DISSENTING OPINION OF JUDGE HENDERSON

1. I respectfully dissent from the 'Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016' ('Majority Decision') in which, having received extensive submissions from the parties and the LRV, the solitary decision taken by the Majority is its recognition as submitted all the documentary items that formed the basis of the prosecutor's request, notwithstanding their stated concerns. With utmost respect, this outcome appears pointless and is itself contrary to their own earlier decisions.

2. I wish to make clear at the outset that I accept that the Statute and Rules, as well as the Court's own jurisprudence, do not oblige Trial Chambers to always rule on admissibility when the evidence is first submitted. 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. However, in doing so, and as cautioned by the Appeals Chamber, "the Trial Chamber must balance its discretion to defer consideration of [relevance and admissibility] with its obligations under [Article 64(2) of the Statute]."[1] In other words, even though postponing ruling on relevance and admissibility is not prohibited per se, it is only permissible if doing so does not affect the fairness and expeditiousness of the proceedings. Whether or not this is the case largely depends on how the trial is actually being conducted. The more the presentation of evidence is driven by the parties, the greater need there is for the Chamber to intervene to ensure that only relevant and probative evidence is submitted on the record.

[1] ICC-01/05-01/08-1386, para. 37

3. In my view, the failure of the Chamber to make admissibility rulings on the evidence sought to be submitted by the Prosecution via the bar table, affects the expeditiousness and fairness of proceedings and imposes an unnecessary and unfair burden on the parties, in particular on the defences for Mr. Gbagbo and Mr. Blé Goudé ('Defence').

4. In refusing to make an admissibility decision at this stage, the Majority declared that it would not entertain general submissions by the parties that seemingly seek a reconsideration of the Chamber's previous decision on the submission and admission of evidence.[2] In my view, it is incorrect on the part of the Majority to characterize the parties' request for an admissibility ruling as one that seeks a reconsideration of the Chamber's previous decision. Despite its general policy to defer the question of admissibility of evidence as a whole until the end of the trial, the Chamber expressly recognized the possibility of derogations from this general principle when it said:

> This general principle is without prejudice to admissibility objections being considered by the Chamber upon submission of the relevant item whenever required by the Statute or Rules (such as motions made under Article 69(7) of the Statute). Furthermore, 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, including upon a request of the parties relating to a specific item of evidence, or categories of evidence. The continuous consideration of the submitted evidence by the Chamber throughout the trial will allow it to promptly determine the need, or the desirability, to

[2] ICC-02/11-01/15-405

advance a particular evidentiary determination to an earlier stage of the proceedings.[3]

In other words, when the Defence asked the Chamber to rule on admissibility, they were availing themselves of an option which the Chamber had explicitly left open. It is therefore rather disingenuous to characterise the Defence's arguments as to why the Chamber should rule on admissibility immediately as a request for reconsideration. Indeed, given its perfunctory treatment of the request for an admissibility decision, this characterisation may appear as a poor excuse for the Majority's failure to seriously engage with the arguments raised by the Defence.

5. Despite the postponement of the Chamber's admissibility rulings until the deliberation stage of the trial, under Rule 64(1) of the Rules, the parties themselves are nevertheless expected to fully litigate any issues relating to relevance or admissibility at the time of submission of the evidence to the Chamber. This can only be done in a meaningful manner if the party opposing the admission is sufficiently informed about the purpose for which the tendering party intends to introduce the evidence. This is why the Chamber, under paragraph 44 of the Amended and supplemented directions on the conduct of proceedings ('Directions'), specifically requires that the introduction of any item of documentary evidence be accompanied by "succinct information" on the relevance and probative value (including authenticity) of the item.[4] This direction is intended to provide a safeguard for the party opposing the submission of evidence through a bar table motion, as it allows the party to be better placed to make informed responses on admissibility. It also imposes a level of rigour and discipline on

[3] ICC-02/11-01/15-405, para. 17
[4] ICC-02/11-01/15-498-AnxA

the submitting party that ensures that what is submitted for the Chamber's consideration, meets a minimum threshold of relevance and reliability.

6. Both the defence teams, in objecting to the admission of much of the submitted material, also point to the failure on the part of the Office of the Prosecutor to satisfy the requirements of paragraph 44 of the Directions for the purpose of submission of evidence through the bar table. The Majority itself has expressed concerns that the basic information as required under paragraph 44 has not been provided.[5] Rather than drawing the necessary conclusions from such failure, the Majority has instead provided further guidance to the parties for future submissions. With respect, directions of a Chamber are not pious expressions of hope; rather they are instructions from the Chamber to the parties that are to be complied with. Such directions usually carry consequences for non-compliance.

7. 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.

8. As I explained in a previous decision regarding the procedural framework of this trial,[6] these proceedings are essentially party driven. Notwithstanding

[5] ICC-02/11-01/15-773, paras 37-39
[6] ICC-02/11-01/15-405-Anx

the Chamber's own power to call for the submission of evidence, in practice it has been the Office of the Prosecutor who decided which witnesses to call and which documents it wished to submit. Both the Defence and the Chamber are therefore placed in a reactive position. As far as the Defence are concerned, they are required by rule 64(1) of the Rules to raise any issues relating to relevance or admissibility at the time an item of evidence is first submitted to the Chamber. The normal expectation in such a scenario is that the court immediately informs the parties of whether it considers the evidence as relevant and admissible or not.

9. Why is this so? Simply put, ruling an item inadmissible for lack of relevance or probative value saves everyone valuable time by keeping the case record focused on the charges. More importantly, it allows the Defence to know which evidence they should focus their limited time and resources on. Further, it also assists the Defence in knowing what the state of the evidence is at the close of the Prosecutor's case and whether and what may be considered important to respond to. This is a fundamental right of the accused.[7] One that cannot be restricted, let alone abrogated by blanket appeals to expeditiousness and efficiency or the flexible nature of the Court's procedural framework.

10. My colleagues say that they cannot yet rule on relevance and admissibility because they do not have a complete overview of all the evidence in the case. With respect, this is a problem of their own creation. If the Majority had enforced the Chamber's instructions under paragraph 44 of the Directions, the Chamber should, in principle, have had all the information necessary to make a fully informed ruling on relevance and admissibility.

[7] Article 67(1)(a)

11. In any case, if the Majority's view were to be taken seriously, 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. Such a view implies that my colleagues believe that the drafters of rule 64(1) of the Rules put in place an unworkable system. If this were to be the case, then surely it is unfair that the Defence must make its objections without having all the necessary information and should thus be given another opportunity to make submissions relating to relevance and probative value of all the submitted evidence at the end of the proceedings.

12. Be that as it may, the Majority's approach places an unnecessary and unfair burden on the Defence when, during the trial, they are compelled to focus resources on responding to material that is ultimately treated as inadmissible by the Chamber during its deliberations. By way of illustration, with regard to the Request of 13 June 2016 wherein the Prosecutor requested the introduction of 131 documents, as argued by the Defence of Mr Gbagbo, the Prosecutor failed to explain the relevance of a significant number of documents in sufficient detail. Included in this request are a number of documents pertaining to the fact that certain FDS units had ordered civilian vehicles and requested import and value added tax exemptions. It remains unclear how the importation of these vehicles by the FDS, or that they were imported tax free, is relevant to any live issue in this trial. However, due to the Chamber's position of neither insisting that relevance be established, nor ruling on admissibility, the Defence are nevertheless obliged to devote their scarce resources and attention in responding to this material whose relevance remains unclear at this stage, and which is only presumed by the Majority to attain relevance as part of an as-yet unrealized and undefined system of evidence.

13. Significantly, the prejudice arising through the indiscriminate introduction of documents sought to be submitted by way of the Prosecutor's requests does not limit itself to the Defence alone, but extends to the Prosecution as well. It has been observed by the Majority that the authenticity of some of the documents is materially in dispute because of their alleged source, for example the Ivorian Gendarmerie. It was also noted by the Majority that some documents are undated, bear no signature or name.[8] While 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 and meaningfully address the Chamber's concerns.

14. Because no admissibility decision has been taken by the Chamber, the 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 for their failure to fulfil the minimum indicia of reliability or authenticity, though the parties and the Chamber are cognizant of such failure at this stage due to the Majority Decision. It may well be that the Prosecution does not have a right to be told of any flaws in their case, which may affect their ability to satisfy their burden of proof.[9] However, this does not prevent Chambers from ruling on the relevance and admissibility of evidence. Such rulings are not intended to provide the Prosecution with assistance or guidance about how well they are doing in terms of meeting their burden of proof of proving the guilt of the accused,

[8] ICC-02/11-01/15-773, para. 39, note 68
[9] ICC-02/11-01/15-405, para. 18

but rather to provide clarity as to which items of evidence the Chamber deems worthwhile taking into consideration for the final judgment.

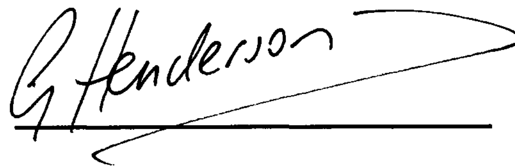
15. The approach taken by the Majority would appear to consider, without any appropriate filter, anything and everything that the parties submit to them. Such an approach disincentivizes rigour in the process of submission, which in a party driven trial, may result in the evidential record being flooded with evidence of dubious or no relevance. This is in no one's interest, and is certainly not conducive to efficiency, especially in a case of such considerable scale and magnitude. Indeed, the Chamber has an obligation to ensure that the case record remains focused and free from evidence that lacks relevance or probative value.

16. As for the much touted efficiency gains, given that these requests have been litigated in writing, it is questionable whether deferring the admissibility decisions has actually resulted in any meaningful efficiency as identified by the Majority and, if so, how. By its decision to defer admissibility, the Trial Chamber has simply postponed a decision that it is still required to make. The Appeals Chamber has stated unequivocally that, irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings.[10] Even if the Chamber waits till the end, it will still have to revisit these submissions that were made by the parties for this decision. There is nothing to suggest that the time required for deliberating and ruling on the relevance and admissibility of the individual documents during Article 74 deliberations will be any less than if we ruled now. In my respectful view, this decision amounts to little more than an instance of

[10] ICC-01/05-01/08-1386, para. 37

'kicking the can down the road' at the expense of both the Prosecution and the Defence.

17. Regrettably, even though nothing is gained by the Majority's approach, it comes at a significant cost in terms of fairness, legal certainty and providing the parties with much-needed guidance. For the foregoing reasons, I find it impossible to reconcile such an approach with the Chamber's obligations under article 64(2) and with the accused's rights under article 67(1) of the Statute.



Judge Geoffrey Henderson

Dated 13 December 2016

At The Hague, The Netherlands