

**Cour
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**International
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Court**

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TRIAL CHAMBER VII

Before: Judge Althea Violet Alexis-Windsor, Presiding Judge
Judge Miatta Maria Samba
Judge Beti Hohler

**SITUATION IN LIBYA
IN THE CASE OF
*THE PROSECUTOR v. KHALED MOHAMED ALI EL HISHRI***

Public

**Defence supplementary submissions on the
Directions on the Conduct of Proceedings**

Source: Defence of Mr Khaled Mohamed Ali El Hishri

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A. INTRODUCTION

1. The Defence for Mr Khaled Mohamed Ali El Hishri files these supplementary submissions pursuant to Trial Chamber VII's Order inviting submissions on Directions on the conduct of proceedings ("Order").¹

2. These submissions complement the joint submissions filed by the Prosecution, Defence, and counsel from the Office of Public Counsel for Victims ("OPCV"), provisionally appointed as common legal representative for victims.² These submissions elaborate on Defence proposals concerning four issues that deviate from the Directions on the conduct of proceedings issued in the *Duterte* case ("*Duterte* Directions")³ on which no agreement could be reached with the Prosecution and OPCV. The Defence submits that its proposals should be preferred over those set out in the *Duterte* Directions.

B. SUBMISSIONS

1. Documentary, digital or physical evidence

3. Paragraphs 33-42 of the *Duterte* Directions provide for a submission-based regime for reception of evidence as opposed to an admission-based regime. Whilst recognising that the submission-based regime is now "court-wide",⁴ the Defence submits that it nevertheless presents significant disadvantages when compared to the greater certainty afforded by a regime that is based on the admissibility of evidence received by the Chamber during proceedings. The submission-based regime necessarily creates great uncertainty for the Parties at the end of the trial as to what evidence, ultimately, will and will not be relied upon by the Chamber at the deliberation phase when preparing its Article 74 Judgment. It obliges the Parties, but

¹ Order inviting submissions on Directions on the Conduct of Proceedings, ICC-01/11-01/25-185, 17 September 2026

² Joint Prosecution, Defence, and CLRV Submissions on the Directions on the Conduct of Proceedings, ICC-01/11-01/25-196

³ *Duterte*, Directions on the conduct of proceedings, ICC-01/21-01/25-185, 19 June 2026

⁴ *Duterte*, First Status Conference, ICC-01/21-01/25-T-009-Red-ENG, 27 May 2026, p. 19, line 21

disproportionately the Defence, to advance in final trial briefs often detailed and lengthy arguments about the relevance and probative value of huge numbers of exhibits that have been poured into the case, disproportionately by the Prosecution. This necessarily risks taking focus away from more substantive arguments about whether the Prosecution has met its burden of proving the Accused's guilt beyond reasonable doubt.

4. The submission-based regime rewards a Party – disproportionately the Prosecution – for “dump[ing] into the court record” a substantial quantity of “unnecessary and irrelevant evidence”, notably through the admission of excessively voluminous documents, and through the Bar table.⁵

5. The Defence respectfully adopts the analysis of Judge Geoffrey Henderson:

In party-driven trials, particularly trials of great complexity or size, it is essential that judges prevent trial proceedings from being inundated by large amounts of irrelevant, unauthentic, non-probative (*e.g.* anonymous hearsay) or otherwise prejudicial evidence. That is what the general admissibility rule contained in article 69 (4) of the Statute is designed for. It is not a formal exclusionary rule, which is based on protecting values that have nothing to do with the inherent quality of the evidence. Instead, it is the practical reflection of a basic principle of procedural fairness as well as a procedural tool to manage and streamline the presentation and evaluation of evidence.⁶

6. By contrast:

making admissibility rulings serves two important functions: firstly, to provide notice to the parties as to the purpose for which the evidence has been entered into the case record; *i.e.* what the tendering party aims to prove by it (possibly in conjunction with other evidence) and, second, to ensure that the Chamber receives all necessary information to make a fully informed evaluation of the exhibit's evidentiary weight.⁷

⁵ Duterte, First Status Conference, ICC-01/21-01/25-T-009-Red-ENG, 27 May 2026, p. 19, lines 24-25

⁶ Bemba *et al.*, Separate Opinion of Judge Geoffrey Henderson to the Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/13- 2275-Anx, 8 March 2018, (“Judge Henderson Separate Opinion”), para. 44

⁷ Judge Henderson Separate Opinion, para. 43

7. The submission-based regime has been criticised by other judges of the Appeals Chamber. In the *Bemba* appeal, Judges Van den Wyngaert and Morrison made the following point:

Whereas [the submission-based regime] may have been unproblematic in the context of a case relating to offences against the administration of justice. We are of the opinion that it is not appropriate in cases relating to article 5 of the Statute. In this respect we agree with our colleagues Eboe-Osuji and Henderson. Not only is it necessary to rule on the admissibility of all evidence submitted by the parties, the Trial Chamber must also apply the admissibility criteria of article 69 (4) of the Statute sufficiently rigorously to avoid crowding the case record with evidence of inferior quality. We are confident that, if this had been done in the present case, many of the problems that we have identified in this section would not have arisen.⁸

8. The *Duterte* Directions state that the Trial Chamber will assess the evidence “as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the Accused”.⁹ However, it is simply not the case that an holistic approach to assessment cannot be taken following the admission-based regime proposed by the Defence. There is no incompatibility with the admission-based regime pressed by the Defence. All judges, irrespective of their legal tradition of origin, consider evidence holistically, whether at the time the evidence is submitted or at the deliberation phase:

41. Indeed, the fact that Common Law judges consider the authenticity, probative value and potential prejudice of each item of evidence individually does not mean that they consider these factors in isolation. Moreover, once the evidence is admitted, its evidentiary weight is assessed ever so “holistically” as in any other legal system.¹⁰

[...]

46. In my respectful view, it is a profound misconception to suggest that it is not possible to make fully informed admissibility rulings before all the evidence is in. To suggest this amounts to saying that thousands of judges on Common Law benches throughout the world have for centuries been making ill-informed decisions. Such a suggestion is plainly wrong. Indeed, as any experienced Common Law judge knows, decisions on relevance, probative value and prejudice are made on the strength of the parties’ submissions. If the tendering party is of the view that the Chamber must assess these

⁸ *Bemba et al.*, Separate opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Anx2, 8 June 2018, para. 18

⁹ *Duterte* Directions, para. 34

¹⁰ Judge Henderson Separate Opinion, para. 41

factors in light of other evidence that is still to be submitted, they have the responsibility to point this out to the Chamber who may then admit such evidence *de bene esse*. The Chamber will normally accept such submissions on a good faith and *prima facie* basis.¹¹

9. The Defence anticipates that all the members of Trial Chamber VII, two of whom are “experienced Common Law judges”, will accept the fundamental truth and good sense of the comments of Judges Henderson, Van den Wyngaert and Morrison.

10. Notwithstanding the attempt in the *Duterte* Directions to identify a fair and pragmatic middle way between the admission- and submission-based regimes, the Defence submits that the right balance is yet to be struck. It is submitted that, in reality, very many items of evidence will be plainly relevant and authentic, and their probative value will not be in dispute. There will be no reason not to admit definitively such evidence there and then.

11. The experience of the *ad hoc* International Criminal Tribunals for Rwanda and the former Yugoslavia is instructive. Many, if not most, exhibits in any given trial were admitted at the time they were discussed with witnesses without objection.

12. Where there was objection but insufficient time for a Trial Chamber to deal with the question of admissibility, an exhibit would be “MFI’d” (marked for identification), with time later set aside for the Parties to advance their arguments and for the Chamber to make its ruling. The system generally speaking worked very well. At the end of a trial, the Parties and the Chamber knew exactly what evidence had been admitted and what evidence had been excluded. By the end of a trial, the record had generally speaking not been “inundated by large amounts of irrelevant, unauthentic, non-probative (*e.g.* anonymous hearsay) or otherwise prejudicial evidence”. At the very least, real efforts would have been made by the Parties and Chamber to mitigate the worst effects of such inundation.

¹¹ Judge Henderson Separate Opinion, para. 46

13. For these reasons, the Defence respectfully submits that the Trial Chamber should adopt an admission-based regime for the reception of evidence in this case.

2. Witnesses

(i) *Order of questioning*

14. The Prosecution and OPCV propose the addition to paragraph 44 of the *Duterte* Directions of a deadline “[w]ithin 10 working days before the expected appearance” of a witness for the non-calling party to indicate the uncontested part of the anticipated evidence. The Defence submits that paragraph 44 of the *Duterte* Directions is unnecessary, does not promote efficiency at trial, whether in its original or amended form as proposed, and should not, therefore, be included in any Directions on the conduct of proceedings in this case.

15. The Defence submits, firstly, that paragraph 44 does not actually reflect established Court jurisprudence or even practice. It had no equivalent in the conduct of proceedings directions in either of the two most recent cases – *Abd-Al-Rahman* and *Said* – before the Court. Paragraph 44, expressing an expectation that the non-calling party indicate in advance the uncontested parts of a forthcoming witness’s evidence, is novel. The Prosecution and OPCV’s proposal that such indication be given “[w]ithin 10 working days” of each witness’s appearance goes further still. As far as the Defence is aware, no Trial Chamber has ever articulated such an expectation.

16. This expectation does not take into account the realities of criminal trial preparation. During the process of preparing cross-examination, the question of which parts of a forthcoming witness’s evidence is contested, or not contested, evolves, sometimes significantly. Different tactical decisions are taken right up to the moment examination by the non-calling party starts.

17. The Prosecution suggests that this requirement would allow the Parties to direct their questioning towards matters at issue. The Defence submits, however, that the calling party should always be prepared to adduce from each witness all evidence it

considers relevant to its own case. It is not for the non-calling party to shepherd its adversary around the matters that are most or least relevant to its case.

18. In any event, it is a commonplace in criminal litigation for the non-calling party to indicate, *at the time of a witness's testimony*, those parts on which the calling party can lead its witness. But to expect this to be indicated ten days in advance is simply unrealistic. The calling party should presume that all parts of each witnesses' evidence is contested.

(ii) *Use of materials during the questioning*

19. Regarding paragraph 56 of the *Duterte* Directions, the Defence notes that the non-calling party's obligation to provide a list of materials for use in cross-examination does not, or does not adequately, take into account the scenario where a witness is likely to take less than one day in examination-in-chief. To ensure that the calling party never has advance notice of the non-calling party's list of materials before the start of questioning of its witness, the Defence respectfully suggests that the following language be added to the current paragraph 56:

The non-calling party or participant will provide to the Chamber and the other party and participants, at least one day before they commence their questioning of the witness, *or immediately after the witness has made the solemn undertaking under Rule 66(1) of the Rules of Procedure and Evidence, whichever is later*, a list of any materials they intend to use during questioning. [...]

(iii) *Live testimony by means of audio or video-link technology*

20. Although not addressed in the *Duterte* Directions, the Defence submits that it would be both expedient and in the interests of justice for the Directions on the conduct of proceedings in this case to contain a paragraph on the use of its discretion when considering applications by a Party or participant under Rule 67(1) of the Rules of Procedure and Evidence.

21. The Defence submits that live testimony by audio or video-link technology should only ever be a means of testimony of last resort. In-court witness testimony

should be the default, departure from which should only be authorised in exceptional circumstances. As far back in time as *Tadić*, the ICTY held that the evidentiary value of video-link testimony “is not as weighty as testimony given in the courtroom”, and that it “should therefore be avoided as far as possible”.¹² The Trial Chamber stated its strong preference for “the physical presence of the witnesses at trial”.¹³

22. The Trial Chamber in *Delalić et al.* noted the *Tadić* Decision and provided its own reasons for attributing less weight to video-link testimony. This included concerns such as “distance of the witness from the solemnity of the courtroom proceedings” and the witnesses’ ability to see all those present in the courtroom, which “may detract from the reliance placed upon his or her evidence”.¹⁴ Further, video-link testimony may carry less weight than that of in-court testimony, “if the quality of the transmission impairs the Chamber’s assessment of the witness”.¹⁵

23. Finally, it has been observed that in-court witness testimony ensures the truthfulness of evidence by “reducing the risk that a witness will wrongfully implicate an innocent person”.¹⁶ A witness may be less capable of telling lies about an accused whom they are directly confronting in the same room, than they are an accused about whom they are testifying via video-link, where their view is primarily of the cross-examining lawyer or the judge. As recognised by the United States Supreme Court, the incentive for truth-telling when testifying via video-link, even if from another room in the same building, is far less than the incentive when in the very same room as the person the witness is testifying about.¹⁷

¹² ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (“*Tadić* Decision”), para. 21

¹³ *Tadić* Decision, paras 19, 21; see also ICTR, *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-4/-T, Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 October 2004 (“*Bagosora* Decision”), para. 15

¹⁴ ICTY, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21, Decision on motion to allow K, L, and M to give their testimony by means of video-link conference, 28 May 1997, para. 18

¹⁵ *Bagosora* Decision, para. 15

¹⁶ United States of America, Supreme Court, *Maryland v. Craig*, 27 June 1990, 497 U.S. 836, at 846

¹⁷ United States of America, Supreme Court, *Maryland v. Craig*, 27 June 1990, 497 U.S. 836, at 846

24. The Defence therefore respectfully proposes the addition of the following paragraph to the forthcoming Directions on the conduct of proceedings:

Live in-court testimony is to be preferred. Testimony presented by means of audio or video-link technology will only be authorised in exceptional circumstances and as a matter of last resort after substantiation by the calling party or participant.

C. CONCLUSION

25. The Defence respectfully requests that the Trial Chamber take these proposals into consideration for the forthcoming Directions on the conduct of proceedings in the instant case.



Yasser Hassan

Counsel for Mr Khaled Mohamed Ali El Hishri

Dated this 30th day of September 2026

At The Hague, The Netherlands