Cour Pénale Internationale

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Date: **15 May 2017**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Confidential

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)

Source: **Defence team for Laurent Gbagbo**

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

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Classification of the document:

1. The present document in support of the appeal is filed as confidential pursuant to regulation 23 *bis*(2) as it refers to documents themselves classified as confidential.

I. Procedural background

2. On 13 June 2016, the Prosecution filed the "Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of the proceedings"[1] in which it requested the introduction of 131 documents under paragraphs 43 and 44 of the directions on the conduct of the proceedings, i.e. without producing them by or through a witness.

3. On 14 July 2016, the Prosecution filed 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"[2] in which it requested the introduction of 24 documents under paragraphs 43 and 44 of the directions on the conduct of the proceedings, i.e. without producing them by or through a witness.

4. On 29 July 2016, the Defence filed a consolidated response to these two Prosecution requests.[3] In its response, the Defence opposed the admission of all but one of the documents referred to in the requests because the Prosecution had not demonstrated the relevance and/or authenticity of the documents in question.

5. On 7 September 2016, the Prosecution orally requested that two documents related to the testimony of Witness P-0501 be introduced into the case record.

[1] ICC-02/11-01/15-583-Conf.
[2] ICC-02/11-01/15-616-Conf.
[3] ICC-02/11-01/15-641-Conf.

6. On 9 September 2016, the Defence filed a response[4] to the Prosecution request and opposed the introduction of the documents relating to Witness P-0501 under paragraphs 43 and 44 of the directions on the conduct of the proceedings.

7. On 19 September 2016, the Prosecution orally requested the introduction of three documents related to the testimony of Witness P-0330 under paragraphs 43 and 44 of the directions on the conduct of the proceedings. [5]

8. On 27 September 2016, the Prosecution filed 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"[6] in which it requested the introduction of 166 documents related to the testimony of Witness P-0321.

9. On 7 October 2016, the Defence filed a "*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] in which it opposed the introduction of two of the three documents referred to in the Prosecution request.

10. On 9 December 2016, the Chamber rendered its "Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016" ("Impugned Decision"), in which it granted the Prosecution requests of 13 June 2016, 14 July 2016, 9 September 2016, 19 September 2016 and 27 September 2016 and recognized 161 documents as submitted into the case record under paragraphs 43 and 44 of the directions on the conduct of the proceedings.

[4] ICC-02/11-01/15-664-Conf.
[5] ICC-02/11-01/15-T-74-CONF-ENG, p. 4, line 24.
[6] ICC-02/11-01/15-687-Conf.
[7] ICC-02/11-01/15-716-Conf.

11. On 19 December 2016, the Defence filed a "*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'".[8] In its request, it raised seven appealable issues.

12. On 4 May 2017, the Chamber rendered a "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",[9] in which it granted the Defence leave to appeal the Impugned Decision on the third and fourth issues. The Chamber combined the two issues raised by the Defence into one single issue in which it also included the third issue raised by the defence for Charles Blé Goudé. The Chamber decided to reformulate the appealable issues into one single 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.[10]

II. Applicable law

13. In accordance with the rules of law, exceptions to the principle of orality – as envisaged in paragraphs 43 and 44 – must fall within the framework of procedural international criminal law and comply with its general principles.

14. Firstly, to abide by the principles of procedural international criminal law, and in particular the fact that documentary evidence must be introduced through a witness in order to be discussed by the parties, the use of paragraphs 43 and 44 should be restricted to non-contentious issues. The Trial Chamber in *Katanga* noted in

[8] ICC-02/11-01/15-776-Conf.
[9] ICC-02/11-01/15-901.
[10] *Ibid.*, para. 21.

this respect that "[i]t is especially appropriate for tendering documentary evidence concerning issues that must be proved, but about which there is relatively little controversy between the parties".[11] This is one way of restricting the use of paragraphs 43 and 44, which is necessary to ensure that fundamental issues relating to allegations can be orally and publicly debated, and therefore, that the principle of orality is applied.

15. Secondly, paragraphs 43 and 44 should not be used if it appears that witnesses who are able to provide clarifications on those documents – in particular, on their authenticity or reliability – are called to appear before the Court. If evidence can be presented to a witness who is scheduled to appear, what purpose would it serve to create additional steps to the proceedings, thus burdening the judicial process by seeking to introduce this evidence under a separate procedure? In other words, if witnesses can be used to introduce evidence, why fail to do so, thereby violating the principle of orality when it is in no way warranted?

16. To circumvent the fact that documents may be tendered only through a witness – in keeping with the principle of orality – and that exceptions to such a procedure are extremely limited, the Chamber makes a distinction between "submission" and "admission". It therefore introduces two stages: in the first stage (submission), the requesting party may submit a number of documents into the case record without knowing if they will technically be "admitted" since it is only at the second stage (admission), at the end of the proceedings, that the Bench will verify the criteria for admission.

17. Thirdly, the process provided for in paragraphs 43 and 44 should not be used at an early stage of the trial. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia stated in *Karadžić*:

[11] ICC-01/04-01/07-1665-Corr, para. 99.

> The bar table should not generally be the first port of call for the admission of evidence. It is, rather, **a supplementary method of introducing evidence**, which **should be used sparingly** to assist the requesting party to fill specific gaps in its case at a later stage in the proceedings.[12]

18. Fourthly, the party that wishes to use paragraphs 43 and 44 should provide a detailed demonstration that the evidence is authentic and that its use is relevant to the specific allegations set forth in the charges. Accordingly, the Trial Chamber in *Katanga* stated:

> [T]he Chamber stresses that, although it is permissible to tender documentary evidence directly without producing it by or through a witness under the Statute and the Rules, this does not entail a lower standard of relevance or admissibility. **On the contrary, the fact that evidence is being tendered without authentification by a witness may be an important factor in the Chamber's assessment of its admissibility.**[13]

19. If the Prosecution were authorized to introduce a large amount of evidence almost automatically, as the Impugned Decision allows it to, without truly demonstrating its usefulness with respect to a specific allegation, the Defence would be cornered into the impossible position of having to try to surmise how the Prosecution intended to use that evidence in relation to all the allegations. This would be akin to muddling the charges and adding ambiguity to the accusations, thereby undermining the basic principle of the accused's right to know what he or she is being charged with and to be informed in advance of the details of those charges.

20. It is for the Bench to verify that the criteria for the admission of evidence not produced by a witness are met for each item of evidence that a party wishes to introduce on the basis of paragraphs 43 and 44. The Bench must therefore give clear and detailed reasons for its decision so that the Defence is aware of what the Court deems relevant with respect to a specific allegation and can thus prepare its case accordingly. If, as in the Impugned Decision, there were no reasons or if the reasons

[12] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radovan Karadžić*, Trial Chamber, 13 April 2010, "*Decision on the Prosecution's first bar table motion*", para. 9.
[13] ICC-01/04-01/07-2635, para. 12.

concerning each item of evidence were inadequate, the Defence would be at a loss to understand not only the Prosecution's use of this evidence, but also the Bench's assessment of its relevance to the allegations. As long as the Bench does not rule on whether the Prosecution may or may not use a specific item of evidence in relation to a specific charge, the true basis of the Prosecution's case remains obscure to the Defence. It is a matter of enabling the Defence to have precise knowledge of the charges, which is made impossible if the Defence is not informed of which evidence will be used for which charges. It is therefore crucial that the Defence is provided with the most comprehensive information possible. The *Katanga* case clearly demonstrated that the relevance and probative value of each item of evidence logically had to be assessed by the Bench *before* its admission into the record, since relevance and probative value are conditions for admissibility. These conditions for admissibility must be differentiated from the weight the Bench might attach to the evidence in the judgment.[14]

21. The Chamber's stance is that it accepts – without a meticulous examination – the submission of a number of items of evidence into the record on the basis of paragraphs 43 and 44 because it considers that there is nothing conclusive in the act of their submission; the actual review allowing the admission of such or such evidence it may deem relevant is conducted only at the end of the trial.

22. The problem that arises is that as long as the Chamber refuses to make a precise, criterion-by-criterion ruling on the admission of evidence, as it does here, the Defence remains unaware of the details of the Prosecution's case and is forced to prepare its own case without knowing which evidence (for which the Prosecution has requested admission) it should take into account: it must therefore be ready for any eventuality. As Judge Henderson remarked in a previous discussion:

[14] *Ibid.*, para. 13.

> This is so as the impugned decision places the Defence in the objectionable position of having to either take the risk that the Chamber will not wittingly or unwittingly rely on such evidence or, alternatively, to shoulder the significant – and, in my view, illegal – burden of having to address each and every potentially adverse proposition contained in the prior recorded testimony (which may also be time and resource consuming). This is both unfair and has the potential to alter the outcome of the trial.[15]

Judge Henderson was referring here to the question of whether previous witness statements were admissible, but his reasoning clearly applied to the admissibility of evidence in general.

23. Let us recall that the procedure for the admissibility – in the ordinary meaning, i.e. after verification of the criteria established by the texts and case law – of evidence is intended to act as a safeguard against the use of thousands of items of evidence whose relevance and authenticity might be debatable or unreliable, and which would result in overwhelming the Defence.

III. Discussion

24. Each time the issue has been raised, the Trial Chamber has chosen to restrict the opportunity granted to the Defence under the Statute to test the Prosecution's evidence, by limiting the number of items of tendered evidence the Defence could discuss in the presence of a witness. By allowing the Prosecution to introduce most of its evidence by means other than through a witness, the Chamber has equally restricted the Defence's opportunity to publicly discuss, with the witnesses, both the form and the content of a large part of the Prosecution's evidence. What is more, the Chamber states in the Impugned Decision that it wishes to render admission under paragraph 43 more widespread to make it "common practice".

[15] ICC-02/11-01/15-612-Anx, para. 8.

25. Adopting such a practice essentially prevents the Defence from testing the Prosecution's evidence during hearings and undermines the principle of orality of proceedings. As a result, there is no discussion on much of the substance of the accusations; this keeps the Defence uninformed of the charges. Indeed, since the Chamber has decided to rule on the admission of evidence tendered under paragraph 43 only at the end of the proceedings, the Defence will not know which evidence introduced by the Prosecution will be admitted by the Bench.

26. One aspect of the Bench's decision therefore concerns the nature of the hearing: the Chamber seems to forego genuine proceedings based on orality in favour of partially written proceedings, hence adhering more closely to systems such as that in France. The question is whether such a mixed system is viable, and whether it is in accordance with the Statute. If the answer had to be that, in line with the practice of international criminal tribunals for example, the trial could be conducted only in the courtroom and that all discussions had to take place therein (the only means of ensuring public – therefore, democratic – scrutiny), then it would be appropriate to consider that the Chamber has deviated from its role and has, as a result, altered the nature of the proceedings.

27. The new procedural framework outlined by the Chamber in the Impugned Decision reduces the Defence's leeway and increases its workload, since it must now consider not only what was discussed during the hearing, but also what was tendered by the Prosecution out of court, which is the vast majority of evidence and the previous statements of its witnesses under rule 68. Above all, the Defence will not know until the very end, i.e. until the final judgment, which items of evidence the Bench will have admitted into the case record and therefore which items it will take into consideration. The Defence will be unable to discuss their use in a timely manner if the Bench fails to indicate here and now, after an adversarial debate, which evidence it is admitting. The Defence has to and will have to, throughout the entire

course of proceedings, discuss each of the thousands of items of evidence submitted by the Prosecution, regardless of how insignificant or unreliable they may be.

28. Why should the admission of evidence of each party be discussed at the time of its submission? As Judge Henderson expressed in his dissenting opinion:

> 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. 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.[16]

29. The Chamber should have ruled at least – and this is the essence of this appeal – on the admissibility of documents for which it had itself observed that there was insufficient proof of their authenticity. Rather than acknowledging this simple observation and drawing the obvious logical conclusion – which would be to reject the Prosecution requests concerning these items of evidence we know nothing about – the Chamber merely noted the Prosecution's inadequate demonstration regarding these items of evidence, while nevertheless admitting them into the record of the case. With no regard to the amount of information provided by an item of evidence, the policy of the Chamber's majority is to admit them all.

30. As Judge Henderson noted in his dissenting opinion:

> 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**.[17]

[16] ICC-02/11-01/15-773-AnxI, para. 9.
[17] *Ibid.*, para. 7.

31. This appeal is therefore of utmost importance since the Impugned Decision is extremely prejudicial to the fairness of the proceedings.

1. **First ground of appeal: the Chamber erred in law by not rejecting the Prosecution requests to file in the record of the case a very large number of documents produced by means other than through a witness, even though these requests were not sufficiently substantiated as required by paragraphs 43 and 44.**

32. In the Impugned Decision, the Chamber recalled that the information submitted by the party requesting the introduction of any item of evidence must not be deficient, nor incomplete: "succinct [information] should not be understood as deficient or incomplete".[18]

33. Yet, the Chamber does not make any legal determination as to the deficiency or the incompleteness of information provided by the Prosecution to obtain the admission of documents.

34. We can draw from the Impugned Decision that the Chamber recognizes the inadequacy of the Prosecution's demonstration: "[T]he Chamber observes that further evidence may be necessary to determine the authenticity of some of the documents submitted. The same applies to other documents allegedly emanating from other bodies, such as the United Nations."[19] The Chamber further mentions in a footnote that "the Chamber also notes that some documents are undated, bear no signature or no name appears on them".[20]

[18] ICC-02/11-01/15-773, para. 38.
[19] *Ibid.*, para. 39.
[20] *Ibid.*, footnote 68.

35. Nonetheless, the Chamber refuses to rule on the admission of these documents. It does not even take the trouble to inform the parties which are the "some of the documents submitted" that could be particularly problematic, leaving both the Prosecution and the Defence in the dark until the end of the proceedings. The Prosecution will not know which documents will require additional evidence and the Defence will not know on which items of evidence to focus its investigations.

36. As Judge Henderson stated in his dissenting opinion of the Impugned Decision: "[D]irections 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."[21]

37. The Chamber was not impeded in any way from ruling immediately, at least on the evidence whose authenticity the Prosecution clearly was unable to demonstrate. In his dissenting opinion, Judge Henderson stated:

> 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.[22]

38. For example, with regard to the documents that were apparently obtained from the Gendarmerie, the Ivorian police or the United Nations (UN),[23] the Defence contended that at no time during their document collection missions did the investigators from the Office of the Prosecutor attempt to enquire into the chain of custody of these documents, their authors, their recipients or the places where they were found. These investigative flaws affect entire categories of documents and, as a result, mean that for all these documents, the Prosecution did not fulfill its

[21] ICC-02/11-01/15-773-AnxI, para. 6.
[22] *Ibid.*, para. 10.
[23] ICC-02/11-01/15-641-Conf, ICC-02/11-01/15-716-Conf, ICC-02/11-01/15-664-Conf.

obligations under paragraphs 43 and 44 on the conduct of the proceedings. Accordingly, it was completely warranted to seek a ruling from the Chamber concerning these documents and the Prosecution requests should have been rejected owing to inadequate information on the authenticity of the documents.

39. By refusing to rule on the Prosecution requests to introduce into the case record documents which do not meet the criteria of paragraphs 43 and 44 – even though these documents are important as they emanate from the UN and the Ivorian authorities – the Chamber opened the door for all the documents emanating from the UN and the Ivorian authorities to be submitted into the record without a real discussion [REDACTED].[24]

40. More specifically, with regard to the documents emanating from the Ivorian authorities, the Chamber 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. Here, the Chamber refuses to act on the fact that the Prosecution has not demonstrated, item by item, documents emanating from the Ivorian authorities that it wishes to introduce into the record. That is to say, the Chamber did not verify that they were in compliance with the criteria of paragraphs 43 and 44, which require a party to prove its claims on the authenticity of documents.

41. In the Impugned Decision, the Chamber

> rejects the argument that the simple fact that some of the documents were provided to the Prosecution by the current Ivorian authorities, who are purportedly biased in this case, automatically puts authenticity into question. Thus far, the Chamber notes that the allegations of fabrication and tampering of evidence are wholly unsubstantiated.[25]

[24] ICC-02/11-01/15-776-Conf-Anx.
[25] ICC-02/11-01/15-773, para. 40.

42. Firstly, the Defence has never argued that the "simple fact" that the documents were provided to the Prosecutor by the Ivorian authorities would cast doubt on them. The Defence merely lays emphasis on the shortcomings in the methodology used by the investigators of the Office of the Prosecutor, the lack of proper steps taken during their collection missions and the subsequent deficiencies in the Prosecution's argumentation to have the collected documents admitted. A document – whose chain of custody, authors and recipients we know nothing about – is not unreliable simply because it comes from the Ivorian authorities. It is unreliable because there is no way of checking its authenticity. By refusing to accept that it is for the Prosecution to provide useful information to authenticate the documents, the Chamber's majority erred in law.

43. Secondly, by refusing to place the onus on the Prosecution to prove the authenticity of a document, the Chamber inverts the logic guiding the criminal trial. The burden of proof is on the Prosecution to demonstrate its allegations against an accused beyond reasonable doubt. Accordingly, it is only natural that the obligation should rest on the Prosecution to prove that the evidence it adduces in support of its allegations is relevant and authentic.

44. In the Impugned Decision, the Chamber seems to place the onus on the Defence to prove that the evidence adduced by the Prosecution is not authentic. For example, the Defence would have to prove that the Ivorian authorities manipulated such or such item of evidence. However, contrary to the view of the Chamber's majority, it is the Prosecution that must demonstrate the authenticity of its evidence, including by using the chain of custody or other common tools.

45. By not rejecting the Prosecution requests, even though the Prosecution failed to comply with the Chamber's instructions set out in paragraphs 43 and 44 of the

directions on the conduct of the proceedings, the Chamber erred in law, invalidating the Impugned Decision.

2. Second ground of appeal: the Chamber erred in law by considering that it could not rule on the admissibility of evidence tendered by the Prosecution – and in particular on its authenticity – until the end of the trial.

46. In the Impugned Decision, the majority asserted that "evidence must not be evaluated in isolation, but as a whole, in the system of evidence presented in a case"[26] and that "making an authoritative affirmative finding or excluding some items of evidence at this stage of the proceedings would be premature, as it would be based on a partial knowledge of the evidence of the case".[27]

47. Firstly, in so determining, the Chamber confounds the weight to be given to an item of evidence and its admission. While it can effectively be agreed that the weight to be attached to an item of evidence can be determined at the end of judicial proceedings on the basis of the evidence as a whole available to the Bench, the same does not hold true for its authenticity, which must be determined, logically, in relation to the item of evidence itself. Under these conditions, there is nothing to prevent the Chamber from ruling immediately on the admissibility, and more precisely, on the authenticity of a document, on the basis of the evidence submitted by the party requesting its admission – in this case the Prosecution.

48. Secondly, the same issue can be approached from a slightly different angle: although the Chamber must determine the weight to attach to evidence tendered by the parties, the burden of proof still lies with the Prosecution. It is therefore the Prosecution which must prove that the evidence it submits is relevant and authentic;

[26] *Ibid.*, para. 33.
[27] *Ibid.*, para. 35.

failing this, the only logical outcome would be for the Chamber to immediately reject the evidence submitted. Here, the decision whether or not to admit evidence has been put on hold. This amounts to making an admissibility ruling conditional on evidence other than the given item of evidence itself, since the Chamber's majority has stated that it would rule on admissibility only in the light of the Prosecution's evidence as a whole. In other words, the debate on authenticity is deprived of meaning. Ultimately, to agree with the Chamber's majority would be to accept evidence whose authenticity is questionable – in contempt of judicial process and fairness. In this context, there is an assumption that the Prosecution's evidence submitted initially – and whose authenticity is not demonstrated – could be validated by evidence submitted subsequently.

49. In other words, the Chamber has proceeded in such a way as to excuse, in advance, the Prosecution's carelessness in the choice of the evidence it adduces. Postponing, as the Chamber has done, the debate on the admissibility of the evidence tendered by the Prosecution is akin to discharging the Prosecution of its obligation to prove the admissibility of any evidence at the time its admission is requested. The Chamber should have taken a different position whereby it is for the Prosecution to prove the authenticity of an item of evidence at the time it submits it; failing this, the evidence should be rejected.

50. We have observed that the Chamber's position raises various crucial issues, to which we can add various procedural issues that are likely to become insoluble. How can the Defence comply with the letter of the Rules of Procedure and Evidence ("Rules") if, according to the new framework created by the majority, it may no longer discuss the admissibility of evidence (having been able to discuss the submission only briefly – see above), even though under the Rules, a party is required to raise issues on the admissibility of evidence at the time it is submitted to the Chamber by the other party ("An issue relating to relevance or admissibility

must be raised at the time when the evidence is submitted to a Chamber"[28])? In the new framework set out by the Chamber, the Bench will rule on the admissibility of evidence only in the final judgment on the basis of evidence introduced into the record which will not necessarily be those items discussed with regard to the submission of the evidence. As a result, the Bench will, by definition, be going beyond what had been discussed by the parties and find itself endowed with excessive power to decide on the submission of evidence without having heard the parties, and in reality without criteria – therefore without scrutiny. As the Defence will not know until the final judgment which items of evidence the Bench will admit and on what basis (authenticity or relevance), how, under these conditions, will it be able to file motions pursuant to rule 64(1) of the Rules?

51. On this matter, Judge Henderson noted that,

> 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.**[29]

52. The Chamber's refusal to rule immediately on the admission of some documents for which the Prosecution requested admission constitutes an error of law, invalidating the Impugned Decision.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

Having regard to article 82 of the Statute:

- **Grant** this appeal.

[28] Rule 64(1) of the Rules of Procedure and Evidence.
[29] ICC-02/11-01/15-773-AnxI, para. 7.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 15 May 2017

At The Hague, Netherlands