”, No. ICC-02/11-01/15-777, 19 December 2016 (the “Requests for Leave to Appeal”).

10. On 22 December 2016, the Prosecution filed its consolidated response to the Requests for Leave to Appeal.¹⁴

11. On 27 December 2016, the Legal Representative filed her consolidated response to the Requests for Leave to Appeal.¹⁵

12. On 4 May 2017, the Chamber issued a decision on the Requests for Leave to Appeal (the “Leave to Appeal Decision”),¹⁶ Judge Tarfusser dissenting (the “Leave to Appeal Decision Dissent”),¹⁷ granting the Defence leave to appeal the Impugned Decision in respect of the following issue: *“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”*.¹⁸

13. On 15 May 2017, Mr Gbagbo and Mr Blé Goudé filed their respective documents in support of the appeal against the Impugned Decision (the “Gbagbo Document in Support of the Appeal” and “Blé Goudé Document in Support of the Appeal”, together the “Documents in Support of the Appeal”).¹⁹

¹⁴ See the “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)”, No. ICC-02/11-01/15-780, 22 December 2016.

¹⁵ See the “Consolidated Response to ICC-02/11-01/15-776-Conf and ICC-02/11-01/15-777”, No. ICC-02/11-01/15-781-Conf, 27 December 2016.

¹⁶ See the “Decision on request (sic) 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” (Trial Chamber I), No. ICC-02/11-01/15-901, 4 May 2017 (the “Leave to Appeal Decision”).

¹⁷ See the “Partly dissenting opinion of Judge Cuno Tarfusser”, No. ICC-02/11-01/15-901-Anx, 4 May 2017 (the “Leave to Appeal Decision Dissent”).

¹⁸ See the Leave to Appeal Decision, *supra* note 16, para. 21.

¹⁹ See the “Document à l’appui de l’appel de la «Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016» (ICC-02/11-01/15-773)”, No. ICC-02/11-01/15-918-Conf, 15 May 2017 (the “Gbagbo Document in Support of the Appeal”); and the “Defence Appeal against the ‘Decision concerning the Prosecutor’s submission of

14. Pursuant to regulation 65(5) of the Regulations of the Court,²⁰ the Legal Representative files a consolidated response to the Documents in Support of the Appeal.

IV. Submissions

1. Preliminary observations: the appeals must be dismissed *in limine*

15. The Legal Representative submits that the flaws in the scope and content of the Documents in Support of the Appeal merit the outright dismissal of the appeals.

16. Firstly, the Legal Representative contends that both Mr Gbagbo and Mr Blé Goudé impermissibly challenge in their Documents in Support of the Appeal the Decision of 29 January 2016 and the Amended Directions on the Conduct of Proceedings applied by the Trial Chamber in the Impugned Decision.

17. Mr Gbagbo argues that relevance and probative value of documentary evidence must be determined by the judges before the evidence at hand is declared admissible,²¹ contrary to the Decision of 29 January 2016.²² Mr Gbagbo also argues that the use of documentary evidence must be limited to non-contentious issues at early stages of the trial and be allowed only if witnesses are also called to testify,²³

documentary evidence on 13 June, 14 July, 7 September and 19 September 2016' (ICC-02/11-01/15-773)", No. ICC-02/11-01/15-922, 15 May 2017 (the "Blé Goudé Document in Support of the Appeal").

²⁰ See the "Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)'" (Appeals Chamber), No. ICC-02/11-01/15-172 OA6, 31 July 2015, paras. 16 and 19.

²¹ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 20-23.

²² See the Decision of 29 January 2016, *supra* note 5, para. 12 and p. 10.

²³ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 13-17.

contrary to the Amended Directions on the Conduct of Proceedings.²⁴ In turn, Mr Blé Goudé states his intention not to use the present appeal to seek “reconsideration” of the Decision of 29 January 2016,²⁵ but takes issue with the main finding of said decision, namely that admissibility rulings will be made at the end of the trial.²⁶

18. Since, as noted by Judge Tarfusser, the Defence did not seek leave to appeal the Decision of 29 January 2016,²⁷ and was not granted leave to appeal the Amended Directions,²⁸ the Legal Representative submits that the Defence cannot challenge said decisions indirectly by appealing their application to a particular set of documents in the Impugned Decision.²⁹ This is irrespective of whether the Chamber in first instance has granted the Defence leave to appeal the Impugned Decision by merging and substantially reformulating several related issues,³⁰ some of them actually arising from the Decision of 29 January 2016 and the Amended Directions on the Conduct of Proceedings.³¹

19. In the same way as the Appeals Chamber cannot reformulate the issues for which the Chamber has granted leave to appeal,³² appeals are not allowed under the Rome Statute against decisions that are final. Consequently, the Legal Representative submits that all Defence’s arguments concerning the Decision of 29 January 2016 and

²⁴ See the Amended Directions on the Conduct of Proceedings, *supra* note 8, paras. 43-44.

²⁵ See the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 15 and 17.

²⁶ *Idem*, para. 25.

²⁷ See the Leave to Appeal Decision Dissent, *supra* note 17, para. 16.

²⁸ See the “Decision on requests for leave to appeal the ‘Decision adopting amended and supplemented directions on the conduct of the proceedings’ (ICC-02/11-01/15-498)” (Trial Chamber I), No. ICC-02/11-01/15-569, 7 June 2016.

²⁹ See the Leave to Appeal Decision, *supra* note 16, para. 19; and the Leave to Appeal Decision Dissent, *supra* note 17, paras. 17 and 19-20.

³⁰ See the Leave to Appeal Decision Dissent, *supra* note 17, paras. 8-10.

³¹ See the “Consolidated Response to ICC-02/11-01/15-776-Conf and ICC-02/11-01/15-777”, *supra* note 15, para. 17. See also the Leave to Appeal Decision Dissent, *supra* note 17, para. 10.

³² See the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), No. ICC-02/11-01/15-744 OA8, 1 November 2016, para. 13 and references included therein.

the Amended Directions on the Conduct of Proceedings as such, rather than the specific application thereof in the Impugned Decision, must be dismissed *in limine*.³³

20. Secondly, concerning the specific application of the Decision of 29 January 2016 and the Amended Directions on the Conduct of Proceedings in the Impugned Decision, the Legal Representative submits that, as noted by Judge Tarfusser, decisions on documentary evidence analogous to the Impugned Decision have been rendered in the past,³⁴ without any objection or challenge being made by the Defence.³⁵ In these circumstances, the Defence's current opposition to the Impugned Decision before the Appeals Chamber is contrary to the principle which proscribes the assertion of a position in contradiction with a previously held position and prejudicial to another party – *non concedit venire contra factum proprium*.³⁶

21. Thirdly, the Legal Representative submits that, although the Appeals Chamber may reverse decisions where an abuse of discretion is established,³⁷ the Documents in Support of the Appeal do not clarify sufficiently which discerned errors in the Impugned Decision amount to an impermissible exercise of discretion by the Chamber resulting in prejudice to the Defence.³⁸

³³ This is specially the case for arguments challenging the Decision of 29 January 2016, since the dissenting Judge has repeatedly stated his agreement that “the statutory framework is deliberately flexible and permits the Trial Chamber to defer its consideration on the relevance and admissibility of evidence submitted by a party until the deliberations stage of the proceedings”. See the Impugned Decision Dissent, *supra* note 11, para. 2. See also the Decision of 29 January 2016 Dissent, *supra* note 6, para. 6.

³⁴ See the Leave to Appeal Decision Dissent, *supra* note 17, footnote 5.

³⁵ See e.g. the transcript of the hearings held on 16 March 2017, No. ICC-02/11-01/15-T-136-CONF-ENG (private session), p. 57, line 6 to p. 63, line 3.

³⁶ See ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 32; IACHR, *Neira Alegría et al. v. Peru*, Preliminary Objections, Judgment of 11 December 1991, Series C No. 13 (1991), para. 29; IACHR, *Ernesto Máximo Rodríguez v. Argentina*, Case No. 10382, Report of 21 February 1998, para. 39; and IACHR, *Acevedo Buendía et al. v. Peru*, Preliminary objections, merits, reparations and costs, Judgment of 1 July 2009, para. 57.

³⁷ See the “Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016” (Appeals Chamber), No. ICC-01/04-02/06-1817-Red OA4, 8 March 2017, para. 18 and references included therein.

³⁸ See the “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’” (Appeals

22. After acknowledging the Chamber's discretion under the Statute to defer its consideration of the admissibility of evidence,³⁹ Mr Blé Goudé explains his expectations from the Chamber balancing its discretion to defer consideration of the admissibility of evidence with its obligations under article 64(2) of the Rome Statute. In Mr Blé Goudé's submission, in order to achieve such balance, the Chamber should have issued a ruling on the admissibility of the documents tendered into evidence, and should not have granted the Prosecution an opportunity to provide further information relating to the authenticity of said documents.⁴⁰

23. However, Mr Blé Goudé does not sufficiently explain how the Chamber's failure to meet his expectations turns the Impugned Decision into an *abuse* of the Chamber's discretion under articles 64(2) and 69(4) of the Rome Statute, which merits the Appeals Chamber's intervention. Mr Blé Goudé limits his submissions to quoting the legal standard set by the Appeals Chamber for interfering with discretionary decisions,⁴¹ and referring to an allegedly incorrect conclusion of fact.⁴² Reference is also made to a hypothetical consequence thereof,⁴³ which should not be considered by the Appeals Chamber given its speculative character.⁴⁴

Chamber), No. ICC-01/09-02/11-1032 OA5, 19 August 2015, para. 25; and the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (Appeals Chamber), No. ICC-02/11-01/15-369 OA7, 18 December 2015, para. 64. See also ICTY, *Prosecutor v. Popović et al.*, "Decision on Appeals against Decision on Impeachment of a Party's Own Witness" (Appeals Chamber), 1 February 2008, para. 14, available at <<http://cld.unmict.org/assets/filings/Decision-on-appeals-against-decision-on-impeachment-of-a-partys-own-witness.pdf>> (last accessed on 26 May 2017).

³⁹ See the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 16 and 31.

⁴⁰ *Idem*, paras. 31 and 44.

⁴¹ *Ibid.*, para. 13.

⁴² For the most specific submissions in this regard, see *ibid.*, para. 29.

⁴³ *Ibid.*, para. 36.

⁴⁴ See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'" (Appeals Chamber), No. ICC-02/04-01/15-251 OA3, 17 June 2015, para. 28.

24. Mr Gbagbo is even less explicit in this regard, merely stating that the Chamber was not prevented from immediately ruling on the admissibility of the documents tendered into evidence.⁴⁵ No arguments are provided as to why the decision to postpone the admissibility ruling amounts to an abuse of discretion by the Chamber.

25. The Legal Representative submits that Defence's failure to sufficiently argue the alleged abuse of discretion by the Chamber in the Impugned Decision cannot be remedied by the Appeals Chamber. In this regard, the Appeals Chamber has repeatedly stated that it may dismiss an appellant's arguments *in limine* because "*an appellant is obliged not only to set out an alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision*".⁴⁶

26. In these circumstances, the Legal Representative submits that the cumulative consideration of the identified flaws in the Documents in Support of the Appeal merit the outright dismissal of the appeals.

27. Assuming *arguendo* that the Appeals Chamber will entertain the substance of the Defence's arguments in the Documents in Support of the Appeal, the Legal Representative provides the following response thereto.

⁴⁵ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 37-38.

⁴⁶ See the "Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu''" (Appeals Chamber), No. ICC-01/05-01/13-559 OA3, 11 July 2014, para. 22 and references included therein.

2. First Ground of Appeal: the Chamber did not commit an error of law by not declaring the inadmissibility of certain documents, despite finding that the tendering party did not provide sufficient information to establish their authenticity at the time of submission

28. The Legal Representative submits that there is no error in the Impugned Decision as a result of the Chamber's decision not to make a ruling on the admissibility of certain evidence submitted by the Prosecutor.

29. Firstly, contrary to the Defence's contentions,⁴⁷ the Chamber did draw a legal consequence from the insufficiency of the Prosecution's demonstration of the authenticity of the documents at hand.

30. Despite the fact that, as noted by Judge Tarfusser,⁴⁸ the Impugned Decision does not contain an express finding that "the tendering party did not provide sufficient information to establish the authenticity of certain documents at the time of submission", the Chamber draws a consequence from the insufficiency in the Prosecution's demonstration of authenticity, namely that "*the authenticity of the documents is disputed*",⁴⁹ and that "*further evidence may be necessary to determine the authenticity of some of the documents submitted*".⁵⁰ In actual fact, the Impugned Decision does not find said evidence to be neither admissible nor inadmissible.⁵¹

31. In other words, contrary to Mr Gbagbo's and Mr Blé Goudé's contentions, the Impugned Decision indicates that, as a consequence of the insufficiency of the Prosecution's demonstration of the authenticity of some documents, the Chamber

⁴⁷ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 33 and 36; and the Blé Goudé Document in Support of the Appeal, *supra* note 19, para. 20.

⁴⁸ See the Leave to Appeal Decision Dissent, *supra* note 17, para. 13.

⁴⁹ See the Impugned Decision, *supra* note 2, para. 39

⁵⁰ *Idem*.

⁵¹ See the Leave to Appeal Decision Dissent, *supra* note 17, para. 14.

will decide on the admissibility thereof in the judgment, pursuant to the system established by the Decision of 29 January 2016.⁵²

32. Secondly, contrary to the Defence's submissions,⁵³ the Chamber did not fail to indicate the documents for which it duly decided not to rule on admissibility, and had no intention to actually rule on the admissibility of the particular documents tendered into evidence as an exception to the established procedure.

33. In the Impugned Decision, the Chamber clearly declined to rule on the admissibility of *all* documents,⁵⁴ upon not finding it necessary or appropriate to do so at the time of the submission of the material.⁵⁵ Therefore, contrary to Mr Blé Goudé's reading of the Impugned Decision,⁵⁶ the Chamber did not make an exception in the established procedure to rule on the admissibility of the documents tendered into evidence. Instead, the Chamber merely clarified that the party presenting the evidence must make sufficiently detailed and precise submissions, *inter alia*, in order for the Chamber to rule on the admissibility of said evidence at the time of its submission, whenever this is necessary or appropriate.⁵⁷

34. This conclusion is consistent with the fact that, as noted by Judge Henderson, "*the 'general rules' adopted so far by the Chamber in relation to the preparation and submission of evidence in the Gbagbo and Blé Goudé case safeguard the discretion of the Chamber, above all else*".⁵⁸ In this regard, the Legal Representative submits that the Appeals Chamber's finding that articles 64(9)(a) and 69(4) of the Rome Statute

⁵² See the Decision of 29 January 2016, *supra* note 5, para 12. See also the Leave to Appeal Decision Dissent, *supra* note 17, para. 14.

⁵³ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 35 and 37-38; and the Blé Goudé Document in Support of the Appeal, *supra* note 19, para. 19.

⁵⁴ See the Leave to Appeal Decision, *supra* note 16, para. 21.

⁵⁵ See the Impugned Decision, *supra* note 2, para. 35.

⁵⁶ See the Blé Goudé Document in Support of the Appeal, *supra* note 19, para. 19.

⁵⁷ See the Impugned Decision, *supra* note 2, para. 38, referring to the Decision of 29 January 2016, *supra* note 5, para. 17.

⁵⁸ See the Decision of 29 January 2016 Dissent, *supra* note 6, para. 25.

“[a]ccord the Trial Chamber discretion when admitting evidence at trial”⁵⁹ validates the Impugned Decision.

35. Accordingly, contrary to Mr Gbagbo’s contentions,⁶⁰ it is not necessary for the Chamber to determine the existence of any obstacle preventing it from determining the admissibility of evidence at the time of its submission. The Impugned Decision is the normal consequence and implementation of the Decision of 29 January 2016, namely the Chamber’s exercise of its discretion to decide on the admissibility of the evidence at the end of the trial, when all the evidence is assessed.⁶¹

36. In this regard, the Impugned Decision can be read, at most, as the Chamber impliedly finding that the evidence at hand is not so unreliable that it cannot be considered as submitted for its consideration at the end of the trial.⁶² The Legal Representative argues that this approach is consistent with the possibility, supported by Judge Henderson in the Decision of 29 January 2016 Dissent, for the Chamber “to determine at the outset that an item of evidence is patently irrelevant or unreliable”,⁶³ and, *mutatis mutandis*,⁶⁴ with the approach of the *ad hoc* tribunals regarding their

⁵⁹ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386 OA6, 3 May 2011, para. 37.

⁶⁰ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 37-38.

⁶¹ See the Decision of 29 January 2016, *supra* note 5, para. 13.

⁶² See the Impugned Decision, *supra* note 2, para. 35 (“The evidence introduced should be evaluated as a whole. Although some items of evidence may currently not clearly appear relevant or lack *prima facie* probative value, the situation may change as other evidence is presented to the Chamber”).

⁶³ See the Decision of 29 January 2016 Dissent, *supra* note 6, para. 17 (emphasis added).

⁶⁴ The Legal Representative notes that, differently from the system put in place by the Decision of 29 January 2016, the *ad hoc* tribunals follow an approach whereby evidence that lacks minimum indicia of authenticity/reliability or does not have the necessary *prima facie* probative value upon its submission cannot be admitted into evidence. See in this regard, the ICTY and ICTR jurisprudence cited in the Decision of 29 January 2016 Dissent, *supra* note 6, footnote 22.

assessment of the *sufficient indicia of reliability* of a piece of evidence *at the admissibility stage* (*prima facie* reliability).⁶⁵

37. Thirdly, contrary to the Defence's arguments,⁶⁶ the Chamber did not leave open the possibility for the Prosecution to freely submit evidence into the record of the case, did not presume the authenticity of said evidence, and did not deprive the Defence of its opportunity to effectively challenge the admissibility of the evidence at hand.

38. The Chamber's approach to the admissibility of evidence, determined in the Decision of 29 January 2016 and not currently under appeal, provides that the evidence submitted by the Prosecution may be challenged by the Defence at the time of its submission and that the Chamber *may* decide on its admissibility then.⁶⁷ Accordingly, as already indicated,⁶⁸ the Impugned Decision does not presume the authenticity of any evidence, but merely postpones its decision on authenticity to the deliberations stage.

39. Moreover, the Legal Representative contends that the consequence reached in the Impugned Decision regarding the evidence at hand does not amount to an abuse

⁶⁵ See ICTY, *Prosecutor v. Prlić et al.*, "Decision on Jadranko Prlić's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence" (Appeals Chamber), 12 January 2009, para. 15 (emphasis added) and references contained therein, available at <<http://www.icty.org/x/cases/prlic/acdec/en/090112.pdf>> (last accessed on 26 May 2017) ("*A piece of evidence may be so lacking in terms of the indicia of reliability that it is not probative and is therefore inadmissible. This principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. Prima facie proof of reliability on the basis of sufficient indicia is enough at the admissibility stage*").

⁶⁶ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 39-44; and the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 24-25.

⁶⁷ See the Decision of 29 January 2016, *supra* note 5, para. 17 ("*This general principle is without prejudice to admissibility objections being considered by the Chamber upon submission of the relevant item [...] the Chamber, in the exercise of its discretion, may rule on admissibility of certain items [...] upon a request of the parties relating to a specific item of evidence, or categories of evidence*") (emphasis added).

⁶⁸ See *supra* para. 31.

of discretion by the Chamber since no prejudice ensues for the Defence.⁶⁹ The Chamber will decide on the Defence's submissions on the authenticity of the evidence at hand in the judgement, the Chamber is not prevented from doing so before the end of the trial,⁷⁰ and nothing suggests that it will not apply the same approach to any admissibility challenge that the Prosecution may make to evidence eventually submitted by the Defence.

40. Furthermore, pursuant to the Decision of 29 January 2016 and as impliedly envisaged in the Leave to Appeal Decision and expressly noted by Judge Tarfusser,⁷¹ the Defence is not precluded from submitting further arguments on the admissibility of the documentary evidence at hand pursuant to rule 64(1) of the Rules of Procedure and Evidence as the trial develops, may challenge evidence subsequently presented by the Prosecution and related to the authenticity of the evidence addressed in the Impugned Decision, and may eventually seek the Appeals Chamber's review of the Chamber's decision on the admissibility or inadmissibility of said evidence by appealing the Chamber's judgement.

41. Lastly, contrary to the Mr Blé Goudé's contentions,⁷² the Chamber did not clutter the record with dubious evidence that may influence upcoming witnesses without the Chamber's knowledge.

42. The Legal Representative reiterates that the Impugned Decision is a result of the application of the Decision of 29 January 2016. Said decision expressly indicates that the Chamber may rule on the admissibility of evidence before deliberating its judgement "*upon a request of the parties relating to a specific item of evidence, or categories*

⁶⁹ See *supra* note 38.

⁷⁰ See the Leave to Appeal Decision, *supra* note 16, para. 21.

⁷¹ See the Decision of 29 January 2016, *supra* note 5, para. 17; the Leave to Appeal Decision, *supra* note 16, para. 21; and the Leave to Appeal Decision Dissent, *supra* note 17, paras. 21 and 23.

⁷² See the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 26-30 and 36.

of evidence".⁷³ Accordingly, the Defence may obtain further clarity on the admissibility of the evidence at hand before the judgement is rendered by making a request to the Chamber on the admissibility of related items of evidence.

43. Moreover, Mr Blé Goudé's concern, of putting to witnesses evidence which may potentially be found to be inadmissible, is inconsistent with the judicial consideration of the evidence when deliberating at the end of the trial. It is not an unusual occurrence before the Court that the judges find at the end of the trial that some evidence is not admissible, even when said evidence was submitted and used during the trial.⁷⁴ If evidence is found inadmissible during the deliberations, the Chamber, composed of professional judges, will obviously consider the extent to which the testimony related to documents subsequently declared inadmissible may be relied upon in the judgement. Accordingly, the Defence's concerns in this regard are unfounded.

3. Second Ground of Appeal: the Chamber did not commit an error of law by giving the tendering party an unrestricted opportunity to submit further evidence to establish the authenticity of the evidence

44. The Legal Representative submits that there is no error in the Impugned Decision as a result of the Chamber's decision to give the Prosecution the opportunity to submit further evidence to establish the contested authenticity of the documents at hand.

⁷³ See the Decision of 29 January 2016, *supra* note 5, para. 17.

⁷⁴ See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012, paras. 482-483, regarding the eventual finding on the unreliability of particular testimonial evidence gathered through intermediaries and submitted to the Chamber during the trial.

45. Firstly, contrary to Mr Gbagbo's submissions,⁷⁵ the Chamber did not mistake the weight of the evidence with its admissibility, did not make its admissibility decision dependent on factors different from the evidence at hand, and did not make it impossible for the Defence to discuss the admissibility of the evidence at the time of its submission.

46. The Chamber's approach to the admissibility of evidence, determined in the Decision of 29 January 2016, is not to make the admissibility decisions dependent on the weight given to a piece of evidence, but to assess a particular piece of evidence in light of all the others pieces submitted throughout the course of the proceedings.⁷⁶ Said decision also determined that intermediate rulings on admissibility would be the exception.⁷⁷ This approach – the Chamber will be in the best position to meaningfully assess each item of evidence upon completion of the submission of evidence – was not challenged by the Defence when the Decision of 29 January 2016 was issued and cannot be indirectly questioned now.

47. Secondly, contrary to Mr Blé Goudé's contentions,⁷⁸ the Chamber did not authorize the Prosecution to unconditionally retain further evidence in relation to authenticity and submit it in contravention of the established deadline for the disclosure of evidence.

48. The Legal Representative argues that Mr Blé Goudé misreads the possibility granted to the Prosecution to submit further evidence in relation to authenticity at a later stage of the proceedings. The Leave to Appeal Decision clarified that "*the Chamber implicitly left open the possibility that the Prosecutor might submit further evidence*

⁷⁵ See the Gbagbo Document in Support of the Appeal, *supra* note 19, paras. 39-44.

⁷⁶ See the Decision of 29 January 2016, *supra* note 5, para. 13.

⁷⁷ *Idem*, p. 10.

⁷⁸ See the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 24-25, 34-35, 37-38 and 43-45.

in relation to authenticity at a later stage of the proceedings".⁷⁹ Said authorization, a mere consequence of the Decision of 29 January 2016, is obviously limited to evidence of which the Defence is already informed and which has been disclosed to the Defence within the time limit already established by the Chamber. Nothing in the Impugned Decision suggests the contrary.

49. In these circumstances, the Legal Representative reiterates that the Defence may avoid the difficulties allegedly arising from the implementation of the Decision of 29 January 2016 by challenging related evidence subsequently presented by the Prosecution, and by appealing the Chamber's decision on the admissibility or inadmissibility of the contested evidence in the judgement issued at the end of the trial.⁸⁰

50. Lastly, contrary to Mr Blé Goudé's contentions,⁸¹ the Chamber did not give any advantage to the Prosecution *vis-à-vis* the Defence and did not set an undue burden on the latter when it comes to challenging the admissibility of evidence submitted by the Prosecution.

51. The Impugned Decision does not provide any specific guidance to the Prosecution regarding the particular manner in which it may subsequently persuade the Chamber about the authenticity of the documents at hand. In this regard, Judge Henderson expressly indicated that "[w]hile the need for further evidence to determine their authenticity has been expressed, no further details or particulars have been provided so as to identify these documents or to delineate the procedure to be followed by the submitting party to be able to remedy such defects".⁸² Moreover, Judge Henderson noticed that "the

⁷⁹ See the Leave to Appeal Decision, *supra* note 16, para. 21.

⁸⁰ See *supra* para. 40.

⁸¹ See the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 39-42.

⁸² See the Impugned Decision Dissent, *supra* note 11, para. 13.

Prosecution will not know until the Chamber's Article 74 decision whether those items, which the Chamber initially allowed to be submitted, are subsequently ruled inadmissible".⁸³

52. In these circumstances, the Defence's arguments on an alleged inequality of arms are misplaced. The Legal Representative reiterates that the approach adopted by the Chamber in the Impugned Decision will be equally applicable to the Defence during its eventual presentation of documentary evidence, since said approach has been set in the Decision of 29 January 2016.⁸⁴

53. Moreover, contrary to Mr Blé Goudé's submissions,⁸⁵ the Impugned Decision does not require the Defence to allocate resources on responses to every additional argument to be raised by the Prosecution. As noted by Judge Tarfusser,⁸⁶ there is no language in the Impugned Decision that can be summarised as giving the tendering party an unrestricted opportunity to submit further evidence with regard to the authenticity. In this regard, the Legal Representative reiterates that the Prosecution may only submit further evidence that was disclosed to the Defence within the time limit already established by the Chamber.⁸⁷ The Chamber has already clarified that in case the further evidence is documentary evidence, the Prosecution must comply with the requirements set up in the Amended Directions on the Conduct of Proceedings because these are "*instructions*" for the parties.⁸⁸

54. Furthermore, the contested ruling of the Chamber is only applicable to the four submissions of documentary evidence by the Prosecution addressed therein. The Chamber expressly indicated that it did not find it necessary or appropriate to decide on the admissibility of evidence at the time of its submission "*in the present*

⁸³ *Idem*, para. 14.

⁸⁴ See *supra* para. 39.

⁸⁵ See the Blé Goudé Document in Support of the Appeal, *supra* note 19, paras. 40-42.

⁸⁶ See the Leave to Appeal Decision Dissent, *supra* note 17, para. 13.

⁸⁷ See *supra* para. 48.

⁸⁸ See the Leave to Appeal Decision, *supra* note 16, para. 10.

instance".⁸⁹ The Chamber is therefore not prevented from ruling on admissibility when deciding on future submissions of evidence. In fact, the Decision of 29 January 2016 expressly provides the Chamber with the discretion to do so.⁹⁰

V. Conclusion

55. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to dismiss the appeals.



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Principal Counsel

Dated this 26th day of May of 2017⁹¹

At The Hague, The Netherlands

⁸⁹ See the Impugned Decision, *supra* note 2, para. 35.

⁹⁰ See the Decision of 29 January 2016, *supra* note 5, para. 17.

⁹¹ This submission complies with regulation 36 of the Regulations of the Court, as amended on 6 December 2016. See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.