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Original: **English**

No.**: ICC-02/11-01/15**
Date: **27 June 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

Public

Public redacted version of "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 OA11, OA12

Source: **Office of the Prosecutor**

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Introduction

1. Gbagbo's and Blé Goudé's appeals against Trial Chamber I's 9 December 2016 decision in which it recognised as submitted four sets of documentary evidence should be dismissed.[1] Both Appellants misread the Decision and disagree with the Chamber's discretion in assessing the evidence. They also disregard the organic nature of trial proceedings. Critically, they fail to show an error in the Decision. There is none.

2. The Trial Chamber reasonably exercised its discretion when, in applying the regime for the submission of evidence in this case, it deferred the assessment of the evidentiary criteria (relevance, probative value and prejudice) in relation to the submitted documents until its article 74 deliberations. On the facts of this case, the Defence suffered no prejudice, nor have they shown otherwise. When the Prosecution submitted the documents, it referred to all available known information on their relevance and probative value. The Defence challenged the documents' reliability pursuant to rule 64(1) upon submission. Further, the Prosecution is not precluded from adducing further evidence in the course of trial on the relevance and probative value of the submitted documents. This arises from the organic and unfolding nature of trial proceedings.

3. Finally, this appeal has a limited factual and legal scope. It does not concern the legality of the submission of evidence regime *per se.* Nor does it concern the principle of orality. These issues do not fall within the scope of this appeal; nor are they intrinsically linked to it. Any submissions by the Appellants unrelated to the issue certified for appeal should be rejected.

Level of Confidentiality

4. The Prosecution files this submission as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it refers to confidential filings from the *Bemba et al.* case and other documents. The Prosecution will file a public redacted version, once public versions of the relevant documents are available.

[1] ICC-02/11-01/15-922 ("Blé Goudé Appeal"); ICC-02/11-01/15-918-Conf and ICC-02/11-01/15-918-Red ("Gbagbo Appeal'); ICC-02/11-01/15-773 ("Decision"); ICC-02/11-01/15-773-AnxA ("Annex A"); ICC-02/11-01/15-773-AnxI ("Judge Henderson's Dissent"). The Prosecution refers to the Majority Judges in the Decision (Judges Tarfusser and Carbuccia) as the "First Majority". *See also* ICC-02/11-01/15-901 ("ALA Decision"), ICC-02/11-01/15-901-Anx ("Judge Tarfusser's Dissent"). The Prosecution refers to the Majority of Judges in the ALA Decision (Judges Henderson and Carbuccia) as the "Second Majority".

Submissions

I. Preliminary Observations

5. As Blé Goudé correctly states,[2] the scope of this appeal is limited to the four sets of documentary evidence recognised as submitted in the Decision.[3] Yet, Gbagbo in particular uses this appeal to improperly challenge various aspects of the submission of evidence regime,[4] notwithstanding that the Statute authorises such a regime, and that the Appeals Chamber has confirmed its legitimacy.[5] Moreover, any attempt to revisit or reconsider the submission of evidence regime put in place by the Chamber's 29 January 2016 Decision (that the Parties did not appeal) would be both belated and unjustified.[6]

6. Chambers of this Court have taken different approaches to the submission and/or admission of evidence, within the margins of the discretion afforded to them by the Rome Statute.[7] However, *this* appeal is not a forum to decide on the broader aspects of the submission of evidence regime. Critically, apart from Trial Chamber I in this case, Trial Chamber IX in *Ongwen* and Trial Chamber VII in the *Bemba et al.* case have also adopted this evidentiary regime. Since the Defence in *Bemba et al.* have challenged the broader aspects of the submission of evidence regime in the ongoing appeals against their convictions, the Appeals Chamber hearing that appeal may be best placed to decide the issue

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[2] Blé Goudé Appeal, para. 15.
[3] *See* ICC-02/11-01/15-583-Conf ("Prosecution's 13 June 2016 Motion", and Annex A) (submitting *Gendarmerie* documents), ICC-02/11-01/15-616-Conf ("Prosecution's 14 July 2016 Motion", and Annex A) (REDACTED); ICC-02/11-01/15-T-72-CONF, p. 25 lns. 12-18 ("Prosecution's 7 September 2016 Motion") (submitting documents relating to P-0501's testimony"); ICC-02/11-01/15-T-74-CONF, p. 4 lns. 24-p. 7 ln. 14 ("Prosecution's 19 September 2016 Motion") (submitting documents relating to P-330's testimony"); ICC-02/11-01/15-687-Conf ("Prosecution's 27 September 2016 Motion" and Annex A) (REDACTED); Blé Goudé Appeal, para. 15. *Contra* Gbagbo Appeal, para. 39, stating that "*[la] Chambre a ouvert la porte à la soumission au dossier de l'affaire, sans réelle discussion […]"* for *all gendarmerie* and UN documents collected from those authorities.
[4] *See e.g.*, Gbagbo Appeal, paras. 19-23, 26, 28.
[5] *See* ICC-01/05-01/08-1386 OA5 OA6 ("*Bemba* Admissibility AD"), para 37; ICC-02/11-01/15-405 ("Evidence Submission Decision"), paras. 3-17.
[6] Evidence Submission Decision, paras. 3-17; Blé Goudé Appeal, para. 17.
[7] *Bemba* Admissibility AD, para. 37. ("[Article 64(9)(a) and article 69(4)] accord the Trial Chamber discretion when admitting evidence at trial. As borne out by the use of the word "may" in article 69(4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial. […] Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. […] 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 [obligation to ensure that the trial is fair and expeditious].")

in the specific circumstances of that case.[8] The present appeal and the *Bemba et al.* ones differ significantly in scope. While the *Bemba et al.* appeals are broader in nature and relate to the fundamental nature of the submission of evidence regime, this appeal is more confined in scope, and does not—as Blé Goudé states—"seek reconsideration" of the submission of evidence regime.[9] Deciding the *Bemba et al.* issues in this appeal would therefore not be appropriate.

7. Arguments relating to the submission of evidence regime (and to the scope and use of documentary evidence and the principle of orality)[10] all go well beyond the issue certified for this appeal.[11] Nor are they "intrinsically linked" to it.[12] Notably, they would go well beyond the three issues proposed by the two Appellants, which were re-phrased into one issue and certified by the Chamber for this appeal.[13] Thus, they should be dismissed *in limine*.[14] Not only are the larger questions relating to the submission regime manifestly outside the scope of this appeal, to fully explore these issues would require a significant page increase. Notwithstanding, to correct certain of the Appellants' misunderstandings, the Prosecution will briefly respond to them. Should the Appeals Chamber have a different view, and bearing in mind the consequences for other ongoing cases at this Court, the Prosecution respectfully reserves its right to provide further and more detailed submissions on these issues.

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[8] *See e.g.*,ICC-01/05-01/13-2144-Red ("Bemba Appeal Brief"), paras. 188-202; ICC-01/05-01/13-2145-Conf-Corr ("Arido Appeal Brief"), paras. 241-246; ICC-01/05-01/13-2147-Conf ("Babala Appeal Brief"), paras. 49-72.

[9] Blé Goudé Appeal, para. 15.

[10] *E.g.*, Gbagbo Appeal, paras. 13-18, 24-25, 27.

[11] ALA Decision, para. 21. *See further* para. 19 (rejecting Blé Goudé's Fourth Issue as "an effort to appeal the Chamber's approach to evidence, as outlined in the Chamber's earlier Decision on the Submission and Admissibility of Evidence" and noting that "[the] Impugned Decision is merely an application of this decision".) *See also* Judge Tarfusser's Dissent, paras. 15-16.

[12] ICC-02/11-01/15-744 OA8 ("*Gbagbo and Blé Goudé* Rule 68 AD"), para. 19.

[13] ALA Decision, paras. 8 (c), Gbagbo's Third Issue: Error of law by failing to reject the Prosecutor's request to submit certain documents, even though this request was insufficiently substantiated in violation of paragraphs 43 and 44 of the Chamber's Directions on the Conduct of Proceedings; para. 8(d), Gbagbo's Fourth Issue: Error of law by considering that the Chamber cannot decide on admissibility, in particular authenticity, until the end of the trial; para. 9(c), Blé Goudé's Third Issue: Whether the Chamber erred in law in finding that the evidence could not be assessed at this stage of the proceedings while considering at the same time that pursuant to rule 64(1) of the Rules, the Defence has the obligation to raise any issue of relevance or admissibility of evidence at the time when the evidence is submitted to the Chamber; para. 21, the ground of appeal: 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.

[14] Likewise, to the extent that Gbagbo's First Ground of Appeal is conditioned on the principle of orality, the Appeals Chamber should disregard this aspect. Gbagbo Appeal, p. 11 (*Premier moyen d'appel* , stating "*sans passer par le truchement d'un témoin"*). *See* ICC-02/11-01/11-572 OA5 ("*Gbagbo* Confirmation AD"), paras. 61- 66, where the Appeals Chamber declined to consider issues outside the scope of the appeal.

II. Response to Blé Goudé's First Ground of Appeal and Gbagbo's First and Second Grounds of Appeal: The Chamber correctly recognised the documents as formally submitted

8. In his first ground of appeal, Blé Goudé alleges that the Chamber erred by not ruling on the admissibility of certain documents, despite finding that the Prosecution had not provided sufficient information to establish their authenticity at the time they were submitted.[15] In his first and second grounds of appeal, Gbagbo alleges that the Chamber failed to reject the Prosecution's requests to introduce evidence when it was neither introduced through a witness, nor sufficiently substantiated contrary to paragraphs 43 and 44 of the Amended Directions, and that it erred when it deferred its admissibility ruling to the end of the trial.[16] None of these grounds of appeal show that the Chamber erred. Rather, the Appellants misread the Decision, misunderstand the regime and fail to show that the Chamber abused its discretion in deferring its assessment of the documents until the end of the trial.[17] The Appellants have shown no prejudice, and indeed, there is none.

a. The Appellants misread the Decision

9. The Appellants wrongly allege that the First Majority erred in not ruling on the admissibility of the documents.[18] In so claiming, the Appellants misconstrue various aspects of the Impugned Decision, despite its clear plain text, and contrary to its natural and expressed meaning.

10. *First*, Blé Goudé's submissions are inconsistent and inaccurate. Although he claims that the Chamber erred by "not ruling" on the admissibility of the documents, he also claims that the First Majority "must have intended to actually rule on the admissibility of the documents tendered into evidence".[19] To advance the latter argument, he interprets the Decision in a strained manner. However, the Decision's plain text makes clear that the Chamber did not

[15] Blé Goudé Appeal, paras. 18-31.
[16] Gbagbo Appeal, paras. 32-52. *See* ICC-02/11-01/15-498-AnxA ("Amended Directions"), paras. 43-44.
[17] ICC-01/04-01/06-3122 A4 A6 ("*Lubanga* SAJ"), para. 3 ("The Appeals Chamber will only intervene in a Trial Chamber's exercise of discretion in determining the sentence if: (i) the Trial Chamber's exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber's weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.")
[18] Blé Goudé Appeal, paras. 19-31; Gbagbo Appeal, paras. 32-45.
[19] Blé Goudé Appeal, p. 8, para. 19. *See* Gbagbo Appeal, para. 35 ("*[la] Chambre refuse de se prononcer sur l'admission de ces documents*.")

"rule on the relevance or admissibility of the evidence submitted at [that] moment in time."[20] Likewise the Decision, in its disposition, merely recognised the tendered documents as "submitted", but no more.[21] Moreover, in granting leave to appeal, the Second Majority confirmed that "[the] Chamber […] declined to rule on […] admissibility."[22] The Presiding Judge in his dissent confirmed this understanding. He underscored that "*[the] decision did not make any finding that any evidence submitted was admissible* […]."[23] According to him, "[the] operative part of the decision only goes as far as 'recognis[ing] as submitted the items of evidence listed in Annex A' (p. 15)."[24] The Presiding Judge also noted that "[the] appeal as certified will not take place against a decision, *but effectively against the absence of a decision declaring certain evidence inadmissible*."[25] Blé Goudé advances only conjecture to bypass the Decision's plain text and the Judges' own understanding of the rendered Decision.

11. Likewise, Blé Goudé only surmises that the First Majority's use of the phrase "an exception in the established procedure" had a "unique meaning", *i.e.*, that the Chamber intended to rule on admissibility.[26] To the contrary, as the plain text shows, the Chamber's "guidance" was not a ruling, but rather constituted general advice, pursuant to the Chamber's obligation to ensure the fair conduct of the trial, to both Parties on how to submit documentary evidence in this case.[27] This was reasonable since the Prosecution's motions of 13 June, 14 July, 7 September and 19 September 2016 were among the first submissions tendering documentary evidence in this trial under paragraphs 43 and 44 of the Amended Directions.

12. That the Chamber's remarks on how to interpret the Amended Directions, and on the authenticity of some of the Prosecution's evidence were advisory in nature is also shown in

[20] Decision, para. 36.
[21] Decision, p. 15.
[22] ALA Decision, para. 21 ("Indeed, even though the Impugned Decision identified specific concerns with regard to [the] authenticity of certain items of evidence, the Chamber nevertheless declined to rule on their admissibility.")
[23] Judge Tarfusser's Dissent, para. 14 (emphasis added).
[24] *Ibid*., para. 14.
[25] Judge Tarfusser's Dissent, para. 14 (emphasis added).
[26] Blé Goudé Appeal, paras. 19, 22.
[27] Blé Goudé Appeal, para. 19; Decision, para. 36 ("[the] Chamber considers it appropriate, *in light of its responsibility to ensure the proper conduct of the trial*, and also in light of paragraph 44 of the Directions on the Conduct of Proceedings, to make an exception in the established procedure, *so as to give some guidance to the parties with respect to submission of documentary evidence*.") (emphasis added).

the generic and non-specific language used to identify concerns, including by illustration.[28] Indeed, both Appellants acknowledge the illustrative nature of this advice.[29] If the Chamber had intended to rule on admissibility, its ruling—inherently—would have been definitive in nature. In fact, in his later Dissent, the Presiding Judge confirmed that they made no such finding.[30]

13. Based on the above, the First Majority did not apply the Amended Directions (paragraph 44) as "evidentiary criteria" which it had to be satisfied about in order to have the documents recognised as formally submitted. This would have been inconsistent with the submission regime (where evidence is recognised as submitted but assessments are deferred to the end of trial) and would have conflated the chosen submission of evidence regime with an admission of evidence regime. In view of the Presiding Judge's clear direction adopting the submission regime for this case, this could not have been intended.[31]

14. Accordingly, the Prosecution stated in its Consolidated Response to the Defence requests for leave to appeal that "[the] Majority never conditioned the formal 'submission' of the evidence on the Parties' compliance with paragraph 44 of the Amended Directions."[32] This was not to say that the Prosecution would not comply with the Chamber's instructions or the Amended Directions,[33] but rather that in the context of the submission of evidence regime adopted by the Chamber in its 29 January 2016 Decision, the Chamber could

[28] Decision, para. 39 ("Without going into further detail, the Chamber observes that further evidence may be necessary to determine the authenticity of some of the documents submitted."; fn. 68 ("In this regard, the Chamber also notes that some documents are undated, bear no signature or no name appears on them.")
[29] Blé Goudé Appeal, para. 21; Gbagbo Appeal, para. 35.
[30] Judge Tarfusser's Dissent, para. 13: "[the Impugned Decision] does not contain a finding that 'the tendering party did not provide sufficient information to establish [the authenticity of certain documents submitted] at the time of submission.'"; also noting that "[t]he only thing I am able to point to is a sentence [in para. 39] stating: 'Without going into further detail, the Chamber observes that further evidence may be necessary to determine the authenticity of some of the documents submitted'". *See also* ALA Decision, para. 21, where the Second Majority only stated: "even though the Impugned Decision identified specific concerns with regard to their authenticity of certain items of evidence[…]".
[31] Evidence Submission Decision, paras. 11-12 ("Contrary to the arguments raised by the parties, the Chamber is not persuaded that [ruling on the admissibility of a given item of evidence at the time of its submission] will be beneficial to the fairness and expeditiousness of the trial, or, even more fundamentally, effectively instrumental to its ultimate duty to determine the truth.")
[32] ICC-02/11-01/15-780 ("Prosecution's Consolidated ALA Response"), para. 32; *Contra* Blé Goudé Appeal, paras. 41-42.
[33] *Contra* ALA Decision, para. 10; Blé Goudé Appeal, paras. 41-42.

recognise items as "formally submitted" irrespective of whether or not they met the criteria in paragraph 44 of the Amended Directions.[34]

15. *Second*, Gbagbo and Blé Goudé allege that the First Majority failed to attach legal consequences to the Prosecution's inability to provide the necessary information to authenticate some of the documents.[35] However, the Appellants disregard the most obvious consequence. If the Prosecution fails to successfully authenticate the documents in the course of the trial, the Chamber will not rely on them in its article 74 deliberations and the Prosecution will be deprived of significant evidence to prove its case.

16. The Appellants' suggestion that rejecting the submission of the evidence was the only proper outcome in this case is unfounded.[36] Nor do they advance any legal basis to show why this must be so. Rather, their suggested remedy would not accord with the submission of evidence regime, where the only evidence which may be excluded is that which falls within article 69(7), or which fails to meet statutory prerequisites such as in rule 68.[37] Nor was the current situation an exceptional one warranting the Chamber's immediate decision on the admissibility of the submitted items.[38]

17. As the Decision's plain text shows,[39] the Amended Directions criteria (although they closely resemble the criteria used in an admission of evidence regime) 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. As the Presiding Judge explained, "[the] effect of rule 64 (1) […] is that it prevents the parties from 'keeping their cards under the table' by not revealing their arguments until late in the trial."[40]

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[34] *See also* Prosecution's Consolidated ALA Response, fn. 54 ("The Amended Directions and the 29 January Decision did not indicate that the evidence would not be considered as "submitted" if paragraph 44 of the Amended Directions was not complied with.")
[35] Blé Goudé Appeal, para. 22; Gbagbo Appeal, para. 33.
[36] Blé Goudé Appeal, para. 25; Gbagbo Appeal, para. 38.
[37] Decision, para. 33; ICC-01/05-01/13-1285 ("*Article 70* Evidence Submission Decision"), para. 13; ICC-01/05-01/13-1989-Red ("*Article 70* TJ"), para. 191; ICC-02/04-01/15-497 ("*Ongwen* Directions"), paras. 24-26; ICC-02/04-01/15-615 ("*Ongwen* Intercept Decision"), paras. 4-13.
[38] Evidence Submission Decision, para. 17. *See below* paras. 20-28.
[39] Decision, para. 38: "[S]uccinct should not be understood as deficient or incomplete. Parties are expected to fully litigate the relevance or admissibility of each item of evidence at the time is submitted (cf. [r]ule 64(1) of the Rules.) […] 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."
[40] Judge Tarfusser's Dissent, para. 21.

18. This does not mean that the tendering party "is authorised to retain evidence on relevance and admissibility, including authenticity";[41] rather, it should present *all relevant available* information on the evidentiary criteria at the time of submission. Paragraph 44 of the Amended Directions obliges the Parties to do so. And the Prosecution sought to do so. When it presented its bar table motion on the *gendarmerie*-related documents, the Prosecution annexed a detailed chart in which it provided individualised assessments of all documents. It also referred to the relevant Investigator's Report[42] which was later submitted, together with all investigators' reports, on 28 April 2017.[43] Although the Prosecution could have signposted more clearly its intended use of these documents, including by stating which witnesses would authenticate them,[44] the Defence have been aware since 30 June 2015 (when the Prosecution filed its list of witnesses[45] with detailed summaries of their testimonies)[46] that commanders from the *Gendarmerie Nationale* were scheduled to testify. The Prosecution acted at all times properly in good faith.

19. Gbagbo also incorrectly claims that the Chamber exempted the Prosecution from its responsibility to prove the authenticity of the documents.[47] The Chamber did not do so.[48] The Prosecution's responsibility to present all relevant available information to show the documents' relevance and probative value at the time of submission cannot be conflated with an alleged "burden" to meet such criteria upon tendering them or otherwise face having them rejected.[49] Moreover, the Prosecution's burden to establish the authenticity of evidence by the end of the trial (in order to establish the charges) remains intact.[50] Nor, contrary to Gbagbo's submissions, did the Defence have any burden to prove that the documents were not authentic.[51] In claiming that the Defence had been required to prove the alleged falsification by the Ivorian authorities, Gbagbo disregards the First Majority's clear language.[52] The Second Majority even clarified that the Defence had no such burden. It stated that "[to] the extent that the Gbagbo Defence has raised valid concerns about the chain

[41] *Contra* Blé Goudé Appeal, para. 35.
[42] Prosecution's 13 June 2016 Motion, fn. 6.
[43] *See generally* ICC-02/11-01/15-895 ("Prosecution's 28 April 2017 Motion"), ICC-02/11-01/15-895-Conf-AnxA and ICC-02/11-01/15-895-Conf-AnxB.
[44] Prosecution's 13 June 2016 Motion, paras. 7-11, Annex A.
[45] ICC-02/11-01/15-114-Conf-AnxA-Corr ("Prosecution List of Witnesses").
[46] ICC-02/11-01/15-114-Conf-AnxB-Corr ("Prosecution Witnesses' Summaries").
[47] Gbagbo Appeal, paras. 40, 43, 44, 48.
[48] Decision, paras. 37-43.
[49] Gbagbo Appeal, paras. 40, 43, 44, 48.
[50] *See* ICC-02/04-01/15-795 ("*Ongwen* BT Decision"), para. 49.
[51] Gbagbo Appeal, para. 44.
[52] Gbagbo Appeal, paras. 42, 44; Decision, para. 40.

of custody of certain documents", the Chamber will accordingly consider them in final deliberations.[53] Gbagbo merely traverses old ground, but shows no error.

b. The Chamber properly exercised its discretion to defer its ruling

20. Notwithstanding its remarks on their authenticity, the Chamber reasonably exercised its discretion to defer assessing the relevance, probative value and any prejudicial effect of the documents until its article 74 deliberations. The Appellants fail to show that they are prejudiced and that the Chamber abused its discretion. Accordingly, they fail to show error.

21. *First*, Blé Goudé's arguments disclose a fundamental misunderstanding of the Chamber's discretion in assessing the evidence.[54] Although he claims that the Chamber should have issued a ruling on the admissibility of the documents, Blé Goudé misreads the scope of the Chamber's exercise of discretion to decide to defer its ruling.[55] A 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). A contrary view would be counter-intuitive: if a non-tendering party were, as a matter of right, to make excessive use of the provision, the Chamber would be required to decide on admissibility in every instance. This approach would—contrary to the Statute and the Appeals Chamber's case law—render the entire submission of evidence regime devoid of value.[56] According to the Appeals Chamber, a Chamber is only required to "balance its discretion" *to consider whether to defer its ruling* in light of the parties' arguments at that stage, but it is not required to rule then.[57] The Chamber correctly balanced its discretion to consider the issue. Blé Goudé is incorrect when he suggests that it should have ruled.

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[53] ALA Decision, para. 15 (rejecting Gbagbo's alleged fifth issue (stating that the Defence bore the burden to prove authenticity) as a "misunderstanding"); *see also* para. 15 ("The Chamber simply wished to clarify that the mere fact that certain documents were provided by the current Ivorian authorities is not, of itself, a sufficient reason not to apply the presumption that official documents from public authorities benefit from a presumption of authenticity when they are properly signed by an agent of the organisation and bear the relevant stamps.")
[54] Blé Goudé Appeal, paras. 24-31.
[55] Blé Goudé Appeal, paras. 24, 31.
[56] *Bemba* Admissibility AD, para. 37 (recognising that article 69(4) allows the admission and submission regimes).
[57] *Bemba* Admissibility AD, para. 37 (emphasis added). ("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 that provision.")

22. *Second*, the Chamber properly exercised its discretion to defer its decision and to assess any prejudice at the end of the trial.[58] As other Chambers have found, for the bulk of materials, a Chamber is unable to assess potential prejudice at the outset of trial, and even at the point of submission.[59] Undue prejudice determinations at the point of submission can only be done reliably for items where it is immediately apparent that they cannot be fairly relied upon for any purpose.[60] Such determinations could simply not have been done for the documents in question. In these circumstances, to reject their submission without a full opportunity to assess claims of prejudice would have been unjust and unreasonable. As shown below, the Defence was not prejudiced.

23. *Third*, the Chamber reasonably considered that there was no prejudice to the Defence.[61] The Defence made full use of its right under rule 64(1) to challenge the documents upon submission.[62] Indeed, Blé Goudé acknowledges that he knew of and "efficiently" objected to issues of relevance and admissibility when the evidence was submitted.[63] Moreover, as the Presiding Judge clarified, "the Defence is not limited in the way it alleges to be."[64] They are not "precluded from making additional arguments in the future, responding to the developments in the trial."[65] Likewise, each of the Defence objections will be on the trial record, and thus available to the Chamber to consider when it assesses the documents.[66] The Defence will also be able to comment and put forward its position regarding the assessment of all the evidence in its closing submissions.[67]

24. The Defence had early access to the documents. They were available to the Defence, first *via* disclosure between 9 August 2013 and 19 February 2015, and then *via* the Prosecution List of Evidence on 30 June 2015,[68] and made available on e-Court. As Chambers have held, notwithstanding the tendering party's obligation, once the non-

[58] Evidence Submission Decision, para. 17.
[59] *Ongwen* Intercept Decision, para. 10. ("The ultimate prejudice which the Defence may suffer depends on the nature of the material, how the material is discussed during trial, whether the Chamber relies on it in its judgment and —if so—how it relies on it.")
[60] *Ibid*, para. 11. *See also* Article 70 Evidence Submission Decision, para. 12.
[61] *Contra* Blé Goudé Appeal, paras. 28-31; Gbagbo Appeal, para. 30.
[62] *See e.g.*, ICC-02/11-01/15-640-Conf, with Annex A (ICC-02/11-01/15-640-Conf-AnxA) ("Blé Goudé Response") and ICC-02/11-01/15-641-Conf, with confidential Annex A (ICC-02/11-01/15-641-Conf-AnxA) ("Gbagbo Response").
[63] Blé Goudé Appeal, para. 27.
[64] Judge Tarfusser's Dissent, para. 21.
[65] *Ibid*.
[66] *See e.g.*, ALA Decision, para. 15; Evidence Submission Decision, para. 19.
[67] Rule 141(2).
[68] ICC-02/11-01/15-114-Conf-AnxC ("Prosecution's List of Evidence").

tendering party has received such access, it may assess the documents (including their relevance and probative value) and build their challenges accordingly.[69] Relying solely on the tendering party for all information is not only unforeseen, it would be unworkable. The Defence can, and did, exercise its independent mandate to verify the documents.

25. Further, since the Decision, the Prosecution has concretely addressed possible shortcomings. Notably, on 28 April 2017, the Prosecution submitted the Investigator's Report detailing how it obtained the documents and the chain of custody.[70] Moreover, 42 of the 131 *gendarmerie* documents were subsequently used with witnesses (P-0010,[71] P-0011,[72] P-0321[73] and P-0330).[74] These witnesses recognised the documents as being documents from the *Gendarmerie Nationale* and in many instances recognised the specific document shown to them as one they had personally signed.[75] The witnesses were also able to authenticate the form of certain documents and explain the abbreviations that appear in the headers.

26. Moreover, Gbagbo himself has used some of these documents,[76] and another 18 documents from the same *Gendarmerie Nationale* collection during the questioning of P-0011.[77] Such reliance by the Defence suggests, at the least, that the reliability of those collections is not in question. Similarly, the United Nations documents identified in the Decision were either publicly available material downloaded from the UN website or

[69] *Ongwen* BT Decision, para. 48.
[70] *See* Prosecution's 28 April 2017 Motion, paras. 11, 16.
[71] CIV-OTP-0043-0296; CIV-OTP-0043-0225; CIV-OTP-0043-0226; CIV-OTP-0044-0073; CIV-OTP-0043-0214; CIV-OTP-0043-0206. *See e.g.*, ICC-02/11-01/15-T-137-CONF-ENG, p. 65, lns. 14-25 to p. 66, lns. 1-18. *See* in particular lns. 24-25: "The signature is mine and the stamp is the stamp of the *école de gendarmerie*".
[72] CIV-OTP-0044-0025; CIV-OTP-0044-0097; CIV-OTP-0043-0448; CIV-OTP-0043-0220; CIV-OTP-0043-0391; CIV-OTP-0043-0217; CIV-OTP-0044-0070; CIV-OTP-0043-0441; CIV-OTP-0044-0101; CIV-OTP-0044-0102; CIV-OTP-0043-0417; CIV-OTP-0044-0060; CIV-OTP-0043-0388; CIV-OTP-0044-0059; CIV-OTP-0043-0419; CIV-OTP-0044-0057; CIV-OTP-0044-0076; CIV-OTP-0043-0420; CIV-OTP-0044-0053; CIV-OTP-0043-0336; CIV-OTP-0043-0334; CIV-OTP-0043-0332; CIV-OTP-0043-0302; CIV-OTP-0043-0214; CIV-OTP-0043-0426; CIV-OTP-0043-0289; CIV-OTP-0043-0213; CIV-OTP-0043-0285; CIV-OTP-0044-0026; CIV-OTP-0043-0320; CIV-OTP-0044-0019; CIV-OTP-0043-0316; CIV-OTP-0044-0038; CIV-OTP-0044-0032; CIV-OTP-0043-0344; CIV-OTP-0043-0432. *See e.g.*, ICC-02/11-01/15-T-131-CONF-ENG, p. 89 lns. 12-15 (recognising the signature and the stamp).
[73] CIV-OTP-0044-0098; CIV-OTP-0044-0028. *See e.g.*, ICC-02/11-01/15-T-61-CONF-ENG, p. 38 lns. 2-25 (REDACTED).
[74] CIV-OTP-0044-0097; CIV-OTP-0043-0442; CIV-OTP-0043-0220; CIV-OTP-0043-0443; CIV-OTP-0043-0444; CIV-OTP-0043-0441; CIV-OTP-0043-0418; CIV-OTP-0044-0072; CIV-OTP-0043-0239; CIV-OTP-0043-0285. *See e.g.*, ICC-02/11-01/15-T-67-CONF-ENG, p. 51 ln. 23 to p. 53 ln. 9 (recognising the document and stating "[the] source of the message is clear, supreme high commander of the gendarmerie and the addressees are clear.")
[75] *But see e.g.*, ICC-02/11-01/15-T-131-CONF-ENG, p. 98 ln. 20 to p. 99 ln. 4 (disputing the signature, but not the substance of the order: "We are used to receiving this type of orders".)
[76] *See* ICC-02/11-01/15-T-135-Red-ENG, p. 23, ln. 17 to p. 24, ln. 10; p. 61, ln. 1 to p. 62, ln. 5 and p. 65, ln. 9 to p. 66, ln. 23.
[77] ICC-02/11-01/15-T-136-Red-ENG, pp. 28-42.

authenticated by a reliable witness. In particular, P-0414, an officer in the ONUCI Human Rights Division, was shown such reports in court and confirmed that these were the usual or typical reports prepared by a mission.[78] The ONUCI's Joint Operations Centre prepared these reports based on information (Daily Situation Reports) written at the time of the events and sent by various divisions.[79] The other documents, although not originating from the UN, were obtained from the UN, namely peace agreements and a media article.[80]

27. Finally, Gbagbo's arguments challenging the methodology of the Prosecution's investigation and the chain of custody of the documents are unfounded.[81] The Investigator's Report details the various focal points and their respective *Gendarmerie* service or unit from which the Prosecution collected documents.[82] It further specifies that "Camp Agban remained intact during the post-electoral crisis. However, some of the offices, such as that of the former Commander of the *Groupe d'engins blindés (GEB),* were emptied by his subordinates when he fled to Ghana."[83] The Report further specifies the source of this information as P-0321 and Captain Ouattara Obeniere (P-0330), both of whom have testified in this trial.[84] The Investigator's Report also contains a detailed section describing the various meetings with the unit or service focal points in which the Prosecution enquired about the location of that unit or service's documents from the relevant period and their archiving practice.[85] This, coupled with the section detailing the methodology of the review,[86] provides precise information about how the documents were selected, and their chain of custody from the *Gendarmerie Nationale* premises to the OTP. Finally, the Investigator's Report also contains an Annex listing each of the documents collected at the different services and units of the *Gendarmerie Nationale.*[87]

28. For the above reasons, the Appellants show no error. Blé Goudé's First Ground and Gbagbo's First and Second Grounds should be dismissed.

[78] ICC-02/11-01/15-T-74-Red-ENG, p. 41, ln. 24 to p. 42, ln. 2.
[79] ICC-02/11-01/15-T-74-Red-ENG, p. 28, ln. 23 to p. 29, ln. 4.
[80] *See e.g.,* CIV-OTP-0051-2162; CIV-OTP-0064-0164.
[81] Gbagbo Appeal, paras. 38, 42.
[82] CIV-OTP-0049- 2986 at 2988-2989.
[83] CIV-OTP-0049- 2986 at 2989.
[84] CIV-OTP-0049- 2986 at 2989 fns. 1 and 2.
[85] CIV-OTP-0049- 2986 at 2997.
[86] CIV-OTP-0049- 2986 at 2999.
[87] CIV-OTP-0049-2986 at 3010.

III. Response to Blé Goudé's Second Ground of Appeal: The Chamber did not err in permitting the Prosecution to submit further evidence

29. In his Second Ground, Blé Goudé again incorrectly assumes that the Chamber improperly considered the documents as formally submitted and, *in addition*, erroneously permitted the Prosecution to present further information as to the evidentiary criteria (relevance, probative value and prejudice) pertaining to the documents. However, the Chamber did not abuse its discretion in recognising the materials as submitted. Nor did it err in allowing the Prosecution to adduce additional evidence as to these criteria.

30. In fact, Blé Goudé's Second Ground is premised on two faulty assumptions: *First*, that the tendering party must *fully* establish the evidentiary criteria in relation to the material tendered at the time of submission. And *second*, that the non-tendering party is obliged to address any additional information regarding material already in the record, and thereby is prejudiced. However, Blé Goudé ignores that the relevance, probative value and potential prejudice of an item of evidence can only be fully established at the end of the proceedings and in light of all the evidence submitted and discussed. In addition, the organic nature of trial proceedings necessarily entails that the assessment of the relevance, probative value and any prejudicial effect of evidence already in the record will continuously evolve as a result of additional evidence arising in the trial.

31. Even assuming *arguendo* that the Chamber erred—and should have ruled on the admissibility of the documents and rejected the Prosecution's requests—the Chamber would still not have erred in permitting the Prosecution to present additional evidence to further substantiate the relevance and probative value of the documents. Blé Goudé's Second Ground should thus be rejected.[88]

a. Blé Goudé disregards the organic nature of the proceedings

32. Blé Goudé fails to appreciate the organic nature of trial proceedings, which exists irrespective of the evidentiary regime adopted by a Chamber. *First*, what Blé Goudé calls the Prosecution's "unrestricted opportunity to submit further evidence",[89] and the Defence's

[88] Also related arguments by Gbagbo, and by Blé Goudé in his First Ground.
[89] Blé Goudé Appeal, para. 34. *See also* para. 44.

undue obligation "to respond to every submission of evidence and to every additional argument",[90] is merely a consequence of the natural course of trial proceedings in which information and evidence is continuously adduced and discussed by parties, participants and the Trial Chamber.[91] As a result, 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.[92] Hence, *fully* informed submissions on these evidentiary criteria by the parties,[93] and a definite determination on them by a Chamber, can only be safely made at the end of a trial in the context of all the evidence and submissions.[94] This is consistent with a Chamber's obligation to conduct a "holistic evaluation and weighing of all the evidence" in its article 74 decision, once all evidence has been submitted and discussed.[95] It also explains the rationale of this and other chambers which use the submission of evidence regime.[96]

33. *Second*, since the assessment of the relevance, probative value and any prejudicial effect of the evidence may continuously evolve during a trial, the tendering party may not be in a position to provide *all* information about these criteria at the time of submission.[97] Some information may simply be outside the party's knowledge and control. This, however, does not mean that "the tendering party is authorised to retain evidence […]".[98] Rather, the tendering party should provide *all known available* information regarding the evidentiary criteria at the time of submission. Nonetheless, and consistent with the organic nature of a

[90] Blé Goudé Appeal, paras. 37, 38, 40.
[91] ICC-01/05-01/08-682 ("*Bemba* In-Depth Chart Decision"), para. 27 ("trials are essentially organic in nature and it is inevitable that as the evidence and the issues in the case develop, the prosecution may in due course seek to argue that the probative value or significance of one or more areas of evidence described in the in-depth analysis chart have changed or developed. The prosecution will not be limited by this document as to the submissions that it is entitled to advance on the ultimate probative significance of any of the testimony of the witnesses it has called or the other materials it has introduced. Ultimately, it is for the Chamber to determine all issues of fact in a manner that is consistent with a fair trial.")
[92] Article 70 Evidence Submission Decision, para. 10 ("The Chamber's evaluation of relevance may also change during the course of the hearing […]").
[93] *Contra* Blé Goudé Appeal, paras. 37-38 and Judge Henderson's Dissent, para. 11.
[94] ICC-01/05-01/08-3343 ("*Bemba* TJ"), para. 237 ("the Chamber stressed that '[i]n its final assessment of the evidence [it would] consider all submissions and testimonial evidence related to the authenticity of [such evidence]"). *Contra* Blé Goudé Appeal, para. 42, misinterpreting Prosecution's Consolidated ALA Response, para. 37, where the Prosecution stated that the evidentiary criteria can only be adequately and fully established at the end of the trial in light of all the evidence and submissions. Also *contra* Gbagbo Appeal, para. 47, erroneously arguing that the authenticity of an item of evidence can be determined in isolation.
[95] *Bemba* TJ, para. 225. Also ICC-01/04-01/06-3121-Red A5 ("*Lubanga* AJ"), para. 22; and ICC-01/04-02/12-3 ("*Ngudjolo* TJ"), para. 45. *See also* *Ntagerura* AJ, para.174: "The Chamber cannot not consider individual items of evidence (such as the testimony of different witnesses or documents) in isolation". *See* *Ntagerura* AJ, para.171.
[96] Evidence Submission Decision, para. 13. *Similarly see* Article 70 Evidence Submission Decision, para. 10; *Ongwen* Directions, paras. 24-25.
[97] Blé Goudé Appeal, paras. 36, 42, 44. *See also* Gbagbo Appeal, para. 47, similarly arguing that authenticity of items of evidence must be fully established in isolation and at the time of submission.
[98] *Contra* Blé Goudé Appeal, para. 35.

trial, new relevant information may well arise during the proceedings which will affect (either bolstering or undermining) the relevance, probative value and/or prejudicial effect of evidence already submitted. Due to the spontaneity of witness testimony, parties may not be able to foresee with absolute certainty the full extent and scope of witnesses' testimony. This scenario differs from the disclosure of new material not included in the parties' list of evidence, which does not apply to this case.[99]

34. In addition, as occurred in this case, parties may choose to submit documents through bar table motions before witnesses come to court to testify. In *Ongwen*, for example, the Prosecution submitted documents ahead of the witnesses' testimonies to avoid expending significant court time introducing them during live testimony; however, witnesses were still questioned (or will be) about the general provenance of the documents.[100] Trial Chamber IX recognised those documents as submitted, and noted that "the formal submission of materials severable from a witness's Rule 68(2)(b) or 68(3) of the Rules statement or in-court testimony [does not] prejudice[…] the Defence "[101] since "[the manner of submission] does not lead to the materials being considered any differently by the Chamber in its deliberations."[102] Indeed, the Chamber highlighted that *"[t]he material issue is that the Prosecution clearly submits the materials to the Chamber in such a manner that the Defence can raise any issues under Rule 64*".[103] As shown above,[104] in this case the Defence meaningfully challenged the documents upon submission. Moreover, as Trial Chamber IX noted, if the in-court testimony of any witness raises a new issue about the relevance and probative value of the documents previously submitted, the Defence is not precluded from raising such an issue pursuant to rule 64(1).[105] In this case, however, the Appellants sought to rely on the content of these documents thus implicitly conceding their reliability.[106]

b. Blé Goudé misapprehends the non-tendering party's right pursuant to rule 64(1)

35. Blé Goudé's submissions misapprehend the terms of rule 64(1) and how it is to be applied. Rule 64(1) permits the non-tendering party, exceptionally, to raise issues related to

[99] *Contra* Blé Goudé Appeal, para. 43.
[100] ICC-02/04-01/15-654, para. 19 ("*Ongwen* Prosecution BT Motion").
[101] "*Ongwen* BT Decision, para. 13.
[102] *Ongwen* BT Decision, para. 14.
[103] *Ongwen* BT Decision, para. 14 (emphasis added).
[104] *See above*, para. 23.
[105] *Ongwen* BT Decision, para. 16; Judge Tarfusser's Dissent, para. 21.
[106] *See above*, para. 26.

the relevance and probative value of previously submitted evidence if *they were unknown* when the evidence was submitted.[107] Hence, if the Prosecution were to adduce *additional* information on the relevance and probative value of documents previously submitted, the Defence could invoke its rights under rule 64(1) and make additional submissions.[108] In addition, and as noted above,[109] the parties will have another opportunity to make final and fully informed submissions on the evidentiary criteria relating to the documents in their closing statements.[110]

36. Finally, Blé Goudé's arguments that the principle of equality of arms has been undermined are speculative and unfounded[111] since the Chamber's guidance was directed to both Parties.[112] It is also incorrect that the "Prosecution will have on average more time than the Defence to substantiate" the probative value and relevance relating to documents in their bar table motions.[113] Because of the organic nature of the trial, such information pertaining to documents in future Defence bar table motions may also arise—and may indeed already have arisen—in the course of the Prosecution's case.

c. Even if the Chamber should have ruled on admissibility, it did not err in allowing further evidence

37. Even assuming *arguendo* that the Chamber had erred—and should have ruled on the admissibility of the tendered documents at the time of their submission—Blé Goude's Second Ground fails in any event. On the facts of this case, the Chamber's decision to permit the Prosecution to adduce additional information on the relevance and probative value of the documents would have been reasonable and squarely within the Chamber's discretion to manage the proceedings. This is particularly so given that:

- this was among the first applications/bar table motions filed by a party in a new evidentiary regime;

[107] *Ongwen* BT Decision, para. 16; Judge Tarfusser's Dissent, para. 21.
[108] *Ibid*.
[109] *See above*, para. 23.
[110] Rule 141(2).
[111] Blé Goudé Appeal, para. 39.
[112] Decision , paras. 36-38. *See above*, para. 12.
[113] Blé Goudé Appeal, para. 39.

- the Prosecution had flagged the existence of the Investigator's Report which was yet to be submitted;

- witnesses who could testify about the evidentiary criteria for some of the documents (such as P-0010, P-0011, P-0321 and P-0330, all commanders within the *Gendarmerie Nationale*) had been on the list of Prosecution witnesses since 30 June 2015[114] for which extensive summaries had been provided;[115]

- the Defence suffered no prejudice since they challenged the reliability of the documents when the Prosecution submitted them.[116] In addition, the Defence had the opportunity to further challenge the witnesses' testimony, and have an additional means to challenge all the evidence at the end of the trial under rule 141(2). In fact, the Defence has relied on the documents.[117]

38. Thus, Blé Goudé's Second Ground should be dismissed.

III. Issues outside the scope of this appeal

39. As noted above, the Appellants raise arguments on topics which fall squarely outside the scope of this appeal. On this basis alone, their arguments as to the principle of orality and the legitimacy of the submission of evidence regime should be dismissed. Notwithstanding, and to correct the Appellant's misunderstandings, the Prosecution briefly addresses below the Appellants' cursory arguments. The Prosecution reserves its right to provide further submissions on these issues, if needed.

a. The Principle of Orality falls outside the scope of this appeal

40. Gbagbo's arguments as to the principle of orality are misplaced.[118] *First*, the Rome Statute does not establish an absolute requirement that evidence be introduced only through a witness.[119] Notably, article 69(2) regulates the principle of orality with respect to witness

[114] Prosecution List of Witnesses.
[115] Prosecution Witnesses' Summaries, pp. 8-13 (P-0010), pp. 14-19 (P-0011), pp. 169-173 (P-0321) and pp. 181-184 (P-0330).
[116] *See above*, para. 23.
[117] *See above* para. 26.
[118] *E.g.*, Gbagbo Appeal, paras. 13-18, 24-25, 27.
[119] *Bemba et al* TJ, para. 206; *Ongwen* BT Decision, para. 15. *Contra* Gbagbo Brief, paras. 14, 16.

testimony, but not with regard to other evidence.[120] *Second*, bar table motions are standard practice at this Court[121] and expressly permitted under article 69(2).[122] This provision does not set a specific time for filing such motions[123] nor sets out any specific limitation apart from such motions not being prejudicial or contrary to the rights of the accused.[124] However any determination of prejudice is case-specific and cannot be established in the abstract.[125] Notably, the method of submission has no bearing on how the Chamber will eventually evaluate the evidence.[126]

b. The Appellants misunderstand the submission of evidence regime

41. The consistency of the submission of evidence regime with the Rome Statute is likewise not linked to the issue certified for appeal. Notably, it has been confirmed by the Appeals Chamber.[127] In addition, the Appellants fundamentally misunderstand the submission regime.

42. *First*, Blé Goudé holds the view that the Chamber will eventually rule on the admissibility of the submitted items of evidence.[128] However, as a general rule, the Chamber

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[120] Article 69(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. […]"; *Bemba* Admissibility AD, paras. 76-78. *Contra* Gbagbo Appeal, para. 16.
[121] Amended Directions, para. 43; ICC-02/04-01/15-497 ("*Ongwen* Directions"), para. 27; ICC-01/04-02/06-619 ("*Ntaganda* Directions"), para. 52; ICC-01/09-01/11-847-Corr ("*Ruto* Directions"), para. 27.
[122] *See* Article 69(2): "[…] The Court may also permit […] 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". Piragoff and Clarke in Triffterer/ Ambos (ed.), *The Rome Statute of the International Criminal Court* (C.H.Beck, Hart, Nomos, 2016), p. 1728 ("Explicit authority in the Statute to permit the introduction of documents and written transcripts is in accord with the general philosophy of article 69 to avoid overly technical rules of evidence […].").
[123] *Contra* Gbagbo Appeal, para. 17, stating that bar table motions should not be filed at the beginning of the proceedings. *See however* *Ruto* Directions, para. 27 ("Such application shall be preferably filed before the commencement of trial").
[124] Article 69(2).
[125] *Contra* Gbagbo Appeal, para. 15, stating that bar table motions should not be allowed when there is a witness who can testify about the document.
[126] *Article 70* TJ, para. 206 (citing *Lubanga* Admissibility Decision, para. 24 ("[t]he drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited—at the outset—the ability of the Chamber to assess evidence 'freely'"). *Also* *Katanga* Bar Table Motions Decision, para. 12 ("[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."); *Ongwen* BT Decision, para. 49 ("[t]here is nothing prejudicial about submitting [evidence on critical elements of the charges] through this procedure, [t]he method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence.")
[127] *Bemba* Admissibility AD, para. 37.
[128] Blé Goudé Appeal, paras. 24 ("to postpone any ruling") and 25 ("when admissibility rulings are made at the end of the trial"). *See also* Gbagbo Appeal, para. 50 ("*Puisque les Juges, dans le nouveau cadre dressé par le Chambre ne se prononceront sur l'admissibilité d' un élément de preuve que dans le Jugement final*").

need not do so; rather, it may assess the evidentiary criteria of relevance, probative value and any prejudicial effect in its article 74 deliberations.[129] Further, there is no contradiction between a non-tendering party's right and duty to raise objections under rule 64(1) at the time of submission and a Chamber's deferred assessment of the evidentiary criteria.[130] The Chamber would note the Parties' objections and considered them in its article 74 deliberations.[131] The article 74 decision would contain a full and reasoned statement of the Chamber's findings. [132] Blé Goudé will have the opportunity, pursuant to article 81, to appeal any alleged evidentiary errors by the Chamber which materially impact the article 74 decision.[133]

43. *Second*, Gbagbo incorrectly makes the Defence's right to know the content, cause and nature of the charges under article 67(1)(a) contingent on receiving admissibility rulings on a rolling basis.[134] However, the Appeals Chamber has already rejected this argument and found that "the right to be informed of the charges is not concerned with the timing of admissibility rulings".[135] The decision on the confirmation of the charges defines the parameters— and provides notice—of the charges. [136] In addition, auxiliary documents, such as the Prosecution's Pre-Trial Brief, provide further details.[137] Moreover, the Prosecution disclosed the submitted evidence as incriminatory evidence from 9 August 2013 until 19 February 2015.

44. Further, the evidence tendered through bar table motions is on the record, [138] the Chamber may rely on it in its article 74 decision and both Parties are expected to "conduct their investigations and prepare their […] cases in light of all evidence submitted".[139] There

[129] *Bemba* Admissibility AD, para. 37.
[130] Blé Goudé Appeal, para. 25.
[131] *Article 70* TJ, para. 193 ; *Ongwen* Intercept Decision, para. 11; Evidence Submission Decision, para. 19.
[132] *Article 70* TJ, para. 193.
[133] *Contra* Blé Goudé Appeal, para. 25 where Blé Goudé erroneously refers to the parties' right to "respond" to admissibility rulings.
[134] Gbagbo Appeal, paras. 20, 22. *See also* para. 19.
[135] *Bemba* Admissibility AD, paras. 63-64.
[136] *Lubanga* AJ, para. 124. *See also Ongwen* BT Decision, para. 48.
[137] *Lubanga* AJ, paras. 124, 132. *See also Ongwen* BT Decision, para. 48.
[138] *Article 70* TJ, para. 198 ; Amended Directions, para. 47. *Contra* Gbagbo Appeal, paras. 39, 50 who states that the Chamber would rely on evidence not discussed at trial. Similarly, prior recorded testimonies which are introduced pursuant to rule 68 are also on the record and considered submitted and discussed for the Chamber to rely on them in its article 74 deliberations. *Contra* Gbagbo Appeal, para. 27.
[139] Evidence Submission Decision, para. 18.

is neither ambiguity nor unfairness.[140] The only "uncertainty" relates to the Chamber's final evidentiary assessment and weight to be given to the evidence—one that is inherent in all trial proceedings, where evidence is assessed as a whole and, not in isolation, at the end of the trial. Even if the Chamber had made admissibility decisions regarding the evidence, the Parties would be in the same position in so far as not knowing with certainty how the Chamber will ultimately weigh and assess the evidence.

Conclusion

45. For all the reasons set out above, the Appeals should be dismissed.

Fatou Bensouda, Prosecutor

Dated this 27th day of June 2017[141]

At The Hague, The Netherlands.

[140] *Ongwen* BT Decision, para. 49 ("there is nothing prejudicial about submitting such evidence through this procedure. Nor does such submission relieve the Prosecution of its burden of proof or shift that burden to the Defence. […] the method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence".). *Contra* Gbagbo Appeal, paras. 25, 35, 50.

[141] This submission complies with regulation 36, as amended on 6 December 2016: ICC-01/11-01/11-565 OA6, para. 32.