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No. ICC-02/11-01/15 OA11 OA12

Date: 24 July 2017

THE APPEALS CHAMBER

Before: Judge Piotr Hofma ski, 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**

Public

Judgment

**on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial
Chamber I's decision on the submission of documentary evidence**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Laurent Gbagbo
Mr Emmanuel Altit
Ms Marie-Agathe Bahi Baroan

Victims
Ms Paolina Massidda

Counsel for Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Herman von Hebel

Other
Trial Chamber I

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I entitled “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016” of 9 December 2016 (ICC-02/11-01/15-773),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016” is confirmed.

REASONS

I. KEY FINDINGS

1. Depending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial.
2. Rule 64 (1) of the Rules requires, in principle, the non-tendering party to raise any objections to the relevance or admissibility of evidence at the time of its submission to the Chamber. The second sentence of rule 64 (1) of the Rules specifically provides that “[e]xceptionally, 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”. If additional information is adduced on the relevance or admissibility of documents previously submitted, the Defence will not be precluded from making additional submissions pursuant to rule 64 (1) of the Rules.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

3. On 29 January 2016, Trial Chamber I (“Trial Chamber”) rendered the “Decision on the submission and admission of evidence”¹ (“Decision of 29 January 2016”). The Trial Chamber, Judge Henderson dissenting², decided, *inter alia*, “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”, “including upon a request of the parties relating to a specific item of evidence, or categories of evidence”.³

4. On 4 May 2016, the Trial Chamber rendered the “Decision adopting amended and supplemented directions on the conduct of the proceedings”.⁴ In an annex to this decision, the Trial Chamber revised and amended the directions it originally adopted on 3 September 2015 (“Amended Directions”).⁵

5. On 13 June 2016, the Prosecutor requested the introduction of 131 documents pursuant to paragraph 43 of the Amended Directions (“Application of 13 June 2016”).⁶ On 14 July 2016, the Prosecutor requested the introduction of 24 documents related to the testimony of Witness P-0048 (“Application of 14 July 2016”).⁷ On 7 September 2016, the Prosecutor orally requested the introduction of two items related to Witness P-0501 (“Application of 7 September 2016”).⁸ On 19 September 2016, the Prosecutor orally requested the introduction of four items of evidence related to Witness P-0330.⁹ On 27 September 2016, the Prosecutor filed a further application to

¹ [ICC-02/11-01/15-405](#).

² [ICC-02/11-01/15-405-Anx.](#)

³ [Decision of 29 January 2016](#), p. 10, para. 17. *See also* para. 12.

⁴ [ICC-02/11-01/15-498](#).

⁵ [ICC-02/11-01/15-498-AnxA](#).

⁶ “Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of the proceedings”, 13 June 2016, ICC-02/11-01/15-583-Conf; with confidential Annex A (ICC-02/11-01/15-583-Conf-AnxA); a public redacted version was registered on 18 July 2016, ([ICC-02/11-01/15-583-Red](#)). *See also* “Response to the ‘Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of the proceedings’ (ICC-02/11-01/15-583-Conf)”, dated 14 July 2016 and registered on 15 July 2016, ICC-02/11-01/15-617-Conf (“Victims’ Response to Application of 13 June 2016”).

⁷ “Prosecution’s application to submit documentary evidence under paragraph 43 of the directions on the conduct of the proceedings relating to the testimony of Witness P-0048”, 14 July 2016, ICC-02/11-01/15-616-Conf; with a confidential annex.

⁸ Transcript of 7 September 2016, ICC-02/11-01/15-T-72-CONF-ENG (ET), p. 25, lines 12 *et seq.*

⁹ Transcript of 19 September 2016, ICC-02/11-01/15-T-74-CONF-ENG (ET), p. 4, line 24 *et seq.*

submit three documents related to Witness P-0321 (“Application of 27 September 2016”).¹⁰

6. Mr Laurent Gbagbo (“Mr Gbagbo”) and Mr Charles Blé Goudé (“Mr Blé Goudé”) filed responses to the various Prosecution applications mentioned above, noting issues relating to the relevance or admissibility of the evidence that the Prosecutor sought to submit.¹¹

7. On 9 December 2016, the Trial Chamber rendered by majority, Judge Henderson dissenting¹², the “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016”¹³ (“Impugned Decision”), recognising 161 items of evidence as submitted and discussed for the purposes of article 74 (2) of the Statute.¹⁴

¹⁰ “Prosecution’s application to submit documentary evidence under paragraph 43 of the directions on the conduct of the proceedings relating to the testimony of Witness P-0321”, 27 September 2016, ICC-02/11-01/15-687-Conf; with a confidential annex.

¹¹ Mr Gbagbo and Mr Blé Goudé filed consolidated responses to the Application of 13 June 2016 and the Application of 14 July 2016: “Réponse consolidée de la Défense à la «Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of the proceedings» déposée le 13 juin 2016 (ICC-02/11-01/15-583-Conf) et à la «Prosecution’s application to submit documentary evidence under paragraph 43 of the directions on the conduct of the proceedings relating to the testimony of Witness P-0048» déposée le 14 juillet 2016 (ICC-02/11-01/15-616-Conf)”, 29 July 2016, ICC-02/11-01/15-641-Conf, with three confidential annexes; and “Consolidated Defence Response to the ‘Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of the proceedings’ (ICC-02/11-01/15-583-Conf) and to the ‘Prosecution’s application to submit documentary evidence under paragraph 43 of the directions on the conduct of the proceedings relating to the testimony of Witness P-0048’ (ICC-02/11-01/15-616-Conf)”, 29 July 2016, ICC-02/11-01/15-640-Conf; with a confidential annex. *See also* “Prosecution reply to Gbagbo Defence response ICC-02/11-01/15-641-Conf”, 11 August 2016, ICC-02/11-01/15-647-Conf. Mr Gbagbo and Mr Blé Goudé filed consolidated responses to the Application of 7 September 2016: “Réponse de la Défense à la demande du Procureur formulée oralement lors de l’audience du 7 septembre 2016 visant à faire admettre deux documents au titre du paragraphe 43 de la décision sur la conduite des débats”, 9 September 2016, ICC-02/11-01/15-664-Conf and “Blé Goudé Defence Response to the Prosecution’s oral request to submit items CIV-OTP-0095-0877 and CIV-OTP-095-0780 pursuant to paragraph 43 of ICC-02/11-01/15-498-AnxA”, 14 September 2016, ICC-02/11-01/15-665-Conf. Mr Gbagbo and Mr Blé Goudé filed responses to the Application of 27 September 2016: “Réponse de la Défense à la «Prosecution’s application to submit documentary evidence under paragraph 43 of the directions on the conduct of the proceedings relating to the testimony of Witness P-0321» (ICC-02/11-01/15-687-Conf)”, 7 October 2016, ICC-02-11/01/15-716-Conf and “Defence Response to the ‘Prosecution’s application to submit documentary evidence under paragraph 43 of the directions on the conduct of the proceedings relating to the testimony of Witness P-0321’ (ICC-02/11-01/15-687-Conf)”, 7 October 2016, ICC-02/11-01/15-717-Conf.

¹² [ICC-02/11-01/15-773-AnxI](#).

¹³ [ICC-02/11-01/15-773](#).

¹⁴ [Impugned Decision](#), p. 15. *See also* para. 44.

8. On 19 December 2016, Mr Gbagbo filed his “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)”¹⁵, requesting leave to appeal the Impugned Decision in respect of seven issues. On the same day, Mr Blé Goudé filed his “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)”¹⁶, requesting leave to appeal the Impugned Decision in respect of four issues. On 22 December 2016, the Prosecutor responded to the requests for leave to appeal, submitting that the requests should be dismissed.¹⁷

9. On 4 May 2017, the Trial Chamber rendered the “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”¹⁸ (“Decision on Leave to Appeal”). The Trial Chamber, Judge Tarfusser partly dissenting,¹⁹ granted leave to appeal with respect to Mr Gbagbo’s third and fourth issues and Mr Blé Goudé’s third issue²⁰ and formulated the issue as follows:

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.²¹

B. Proceedings before the Appeals Chamber

10. On 15 May 2017, Mr Gbagbo and Mr Blé Goudé filed their respective documents in support of the appeal.²² On 26 May 2017, the victims participating in

¹⁵ ICC-02/11-01/15-776-Conf; a public redacted version was registered on the same date ([ICC-02/11-01/15-776-Red](#)).

¹⁶ [ICC-02/11-01/15-777](#).

¹⁷ “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)”, [ICC-02/11-01/15-780](#) (“Prosecution’s Response to Requests for Leave to Appeal”), paras 2, 64.

¹⁸ [ICC-02/11-01/15-901](#).

¹⁹ [ICC-02/11-01/15-901-Anx.](#)

²⁰ [Decision on Leave to Appeal](#), p. 12.

²¹ [Decision on Leave to Appeal](#), para. 21.

²² “Document 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 (ICC-02/11-01/15-773)’, dated 15 May 2017 and registered on 26 May 2017, ICC-02/11-01/15-918-Conf-tENG; original

the proceedings (“Victims”)²³ and the Prosecutor²⁴ filed their consolidated responses to the documents in support of the appeal.

III. MERITS

A. Standard of review

11. The appeals at hand concern the exercise of the Trial Chamber’s discretion to rule on the admissibility of documentary evidence.

12. The Appeals Chamber recalls that it will not interfere with a Chamber’s exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.²⁵ The Appeals Chamber will only disturb the exercise of a Chamber’s discretion where it is shown that an error of law, fact or procedure was made.²⁶ In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of

French version dated and registered 15 May 2017 (ICC-02/11-01/15-918-Conf); a public redacted version in French was registered on 15 May 2017 ([ICC-02/11-01/15-918-Red](#)) and in English on 16 June 2017 ([ICC-02/11-01/15-918-Red-tENG](#)) (“Mr Gbagbo’s Document in Support of the Appeal”) and “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)”, 15 May 2017, [ICC-02/11-01/15-922](#) (“Mr Blé Goudé’s Document in Support of the Appeal”).

²³ “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’”, 26 May 2017, ICC-02/11-01/15-936-Conf (“Victims’ Response to the Documents in Support of the Appeal”). This document was originally filed confidentially but was reclassified as public pursuant to the “Order on the reclassification of document ICC-02/11-01/15-936-Conf”, 28 June 2017, [ICC-02/11-01/15-971](#) (OA 11 OA 12).

²⁴ “Prosecution’s Consolidated Response to Laurent Gbagbo’s and Charles 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’”, 26 May 2017, ICC-02/11-01/15-937-Conf (“Prosecutor’s Response to the Documents in Support of the Appeal”); a public redacted version was registered on 1 June 2017 ([ICC-02/11-01/15-937-Red](#)).

²⁵ *Prosecutor v. Uhuru Muigai Kenyatta*, “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’”, 19 August 2015, [ICC-01/09-02/11-1032](#) (OA 5) (“*Kenyatta* OA 5 Judgment”), para. 22, referring *inter alia* to *Prosecutor v. Joseph Kony et al.*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, [ICC-02/04-01/05-408](#) (OA 3) (“*Kony et al.* OA 3 Judgment”), para. 79; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 1 December 2014, [ICC-01/04-01/06-3122](#) (A4 A6) (“*Lubanga* A 4 A 6 Judgment”), para. 41.

²⁶ [Kenyatta OA 5 Judgment](#) referring to [Kony et al. OA 3 Judgment](#), para. 80; *Prosecutor v. Abdallah Banda Abakaer Nourain*, “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest”, 3 March 2015, [ICC-02/05-03/09-632-Red \(OA 5\)](#) (“*Banda* OA 5 Judgment”), para. 30; *Prosecutor v. Dominic Ongwen*, “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””, 17 June 2015, [ICC-02/04-01/15-251](#) (OA 3) (“*Ongwen* OA 3 Judgment”), para. 35.

other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely 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.²⁷ Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.²⁸

13. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.²⁹

14. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings.³⁰ The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.³¹ Regarding the misappreciation of facts, the Appeals

²⁷ [Kenya OA 5 Judgment](#) referring to [Kony et al. OA 3 Judgment](#), paras 80-81; [Banda OA 5 Judgment](#), para. 30; [Ongwen OA 3 Judgment](#), para. 35.

²⁸ [Kenya OA 5 Judgment](#) referring to [Kony et al. OA 3 Judgment](#), para. 80; [Banda OA 5 Judgment](#), para. 30; [Ongwen OA 3 Judgment](#), para. 35.

²⁹ [Kenya OA 5 Judgment](#) referring, *inter alia*, to *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) with a public redacted version, ([ICC-01/04-01/06-3121-Red](#)) (A 5) ("*Lubanga A 5 Judgment*"), para. 18; *Prosecutor v. Simone Gbagbo*, "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", 27 May 2015, ICC-02/11-01/12-75-Conf (OA) with a public redacted version, ([ICC-02/11-01/12-75-Red](#)) (OA) ("*S. Gbagbo Admissibility OA Judgment*"), para. 40.

³⁰ [Kenya OA 5 Judgment](#) referring to [Lubanga A 5 Judgment](#), paras 24, 27; [S. Gbagbo Admissibility OA Judgment](#), para. 39.

³¹ [Kenya OA 5 Judgment](#) referring to *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, [ICC-01/04-01/07-572](#) (OA 4), para. 25; *Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", 27 February 2015, [ICC-01/04-02/12-271](#) ("*Ngudjolo A Judgment*"), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

Chamber will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.³² It will interfere only where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.³³

15. The above standard of review will guide the analysis of the Appeals Chamber.

B. Applicable Law

16. The Appeals Chamber considers it appropriate to set out the provisions of the Statute and of the Rules of Procedure and Evidence (“Rules”) relevant to the issues raised on appeal. Article 64 of the Statute (“Functions and powers of the Trial Chamber”) provides, in relevant part, as follows:

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence;

[...]

17. Article 69 of the Statute (“Evidence”) provides, in relevant parts, as follows:

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any

³² [Kenya OA 5 Judgment](#) referring to *Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”””, 14 July 2011, [ICC-01/04-01/10-283 \(OA\)](#) (“*Mbarushimana* OA Judgment”), para. 17; [Ngudjolo A Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

³³ [Kenya OA 5 Judgment](#) referring to [Mbarushimana OA Judgment](#), para. 17; [Ngudjolo A Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

18. Rule 64 of the Rules (“Procedure relating to the relevance or admissibility of evidence”) provides as follows:

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. 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. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the proceedings in accordance with article 64, paragraph 10, and rule 137, sub-rule 1.

3. Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.

C. Mr Gbagbo and Mr Blé Goudé’s Grounds of Appeal

19. On appeal, Mr Gbagbo and Mr Blé Goudé essentially challenge the decision of the Trial Chamber to defer its ruling on the admissibility of certain items of documentary evidence despite finding that the Prosecutor did not provide sufficient information to establish their authenticity at the time of submission.³⁴ The Appeals Chamber notes that there exists considerable overlap between Mr Gbagbo and Mr Blé Goudé’s grounds of appeal. Therefore, the Appeals Chamber will address all the grounds of appeal jointly.

1. Background and relevant part of the Impugned Decision

20. In relation to the introduction of documentary evidence the Trial Chamber, in setting out the conduct of the trial proceedings, directed as follows at paragraphs 43 and 44 of the Amended Directions:

43. In the interest of the efficiency of the proceedings, the parties are encouraged to introduce documentary evidence other than testimonial (i.e.

³⁴ See [Mr Gbagbo’s Document in Support of the Appeal](#), pp. 12 and 16 and [Mr Blé Goudé’s Document in Support of the Appeal](#), p. 8.

documents and audio-visual material), whenever feasible. They may introduce documentary evidence directly, without producing it by or through a witness.

44. The 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.

21. In the Impugned Decision the Trial Chamber, at the outset, recalled its Decision of 29 January 2016, where it had determined that “as a matter of principle, it would postpone making any rulings on the relevance or admissibility of evidence submitted by the parties until the end of the trial”.³⁵ The Trial Chamber emphasised that “[u]nless a preliminary evaluation of the evidence is required (such as under Article 69(7) of the Statute or Rule 68 of the Rules), the Chamber will not as a general rule decide on its relevance or admissibility before having heard the entirety of the case”.³⁶

22. With respect to the evidence being sought to be submitted by the Prosecutor the Trial Chamber held, *inter alia*, that even though it may exercise its discretion to rule on the relevance or admissibility of evidence at the time of submission, it found “no indication in the present instance that this [was] necessary or appropriate”.³⁷ The Trial Chamber reasoned that “[a]lthough 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”.³⁸ In its view, making “an authoritative affirmative finding or excluding some items of evidence at this stage of the proceedings would be premature” as their relevance or *prima facie* probative value may become more apparent when considered in totality with other evidence presented to the Chamber.³⁹

23. In particular, the Trial Chamber noted that the authenticity of the documents allegedly emanating from the *Gendarmerie* of Côte d’Ivoire was disputed and that “further evidence may be necessary to determine the authenticity of some of the documents submitted”, noting in a footnote that one document has not been formally submitted and that “some documents are undated, bear no signature or no name

³⁵ [Impugned Decision](#), para. 33.

³⁶ [Impugned Decision](#), para. 33.

³⁷ [Impugned Decision](#), para. 35.

³⁸ [Impugned Decision](#), para. 35.

³⁹ [Impugned Decision](#), para. 35.

appears on them”.⁴⁰ Following a general analysis of the relevance of the documents submitted, the Trial Chamber decided that all the items under consideration “shall be considered as submitted and discussed within the meaning of Article 74(2) of the Statute”.⁴¹

2. *Mr Gbagbo’s submissions before the Appeals Chamber*

24. Mr Gbagbo contends that the Trial Chamber erred in law by refusing to rule immediately on the admission of certain documents for which the Prosecutor sought admission,⁴² especially those “for which it had itself observed that there was insufficient proof of their authenticity”.⁴³

25. Under his first ground of appeal, Mr Gbagbo argues that the Prosecutor failed to comply with the requirements of paragraphs 43 and 44 of the Amended Directions, “which require a party to prove its claims on the authenticity of documents”.⁴⁴ Raising arguments regarding “investigative flaws” in the Prosecutor’s collection of evidence,⁴⁵ he argues that the Trial Chamber erred in law by not making “any legal determination as to the deficiency or the incompleteness of information provided by the Prosecution to obtain the admission of documents”.⁴⁶ Mr Gbagbo submits that, by “refusing to rule” on the Prosecutor’s applications, the Trial Chamber effectively allowed the submission of evidence into the record “without a real discussion” and “exempted the Prosecution from its obligation to provide information on their authenticity by establishing a presumption of authenticity which the Defence will now have to reverse”.⁴⁷ In this regard, Mr Gbagbo avers that the Trial Chamber “was not impeded in any way from ruling immediately, at least on the evidence whose authenticity the Prosecution clearly was unable to demonstrate”.⁴⁸

26. Under his second ground of appeal, Mr Gbagbo argues that, while “the weight to be attached to an item of evidence can be determined at the end of judicial

⁴⁰ [Impugned Decision](#), para. 39 and footnote 68.

⁴¹ [Impugned Decision](#), para. 44.

⁴² [Mr Gbagbo’s Document in Support of the Appeal](#), para. 52.

⁴³ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 29.

⁴⁴ [Mr Gbagbo’s Document in Support of the Appeal](#), paras 33-35, 40.

⁴⁵ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 38.

⁴⁶ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 33.

⁴⁷ [Mr Gbagbo’s Document in Support of the Appeal](#), paras 39-44.

⁴⁸ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 37.

proceedings [...] the same does not hold true for its authenticity”.⁴⁹ Mr Gbagbo argues that, by not ruling immediately on the admissibility of the evidence, the Trial Chamber made “an admissibility ruling conditional on evidence other than the given item of evidence itself”.⁵⁰ Mr Gbagbo adds that this approach makes it difficult for the Defence to comply with the letter of the Rules, namely rule 64 (1) of the Rules.⁵¹ He argues that since the Defence will not know until the final judgment which items of evidence the Chamber will admit and on what basis (authenticity or relevance) how could it, under these conditions, be able to file motions pursuant to this rule.⁵²

3. *Mr Blé Goudé’s submissions before the Appeals Chamber*

27. Under his first ground of appeal, Mr Blé Goudé submits “that by ‘mak[ing] an exception to the established procedure’”, which “in the present case [...] is not to rule on admissibility of evidence before the end of the trial”, “the Majority must have intended to actually rule on the admissibility of the documents tendered into evidence”.⁵³ Mr Blé Goudé observes that, despite “identif[ying] specific concerns with regard to the authenticity of certain items of evidence” submitted by the Prosecution, the Majority declined to rule on the admissibility of the evidence and thus “did not attach any legal consequence to its [...] findings” of insufficiency.⁵⁴

28. Mr Blé Goudé additionally notes that the Appeals Chamber has held that “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” article 64 (2) of the Statute to “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’”.⁵⁵ In this regard, Mr Blé Goudé argues that the Trial Chamber’s decision creates unfairness in a number of ways.

⁴⁹ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 47.

⁵⁰ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 48.

⁵¹ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 50.

⁵² [Mr Gbagbo’s Document in Support of the Appeal](#), para. 50.

⁵³ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 19 quoting [Impugned Decision](#), para. 36.

⁵⁴ [Mr Blé Goudé’s Document in Support of the Appeal](#), paras 20-22.

⁵⁵ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 24 referring to Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, “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’”, 3 May 2011, [ICC-01/05-01/08-1386](#) (OA 5 OA 6) (“Bemba OA 5 OA 6 Judgment”).

29. First, Mr Blé Goudé contends 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)” of the Rules “to raise any issue relating to relevance or admissibility at the time when the evidence is submitted to the Chamber”.⁵⁶ Second, Mr Blé Goudé asserts that, where the tendering party fails to provide information relating “to an issue as important as authenticity of the document, the only remedy that would be consistent with [the Trial Chamber’s] 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”.⁵⁷

30. Third, Mr Blé Goudé avers that the Trial Chamber’s decision “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”, thus creating “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”.⁵⁸

31. Finally, Mr Blé Goudé argues that as a result of the Impugned Decision, potentially inadmissible evidence would be put to witnesses and it would therefore “be impossible for the judges and the parties to determine, at the end of the proceedings, the extent to which a witness has been led or influenced by inadmissible evidence”, a “consequence [that] will [...] endanger the truth-finding nature of the trial”.⁵⁹

32. Mr Blé Goudé concludes that the Trial Chamber “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”.⁶⁰

33. Under his second ground of appeal, Mr Blé Goudé challenges the Trial Chamber’s decision to provide the Prosecutor with an “unrestricted opportunity”⁶¹ to

⁵⁶ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 25.

⁵⁷ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 25.

⁵⁸ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 29. *See also* para. 28.

⁵⁹ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 30.

⁶⁰ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 31.

⁶¹ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 32.

submit further evidence on the admissibility of the documentary evidence. Mr Blé Goudé submits that “the Impugned Decision introduced the concept of ‘go with the flow’ substantiation of admissibility of documentary evidence” whereby “[t]he 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”.⁶² He avers that this appears to be in plain contradiction with rule 64 (1) of the Rules, leading to the impairment of the rights of the Defence and the right to a fair trial on several levels.⁶³ Mr Blé Goudé asserts that this approach affects the principle of equality of arms as “the Majority gave guidance to the Prosecution on how to better substantiate the authenticity of the documents tendered into evidence” without assurance that the Defence will receive specific guidance on its bar table motions, and because, given “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”;⁶⁴ lastly, he adds that this approach also has consequences for the Defence in terms of resource allocation.⁶⁵

34. Finally, Mr Blé Goudé notes that the Impugned Decision appears to contradict “the Order issued by the Chamber on 7 May 2015” by which the Prosecution ought to have terminated its investigation by 30 June 2015 and should therefore not be authorized to disclose more incriminatory material.⁶⁶ Mr Blé Goudé concludes that “[t]his implies that *de facto* potential exculpatory information could not be disclosed to the Defence”.⁶⁷

4. *Prosecutor’s submissions before the Appeals Chamber*

35. The Prosecutor claims that the Trial Chamber was within its discretion to apply the regime for the submission of evidence in this case and by deferring the assessment of the evidentiary criteria in relation to the submitted documents until the deliberations pursuant to article 74 of the Statute.

⁶² [Mr Blé Goudé’s Document in Support of the Appeal](#), paras 32-34. *See also* para. 23.

⁶³ [Mr Blé Goudé’s Document in Support of the Appeal](#), paras 35-36.

⁶⁴ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 39.

⁶⁵ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 40.

⁶⁶ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 43 referring to Trial Chamber I, “Order setting the commencement date for trial”, [ICC-02/11-01/15-58](#), para. 22.

⁶⁷ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 44.

36. First, the Prosecutor argues that the Impugned Decision did not rule on the relevance or admissibility of the evidence submitted, but merely recognised the tendered documents as having been “‘submitted’, but no more”.⁶⁸ She argues that the Impugned Decision did not apply paragraph 44 of the Amended Directions as “‘evidentiary criteria’ which it had to be satisfied about in order to have the documents recognised as formally submitted”, as “[t]his would have been inconsistent with the submission regime [...] and would have conflated the chosen submission of evidence regime with an admission of evidence regime”.⁶⁹ The Prosecutor asserts that the Trial Chamber could have recognised “items as ‘formally submitted’ irrespective of whether or not they met the criteria in paragraph 44 of the Amended Directions”.⁷⁰

37. Second, the Prosecutor argues that neither appellants “advance any legal basis to show why” the submission of the evidence should have been rejected or warranted an “immediate decision on the admissibility of the submitted items”.⁷¹ The Prosecutor avers that the Amended Directions criteria are “geared towards assisting the non-tendering party with ‘succinct information’ so that it may properly exercise its right under rule 64(1) to make pertinent objections at the time of submission”.⁷² She adds that the Prosecution’s burden to establish authenticity by the end of the trial remains intact.⁷³

38. In respect of the Trial Chamber’s discretion to defer the assessment of the admissibility of the evidence, the Prosecutor argues that the Trial Chamber is “not obliged to rule on admissibility at the time of submission merely because the non-tendering party advances objections under rule 64(1)”.⁷⁴ Second, she argues that the Trial Chamber would have been “unable” at this stage to assess potential prejudice to the parties resulting from the deferment of decisions on admissibility of the evidence.⁷⁵ Third, the Prosecutor emphasises that the Trial Chamber’s consideration that the Defence was not prejudiced was reasonable in the circumstances as both Mr

⁶⁸ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 10.

⁶⁹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 13.

⁷⁰ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 14.

⁷¹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 16.

⁷² [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 17.

⁷³ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 19.

⁷⁴ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 21.

⁷⁵ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 22.

Gbagbo and Mr Blé Goudé could still continue to place their objections on the trial record in respect of the documents; they may still make additional arguments in the future, respond to the developments in the trial, and present their position on the assessment of the evidence in their closing submissions for the consideration of the Trial Chamber when assessing the documents in totality.⁷⁶

39. The Prosecutor points out that the Defence had access to the documents in question and the liberty to assess them in order to build their challenges accordingly.⁷⁷ She contends that Mr Gbagbo has used some of these documents in court which “suggests, at least, that the reliability of those collections is not in question”.⁷⁸

40. The Prosecutor also responds on the content of Mr Gbagbo’s challenges to certain documents⁷⁹ as well as the challenges concerning the “methodology of the Prosecution’s investigation and the chain of custody of the documents”,⁸⁰ concluding that Mr Gbagbo’s first and second ground and Mr Blé Goudé’s first ground should be dismissed for failure to show error.⁸¹

41. In respect of Mr Blé Goudé’s second ground of appeal, the Prosecutor responds that he disregards the “organic” nature of the proceedings seeing as the assessment of the relevance, probative value and any prejudicial effect of an item of evidence may evolve from the time when it was first introduced.⁸² The Prosecutor adds that Mr Blé Goudé has not been precluded from invoking rule 64 (1) and making additional submissions upon submission of additional information on the relevance and probative value of the documents in question.⁸³ She avers that Mr Blé Goudé’s arguments pertaining to the principle of equality of arms are “speculative and unfounded” as the Chamber’s guidance is directed to both parties.⁸⁴ Further, the Prosecutor argues that, even assuming that the Chamber had erred in not ruling on the question of admissibility of the documents in question, there is no error because the

⁷⁶ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 23.

⁷⁷ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 24.

⁷⁸ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 26.

⁷⁹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 26.

⁸⁰ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 27.

⁸¹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 28.

⁸² [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 32.

⁸³ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 35.

⁸⁴ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 36.

Chamber's decision is "reasonable and squarely within [its] discretion to manage the proceedings".⁸⁵ The Prosecutor argues, finally, that the Defence did not suffer any prejudice since they had challenged the reliability of the documents upon submission and had had the opportunity to further challenge the witnesses' testimony in addition to challenging all the evidence at the end of the trial under rule 141 (2).⁸⁶

5. *Victims' submissions before the Appeals Chamber*

42. The Victims contend that the Trial Chamber did impose a legal consequence for the Prosecutor's insufficient demonstration of authenticity by declining to rule on the admissibility of the submitted evidence in the Impugned Decision, in line with the established procedure.⁸⁷ They explain that no prejudice results from the Impugned Decision because, *inter alia*, "[Mr Ntaganda] is not precluded from submitting further arguments on the admissibility of the documentary evidence at hand pursuant to rule 64(1) of the Rules [...] as the trial develops", "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".⁸⁸ Furthermore, the Victims submit that the Chamber did not "clutter the record with dubious evidence that may influence upcoming witnesses without the Chamber's knowledge" because "the Chamber [is] composed of professional judges" who will consider the appropriate weight to afford to "testimony related to documents subsequently declared inadmissible".⁸⁹

43. The Victims argue that the Trial Chamber's authorization to the Prosecutor to submit more evidence in relation to authenticity "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."⁹⁰ Finally, the Victims submit that the contested ruling is only applicable to the specific submissions of documentary evidence addressed therein, so "[t]he Chamber is therefore not

⁸⁵ [Prosecutor's Response to the Documents in Support of the Appeal](#), para. 37.

⁸⁶ [Prosecutor's Response to the Documents in Support of the Appeal](#), para. 37.

⁸⁷ [Legal Representatives' Response to the Documents in Support of the Appeal](#), paras 29-33.

⁸⁸ [Legal Representatives' Response to the Documents in Support of the Appeal](#), paras 39-40.

⁸⁹ [Legal Representatives' Response to the Documents in Support of the Appeal](#), paras 41, 43.

⁹⁰ [Legal Representatives' Response to the Documents in Support of the Appeal](#), paras 48, 53.

prevented from ruling on admissibility when deciding on future submissions of evidence”.⁹¹

6. *Determination by the Appeals Chamber*

(a) **Scope of the present appeals**

44. In light of the arguments raised by Mr Gbagbo and Mr Blé Goudé, the Appeals Chamber deems it necessary first to recall the scope of the appeals at hand. It notes that, in its Decision of 29 January 2016, the Trial Chamber, by majority, 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”, “including upon a request of the parties relating to a specific item of evidence, or categories of evidence”.⁹² In the Impugned Decision, the Trial Chamber recalled this decision and reiterated that “as a matter of principle, it would postpone making any rulings on the relevance or admissibility of evidence submitted by the parties until the end of the trial”.⁹³ In the Decision on Leave to Appeal, the Trial Chamber noted that the Impugned Decision was “merely an application” of its earlier Decision of 29 January 2016 and, as such, the Chamber’s “general approach towards the submission and admissibility of evidence [...] does not arise from the Impugned Decision”.⁹⁴ The Appeals Chamber also notes that the Amended Directions which, *inter alia*, are instructive on the approach adopted by the Trial Chamber to the introduction of documentary evidence without producing it by or through a witness, is a decision for which leave to appeal was denied.⁹⁵

45. The Appeals Chamber recalls that it has previously held that, by virtue of articles 64 (9) (a) and 69 (4) of the Statute, Trial Chambers have discretion to “rule or not on relevance or admissibility when evidence is submitted to the Chamber”.⁹⁶ Nevertheless, the Appeals Chamber has cautioned that a Trial Chamber

⁹¹ [Legal Representatives’ Response to the Documents in Support of the Appeal](#), para. 54.

⁹² [Decision of 29 January 2016](#), p. 10, para. 17. *See also* para. 12.

⁹³ [Impugned Decision](#), para. 33.

⁹⁴ [Decision on Leave to Appeal](#), para. 19.

⁹⁵ *See* “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)”, 7 June 2016, [ICC-02/11-01/15-569](#).

⁹⁶ [Bemba OA 5 OA 6 Judgment](#), para. 37.

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 [article 64 (2) of the Statute].⁹⁷

46. In the case at hand, the Trial Chamber, while generally deciding to defer consideration of relevance and admissibility of evidence, left open the possibility to render an “intermediate ruling” when required “under the Statute or otherwise appropriate”, “including upon a request of the parties”.⁹⁸ In this context, the Appeals Chamber understands the scope of the appeal to be confined to whether the Trial Chamber in this instance correctly balanced its discretion, when it decided not to rule on the admissibility of the documents in question despite finding potential deficiencies in the authenticity of same with its obligations under article 64 (2) of the Statute. Thus, for Mr Gbagbo and Mr Blé Goudé to succeed on appeal, it must be established that the Trial Chamber erred in the exercise of its discretion and, if so, that this materially affected the Impugned Decision.

47. In contrast, the present appeals do not cover the correctness or otherwise of the Trial Chamber’s general approach to defer rulings on the relevance or admissibility of evidence submitted until the final judgment or its approach to the submission of documentary evidence when not produced through a witness. As such, the Appeals Chamber will disregard arguments that challenge the general approach of the Trial Chamber to decisions on admissibility and/or the submission of documentary evidence.⁹⁹

⁹⁷ [Bemba OA 5 OA 6 Judgment](#), para. 37.

⁹⁸ [Decision of 29 January 2016](#), p. 10, para. 17. *See also* para. 12.

⁹⁹ *See* [Mr Gbagbo’s Document in Support of the Appeal](#), paras 13-21 where he argues, *inter alia*, that the submission of documentary evidence in accordance with the Amended Directions violates the principle of orality when such evidence can be introduced through witnesses; [Mr Gbagbo’s Document in Support of the Appeal](#), paras 21-23 where he argues, *inter alia*, that allowing the submission of large amounts of evidence without a “precise, criterion-by-criterion ruling on the admission of evidence” at the time of submission, forces the Defence “to prepare its own case without knowing which evidence [...] it should take into account [...]”. *See also* [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 25.

(b) Arguments that are unsubstantiated or based on a misunderstanding of the Impugned Decision

48. The Appeals Chamber observes that some of the arguments raised by Mr Gbagbo and Mr Blé Goudé misapprehend the Impugned Decision or are unsubstantiated. In particular, Mr Gbagbo argues that the Impugned Decision “exempted the Prosecution from its obligation to provide information on [the documents’] authenticity by establishing a presumption of authenticity which the Defence will now have to reverse”.¹⁰⁰ The Appeals Chamber notes that, in support of this argument Mr Gbagbo makes several assertions concerning the Trial Chamber’s findings, but fails to substantiate with precision where the error arises in the Impugned Decision. For instance, he asserts that “[b]y refusing to accept that it is for the Prosecution to provide useful information to authenticate the documents, the Chamber’s majority erred in law”.¹⁰¹ The Appeals Chamber notes that the Trial Chamber at no point directed the Defence to provide further information to authenticate the documents that were being tendered by the Prosecutor. Accordingly this argument is rejected.

49. Similarly, Mr Blé Goudé contends that the Trial Chamber “must have intended” to rule on the admissibility of the documents after having identified specific concerns as to authenticity by making an exception to the established procedure.¹⁰² The Appeals Chamber finds no merit in this argument as it is clear from the plain text of the Impugned Decision that the Trial Chamber did not intend to rule on the admissibility of the items of evidence at this point in time and, in fact, did not do so.¹⁰³ Accordingly, this argument is rejected.

50. Mr Blé Goudé also refers to the principle of fair trial together with “good trial management” to argue that substantiation of the admissibility and relevance of documentary evidence at the very time of submission is justified.¹⁰⁴ The Appeals Chamber finds this argument to be predicated on mere disagreement with the Trial Chamber’s decision to, in principle, defer ruling on the relevance or admissibility of

¹⁰⁰ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 40.

¹⁰¹ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 42. *See also* paras 43 and 44.

¹⁰² [Mr Blé Goudé’s Document in Support of the Appeal](#), paras 19-22.

¹⁰³ [Impugned Decision](#), para. 36.

¹⁰⁴ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 42.

the evidence concerned until the end of the proceedings. Accordingly, this argument is rejected. .

(c) Alleged errors in the exercise of discretion

51. Turning to their arguments in the main, both Mr Gbagbo and Mr Blé Goudé challenge the Trial Chamber’s finding that “[given its discretion] to rule on relevance or admissibility of evidence at the time of its submission, there is no indication in the present instance that this is necessary or appropriate”.¹⁰⁵ In Mr Gbagbo and Mr Blé Goudé’s view, the Trial Chamber should have ruled on the admissibility of the documents, given its concerns regarding the authenticity of the documents concerned. In support of this contention, they raise several arguments, which the Appeals Chamber will address in turn.

(i) Purported requirement to determine authenticity immediately

52. To the extent that Mr Gbagbo argues that, as a matter of logic, the authenticity of a document must be determined by reference only to the document concerned and that there is therefore no reason to defer a ruling in this regard,¹⁰⁶ the Appeals Chamber disagrees. It is clear that, depending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial. Indeed, this appears to have been the assumption of the Trial Chamber, when it stated, in relation to items allegedly emanating from the *Gendarmerie*, that “further evidence may be necessary to determine the authenticity of some of the documents submitted”.¹⁰⁷ For that reason, the Appeals Chamber is also unpersuaded by the argument that, having identified concerns as to authenticity, the Trial Chamber should have ruled on admissibility. Therefore, Mr Gbagbo’s argument in this respect is rejected.

(ii) Non-compliance with Amended Directions

53. Mr Gbagbo argues that the Trial Chamber ought to have ruled on admissibility since the Prosecutor had not complied with her obligations under paragraphs 43 and

¹⁰⁵ [Impugned Decision](#), para. 35.

¹⁰⁶ [Mr Gbagbo’s Document in Support of the Appeal](#), para. 47.

¹⁰⁷ [Impugned Decision](#), para. 39.

44 of the Amended Directions, which, he asserts, “require a party to prove its claims on the authenticity of documents”. The Appeals Chamber notes that the Amended Directions stipulate that the introduction of any item of documentary evidence “shall be accompanied by succinct information” indicating, *inter alia*, the relevance and probative value (including authenticity).¹⁰⁸ In the Impugned Decision the Trial Chamber further clarified that

[...] succinct should not be understood as deficient or incomplete. 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 [...] 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.¹⁰⁹

54. The Appeals Chamber notes that the purpose of the procedure set out in paragraphs 43-44 of the Amended Directions is to require the tendering party to provide sufficient information on the relevance or admissibility of the item of evidence so as to enable the other parties to fully ventilate any objections thereto. However, paragraphs 43-44 of the Amended Directions do not stipulate that failure to provide sufficient information in this regard should necessarily entail the inadmissibility of the evidence in question. Rather, as per the Amended Directions, it remains within the discretion of the Trial Chamber to address shortcomings in a party’s submissions. Thus, the arguments in this regard are rejected.

(iii) Purported incompatibility with rule 64 (1) of the Rules

55. The Appeals Chamber does not consider that the Trial Chamber’s decision not to rule on the admissibility of the items in respect of which it had concerns as to their authenticity is incompatible with the right of the non-tendering party to raise objections, as stipulated in rule 64 (1) of the Rules. This provision requires, in principle, the non-tendering party to raise any objections to the relevance or admissibility of evidence at the time of its submission to the Chamber. It is precisely for that reason that the Amended Directions require the tendering party to submit

¹⁰⁸ See [Amended Direction](#), para. 44.

¹⁰⁹ [Impugned Decision](#), para. 38.

sufficient information; thus, the right to challenge the evidence is preserved as well as the discretion of the Trial Chamber to rule on admissibility.

56. Nevertheless, if the tendering party fails to submit sufficient information, this does not mean that the non-tendering parties' right to raise objections is violated. The second sentence of rule 64 (1) of the Rules specifically provides that "[e]xceptionally, 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". Mr Blé Goudé maintains that, in the present case, the issues concerning relevance or admissibility were known at the time of submission and as such the exception provided in rule 64 (1) of the Rules would not apply. The Appeals Chamber finds this argument to be unpersuasive since, as argued by the Prosecutor,¹¹⁰ if additional information is adduced on the relevance or admissibility of documents previously submitted, the Defence will not be precluded from making additional submissions pursuant to rule 64 (1) of the Rules. In the view of the Appeals Chamber, in situations where the tendering party failed to provide sufficient information at the time of submission of the evidence, this provision allows for the protection of the rights of the non-tendering parties and must be applied accordingly. In other words, the Appeals Chamber would expect the Trial Chamber to accept the existence of "exceptional circumstances" in terms of rule 64 (1) of the Rules more easily if the original submissions of the tendering party were deficient. What is important is that the parties are able to raise issues on relevance or admissibility in light of all the information, either at the time of submission or subsequently within the confines of rule 64 (1) of the Rules.

57. The Appeals Chamber also finds unpersuasive Mr Blé Goudé's contention that the Defence are prevented from making a "founded objection" at the time of submission as "it will not know whether there will be additional arguments on this issue".¹¹¹ Rule 64 (1) of the rules requires the non-tendering party to found its issues on relevance or admissibility on the information known and available at the time of submission regardless of whether additional information would be forthcoming.

¹¹⁰ [Prosecutor's Response to the Documents in Support of the Appeal](#), para. 35.

¹¹¹ [Mr Blé Goudé's Document in Support of the Appeal](#), para. 38.

58. Thus, while it is generally desirable and in the interests of fairness and efficiency for all known information regarding relevance or admissibility to accompany the submission of evidence, ruling on admissibility in such circumstances is not the “only remedy consistent with [a Trial Chamber’s] obligations under article 64(2) of the Statute”¹¹² if a party fails to do so.

(iv) Provision of an “unrestricted opportunity” for the Prosecutor to make further submissions and guidance

59. The Appeals Chamber finds no merit in Mr Blé Goudé’s argument that, as a consequence of the Trial Chamber’s decision, the Prosecutor has been given an “unrestricted opportunity” to submit further evidence on the admissibility of documentary evidence,¹¹³ “impair[ing] the rights of the Defence and the right to a fair trial on several levels”.¹¹⁴

60. As noted above, evidence adduced and discussed during trial may impact on the assessment of evidence already submitted, including in respect of its authenticity. When viewed in this light, the Trial Chamber did not err by not restricting the Prosecutor’s opportunity to submit further information relating to the authenticity of the documents tendered. Mr Blé Goudé misrepresents the Trial Chamber’s decision when he asserts that the “tendering party is authorized to retain evidence on relevance and admissibility [...] until the end of the trial”.¹¹⁵ The Appeals Chamber notes that the Trial Chamber neither stipulated nor implied such authorisation. While no time limit for the submission of additional information was explicitly imposed by the Trial Chamber, it should clearly be submitted as soon as it becomes known and available to the tendering party at which point the non-tendering party, pursuant to rule 64 (1) of the Rules, may respond. The Appeals Chamber considers that this does not place an undue obligation on the non-tendering party or their allocation of resources as the right to respond in such circumstances represents an inevitable consequence of trial proceedings.

¹¹² [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 25; [Mr Gbagbo’s Document in Support of the Appeal](#), paras 38, 48.

¹¹³ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 32.

¹¹⁴ [Mr Blé Goudé’s Document in Support of the Appeal](#), paras 35-36.

¹¹⁵ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 35.

61. Furthermore, the Appeals Chamber considers Mr Blé Goudé’s argument that the principle of equality of arms is compromised because it is unclear whether the Defence would also be given guidance on how to substantiate the authenticity of its documents to be wholly without merit and at best speculative. The Appeals Chamber also notes that it cannot be said that the Trial Chamber provided inappropriate guidance to the Prosecutor. It merely stated that “[w]ithout going into further detail, the Chamber observes that further evidence may be necessary to determine the authenticity of some of the documents submitted”, referring in a footnote to one document that “ha[d] not been formally submitted so far” and noting that “some documents are undated, bear no signature or no name appears on them”.¹¹⁶ Far from giving guidance, the Trial Chamber thus merely noted certain facts – without indicating what the Prosecutor should or should not do.

(v) *“Cluttering” of the evidentiary record*

62. Contrary to the submission of Mr Blé Goudé, the Appeals Chamber does not consider that the Trial Chamber’s decision not to rule on the admissibility of the items in respect of which it had concerns as to their authenticity leads to an inappropriate “cluttering” of the evidentiary record.¹¹⁷ To a large extent, the result complained of is merely a consequence of the Trial Chamber’s decision generally to defer its consideration of relevance and admissibility of evidence to the end of the trial and is, therefore, beyond the scope of this appeal. To the extent that the argument seems to predict what the eventual decision of the Trial Chamber in relation to the items in question might be, the argument is speculative.

(vi) *Impact of potentially inadmissible evidence on witness testimony*

63. To the extent that Mr Blé Goudé argues that, by not ruling on the admissibility of the items, even though the Trial Chamber has expressed concerns as to their authenticity, potentially inadmissible documents may be presented to witnesses, which may influence their testimony,¹¹⁸ the Appeals Chamber considers that this argument is speculative at best as it is currently unclear whether and which documents

¹¹⁶ [Impugned Decision](#), para. 39 and footnote 68.

¹¹⁷ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 29.

¹¹⁸ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 30.

will be presented to witnesses in the further course of the trial. In addition, since concerns in relation to authenticity have been raised, the Trial Chamber is fully aware of them and there is no indication that it will not be in a position to contextualise any evidence that a witness may give in relation to, or based on, items of evidence the authenticity of which is challenged. Accordingly, the argument is rejected.

64. On a related argument, Mr Blé Goudé claims that the Prosecutor’s obligation to disclose “all incriminatory material [...] and any other material to be relied on at trial [...] no later than 30 June 2015” precludes her from disclosing more incriminatory material at a later stage.¹¹⁹ The Appeals Chamber finds the argument to be speculative as it fails to demonstrate that an opportunity to adduce further information in these circumstances would necessarily involve the disclosure of new material not previously included in the parties’ list of evidence. Accordingly, the argument is rejected.

(d) Conclusion

65. In sum, the Appeals Chamber considers that the Trial Chamber did not incorrectly balance its discretion to defer its consideration of the admissibility of the items with its obligations under article 64 (2) of the Statute. Mr Gbagbo and Mr Blé Goudé have failed to demonstrate that the Trial Chamber erred in the exercise of its discretion when it deferred ruling on admissibility. Accordingly the grounds of appeal are rejected.

IV. APPROPRIATE RELIEF


66. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision.

67. The Appeals Chamber notes regulation 19 *bis* (1) of the Regulations of the Court which provides that “[u]nless otherwise determined by a Chamber, during the judicial recess hearings shall be limited to urgent issues and time limits shall not be suspended”. Although rule 158 of the Rules read with article 83 (4) of the Rome

¹¹⁹ [Mr Blé Goudé’s Document in Support of the Appeal](#), para. 43.

Statute provides that judgments of the Appeals Chamber “shall be delivered in open court”, the Appeals Chamber notes that the purpose is, *inter alia*, to allow for publicity of proceedings. In the present circumstances where the Court is in judicial recess, the Appeals Chamber considers it appropriate to deliver the judgment by publishing it on the Court’s website and by notifying the participants in accordance with regulations 31 and 32 of the Regulations of the Court.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofma ski
Presiding Judge

Dated this 24th day of July 2017

At The Hague, The Netherlands