

ANNEX B**Previous Defence Submissions on Impeachment Material**

Document No **E-1/59.1**, 'Transcript of Trial Proceedings', 4 April 2012 (Trial Day 47), ERN 00799333–00799437, p 11:8–20 ('[B]ut more importantly, I am here to test the reliability of this witness, the credibility of his statements. And in order to do so effectively, I should be allowed to question him broadly, to ask whatever question I think or my client thinks is appropriate to test this reliability. It goes without saying that my client doesn't agree with what this particular witness has said so far, especially about his own role, the role of my client, and that's the role in S-21, and we should be given the opportunity, I repeat, to challenge, to impeach this witness and we should be allowed to ask whatever question we think is necessary to do so, even if it goes outside the scope of the charges in the first trial.')

Ibid, p 15:5–18 ('Just to quickly respond to that, thank you very much for clarifying that, but we take the position that to impeach a witness, we are allowed to use whatever document we want to use. They don't have to be on the list. I just want to remind everyone that, for example, the prosecutor used websites to question witnesses. And when we asked whether we were required to put all the documents we wanted or intended to use for cross-examination on a list and submit that list to the Court, we were told by the senior legal officer that that was not necessary. We were only supposed to put documents on a list, which we intended to put before the Chamber, not the documents we intended to use for the cross-examination of witnesses. So I'm just following instructions from the legal – senior legal officer [(the 'SLO')].')

Ibid, p 17:9–13 ('But I would like to repeat, we take the position that we believe that we are allowed to ask whatever we think is necessary to impeach a witness; to challenge the credibility of a witness and that our questions should not be limited to the scope of the first trial.')

Ibid, p 23:6–11 ('I believe that all documents I was going to use for the cross-examination are on the case file, but we – we'll take the position that if they're not on the case file and they are relevant for establishing the truth that we should be allowed to use them anyway; if not, put them on the case file after we finish the cross-examination.')

Document No **E-1/70.1**, 'Transcript of Trial Proceedings', 30 April 2012 (Trial Day 58), ERN 00806485–00806595, pp 85:20–86:5 ('Thank you. The explanation is perfectly clear, Judge Lavergne. It may also be obvious that we don't agree with this. And as far as we are

concerned, this is a new development, this is not old jurisprudence. When we were asked to make that list, in April 2011, these were not the instructions. This document existed at the time, was already on the case file. We did not put it on the list for the simple reason that we were not required to do so. We're not trying to present new evidence; we're simply using this information to impeach the witness.'))

Document No **E-1/71.1**, 'Transcript of Trial Proceedings', 2 May 2012 (Trial Day 59) (Closed Session), ERN 00806843–00806864, pp 14:23–15:17 ('Your Honour, it's impeachment material, which Rule 87(4) clearly does not cover. Rule 87(4) refers to "new evidence". The word is "evidence". This is impeachment material. It's not evidence. It's potential evidence. It could, at some stage, become evidence, pursuant to an application under Rule 87(4). But, at this stage – and this is our firm position – it is impeachment material, which is a different category of material. It's not evidence. It's not covered by Rule 87(4). And that – let me add, that is, I believe, a position that Mr Smith is on record agreeing with. Certainly, it's a position that was advanced by the [SLO] at some stage. I think it's a position that everyone in this courtroom is familiar with. That's how cross-examination is done. I didn't know six, eight months ago what document I was going to put to this witness. I didn't even know he was coming. So, how could I have been expected, then, in July 2011, to prepare my cross-examination for a witness who hasn't even been scheduled for testimony? It simply makes no sense. It simply makes no sense. That's our firm position on impeachment material.')

Ibid, pp 17:23–18:22 ('Your Honour, I take issue with being accused of trying to finesse that point. I thought I was quite blunt. We don't think – we don't – we take the position that Rule 87(4) does not apply to impeachment material. There's no finesse involved. That's a position that was articulated by the [SLO]. That's a position that the OCP is on record as agreeing with. That's a position that many, many lawyers in this courtroom are familiar with. That's how you impeach a witness. You put something to the witness – you elicit testimony from the witness. Then, if necessary, if it serves your purpose, you move for that material to be admitted as evidence. That's the way I understand it. I'm not trying to finesse anything. I'm just trying to state my understanding of the procedure. [...] I think these rules are being made up, *ad hoc*, in this courtroom to hamstring – to limit Defence attempts at cross-examination. It's *ad hoc*. We've seen the Prosecution do the same thing – putting documents to witnesses that were not on the case file, from the internet. You're making things up as you go, and you're not being fair. And that's our position.')

Document No **E-1/73.1**, ‘Transcript of Trial Proceedings’, 17 May 2012 (Trial Day 61), ERN 00810282–00810392, pp 69:8–15: (‘I might add – I might just ask for the Chamber’s clarification on a point. This is a document that’s not on our witness list. It’s a document that we’d like to use for impeachment purposes. So can I take it that the scenario – the proposal, the methodology – that I referred to before with respect to the distinction between impeachment material and new documents – can I infer that that has been accepted, and that we will be allowed to continue impeaching witnesses?’)

Ibid, p 78:5–9 (‘We have taken a principled stand on that, and by “principled” I just mean a consistent stand, and we’ve said that any material – any material – that can somehow be shown to be relevant to the testimony at hand should be allowed to be used, to attempt to test or challenge the credibility of the witness.’)

Ibid, pp 81:18–82:14 (‘And let me correct myself, it was the 2nd of May. On that day we made a distinction. The objections that my colleague is referring to are substantive objections, objections to documents that were presented as possible evidence, and I made that distinction in that closed session regarding material that may be presented on the one hand as substantive evidence of something, and the same material that may be used for a different purpose, impeachment, sorry, excuse me, testing the credibility of the witness. So I think that’s a key distinction that needs to be made. So the fact that any document may have been subject to a prior objection based on its substantive value has absolutely no bearing on its later use to impeach a witness, for the reasons as I stated, we didn’t know the witness order when were told to submit those lists. We didn’t know who was going to be called. As I’ve said it’s, in my submission, utterly unreasonable to expect us to be somehow clairvoyant and to guess as to who the Chamber is going to call. So that’s the difficulty we really have with this distinction between substantive evidence and impeachment material, and I’ll stop using that word, I’m sorry.’)

‘[Draft] Transcript of Trial Proceedings’, 23 May 2012 (Trial Day 63), (ERN range not yet assigned), p 22:3–16 (‘First of all, in response to what you have just said about a ruling, could we be advised when to expect that ruling? When will that ruling be issued? Because we will, of course, need to object to that, possibly appeal it. I understand from what Judge Lavergne has said so far, it’s against the position that we’ve put forward so we would like to know when that decision will come out. Also, we would request that going forward, if we’re going to be required to make Rule 87(4) applications with respect to what is obviously

impeachment material, and what we say falls outside of the scope of that Rule, we would like to make those requests orally. Not in writing. We would like to make them orally at the Chamber, have the debate publically in Court at the Chamber, as it should be able to decide very quickly on those requests.’)