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TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

**Prosecution's Request for Leave to Appeal the Trial Chamber's Decision on
Directions for the Conduct of the Proceedings**

Source: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 19 November 2010, the Trial Chamber issued its “Decision on Directions for the Conduct of the Proceedings”(the “Decision”), whereby it set out, pursuant to Rule 140, rules governing the order, scope and mode of questioning.¹
2. The Trial Chamber firstly stated in paragraph 15 with respect to the mode of questioning that “[it] expects all parties and participants to ask neutral questions to the witnesses”. Hence, the Trial Chamber appears to prohibit the use of leading questions, departing from the practice established by Trial Chambers I and II in the *Lubanga* and *Katanga* trials, respectively.
3. The Prosecution appreciates that the Presiding Judge today addressed Defence Counsel in the following terms: “[...]I don't need to remind you that we are talking here in this Court about cross-examination in which leading questions are allowed.”² Therefore, the Chamber appears to accept that the use of leading questions in cross-examination will be allowed.
4. However, the question still arises whether, in the expectation that all questioning be “neutral”, the Chamber only intended to require appropriate respect to the witnesses themselves by barring unwarranted insinuations, concealed speeches or misleading questions, but never sought to forbid the use of leading questions in absolute terms. If this was the Chamber’s intention, then it is certainly one which the Prosecution strongly supports, as it is similarly required by the other Chambers of this Court, that direct and cross-examination must be conducted in a focused and professional manner.³ In this case, this application could be summarily dismissed by the Trial Chamber.
5. However, and in the event that the Chamber’s intention was to ban the use of leading questions throughout the proceedings, in particular during cross-examination, the Prosecution has to seek leave to appeal this aspect of the

¹ ICC-01/05-01/08-1023.

² ICC-01/05-01/08-T-37-ENG, p.41, lns.17-21.

³ ICC-01/04-01/07-1665-Corr, para.74.

Decision. In this sense, the Prosecution further notes that earlier in the proceedings the Presiding Judge stated that the Chamber was “paying attention *in order to remind the parties not to put leading questions*”,⁴ a statement that could suggest the existence of a general ban on the use of leading questions.

6. By prohibiting leading questions, the Trial Chamber would be depriving the parties of an efficient tool to test the credibility of witnesses on cross-examination or to impeach hostile witnesses. The Decision has therefore an irreversible impact on the fairness and expeditiousness of the proceedings: not only will the parties be handicapped in their ability to challenge the truthfulness of evidence, but the ban against leading questions can unnecessarily extend the length of the proceedings.
7. Secondly, and with regard to the scope of questioning, the Trial Chamber stated that “the party not calling the witness *may* ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as on mitigating and/or aggravating circumstances and reparation issues”.⁵ The Chamber does not require the party to present the matter, it presents it as an option. The Decision does not state further that the failure to ask such questions will affect the party’s subsequent ability to introduce evidence to contest credibility, reliability, or other aspects of the witness’ initial testimony. The Decision again accordingly departs from the established jurisprudence of Trial Chambers I and II in the *Lubanga* and *Katanga* cases.
8. By not requiring the parties to ask witnesses questions related to their credibility and reliability, or alternatively, by not foreclosing the presentation of contradictory evidence without having first put the possibility to the witness, the Chamber may effectively deny those witnesses the opportunity to explain and respond to purported contradictions or possibly unfounded accusations.

⁴ ICC-01/05-01/08-T-34-ENG, p.37, lns.1-4.

⁵ Ibid., para.13.(emphasis added).

9. The systemic nature of these two issues, if not immediately remedied by the Appeals Chamber, will affect the outcome of the trial and affect the presentation of the evidence.

The issues for which leave to appeal is sought

10. The Prosecution seeks leave to appeal two issues arising out of the Decision. The first issue, if is not interpreted in the manner proposed in paragraphs 3-4 above, refers to the Trial Chamber's prohibition of leading questions: by "expect[ing] all parties and participants to ask neutral questions to the witnesses"⁶ the Chamber is excluding leading questions on cross-examination or when a party's own witness is declared hostile. It thus is in conflict with procedures allowed by the Chambers of this Court in the *Lubanga* and *Katanga* trials.⁷
11. The second issue related to the obligation of a party to challenge the credibility of a witness or other aspects of his/her testimony during cross-examination. The Trial Chamber states that a party not calling a witness "*may* ask questions related to the credibility of a witness, the reliability of the evidence presented, as well as on mitigating and/or aggravating circumstances and reparation issues".⁸ However the Chamber does not impose an *obligation* on a party to do so and provide that a failure will waive its right to introduce contrary evidence in its case - as Trial Chambers I and II required in the *Lubanga* and *Katanga* trials.⁹ Hence, factual issues related to the credibility of witnesses called by the Prosecution, or

⁶ Decision, para.15.

⁷ ICC-01/04-01/06-T-104 ENG, pp.35-36; ICC-01/04-01/06-T-259,p.27,ln.21-p.29,ln.1 ; ICC-01/04-01/07-1665-Corr, paras. 74,67. Also on no controversial issues in chief see: ICC-01/04-01/06-T-107,pp.72-73; ICC-01.04-01/07-1665-Corr, para.66.

⁸ Ibid., para.13. (emphasis added)

⁹ ICC-01/04-01/07-1140, para.32; ICC-01/04-01/06-T-337-ENG (25 November 2010), p.46, lns.20-25 to p.47, lns.1-15, where Trial Chamber I reiterated that Defence counsel had to put to the testifying witness any issue related to his credibility, or the reliability of his evidence; otherwise he would not be able to put such matters before other witnesses who were not in a position to testify about it; ICC-01/04-01/07-1665-Corr, paras.69-70,73,76. See also Rule 90(H)(ii) of the ICTY Rules of Procedure and Evidence: "In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness." See also Rule 90(G)(ii) of the ICTR Rules.

the reliability of the evidence, may be raised for the first time during the defence case. Not only will those witnesses not have the possibility to refute or explain the Defence allegations or purported contradictions, but the Prosecution may be forced to recall the witnesses or present rebuttal evidence in order to effectively address the new allegations.

12. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues meet the criteria set out in that provision.¹⁰ Therefore, for the purposes of whether to grant leave to appeal it is not relevant whether the Trial Chamber was correct in requiring parties and participants to frame their questions on a neutral manner at all times, or in not requiring the cross-examining party to put its case to testifying witnesses.¹¹ All of those matters go to the merits of an ensuing appeal, and accordingly they are exclusively for the consideration of the Appeals Chamber if leave to appeal is granted. The sole questions that this Chamber must consider is whether the underlying issues, in this case the absolute prohibition of leading questions ("First Issue"), and the absence of an obligation on the cross-examining party to put its case to the testifying witness ("Second Issue") will have an impact on the proceedings that is sufficient to justify leave to appeal, and whether early intervention by the Appeals Chamber is warranted.
13. The Prosecution submits that the two issues identified above directly impact on the rights of the parties to present their cases and fulfill their statutory obligations. It also impacts on the manner in which this trial will proceed and its outcome. Leave to appeal should be granted to ensure that the trial proceeds on sound and solid grounds.

¹⁰ ICC-02/04-01/05-20, para.22.

¹¹ The Prosecution is mindful that the Statute and Rules do not define as examination in chief or cross-examination the questioning of the party calling a witness and that of the other party, respectively, however, these terms have been adopted by Trial Chamber I and II.

The issues fulfil the criteria in Article 82(1)(d)

First Issue: “Whether parties may be prohibited in absolute terms from using leading questions”

(a) The First Issue affects the fair conduct of the proceedings

14. This issue firstly affects the fair conduct of the proceedings. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.¹² In particular, it “means that the Prosecutor must be able to exercise the powers and fulfill the duties listed in Article 54”.¹³ Fairness is also linked to the ability of a party to present its case.¹⁴
15. The Chamber has the duty to ensure appropriate respect to the witnesses themselves by barring unwarranted insinuations, concealed speeches or misleading questions but should not ban leading questions in all the circumstances. A leading question has been defined as “[a] question that suggests the answer to the person being interrogated”.¹⁵
16. The First Issue causes unfairness in an adversarial proceeding by barring the use of a tool of demonstrated effectiveness to (a) test the credibility of a witness and (b) elicit favorable facts from an otherwise hostile witness. The right of the parties to question the credibility of witnesses is enshrined in Rule 140(2)(b) and acknowledged by this same Chamber in the Decision.¹⁶ Hence, the use of leading or closed-ended questions is not only a highly effective tool to exercise a party’s

¹² See further ICC-01/04-141, para.48; ICC-02/04-01/05-212, paras.10-11; ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para.24; ICC-01/04-135-tEN, para.38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

¹³ ICC-01/04-135-tEN, paras.38-39.

¹⁴ ICC-02/04-01/05-90-US-Exp (reclassified-ICC-02/04-01/05-135), para. 24. See also *Prosecutor v. Tadic*, IT-94-1-A, Appeal Judgment, 15 July 1999, para.48 (the right to a fair trial requires that neither party is put at a disadvantage when presenting its case).

¹⁵ Black’s Law Dictionary, (Thomson West, 8th Edition), p.906.

¹⁶ Decision, para.13.

right to test the opposing party's evidence or to deal with a hostile witness, but may also be in some instances the only effective way to do so.

17. Critical evidence in trials is frequently produced during cross-examination.¹⁷ In that regard, the First Issue is unfair towards the Defence, which initially reacts to the Prosecution's evidence,¹⁸ as the Prosecution bears the burden of presenting a coherent case and proving every element beyond reasonable doubt.¹⁹ However, since the Decision does not differentiate between Prosecution and Defence examination of witnesses, it will impose the same restrictions on the Prosecution in cross-examining Defence witnesses.²⁰ Hence the Decision can effectively impact on and detrimentally impair the Prosecution's statutory duty to establish the truth.²¹
18. Both parties will also be restricted in their ability to question their own witnesses should the witnesses be hostile or adverse. In such instances, Chambers of this Court have allowed the party calling the witness to cross-examine him/her through the use of leading questions.²²
19. Finally, a prohibition against using leading questions in cross-examination will directly impact on the scope and quality of the evidence elicited from the witnesses, which will form the basis of the final judgment of the Chamber. In that regard the Decision will adversely impact on the Trial Chamber's ability to determine the truth and, with it, the overall fairness of the proceedings.²³ In addition, the Chamber will not be able observe the demeanor or reaction of witnesses when faced with leading questions that openly seek to challenge their evidence. Chambers of this Court have considered this factor an important

¹⁷ ICC-01/04-01/07-1665-Corr, para.71: Trial Chamber II has stressed that "cross-examination must also contribute to the ascertainment of the truth [...]"; see also J.H. Wigmore (Revised by Chadbourn), *Wigmore on Evidence*, (Aspen Law & Business: 1974), volume V, p.1367 at 32: "Cross-examination is the greatest legal engine ever invented for the discovery of truth. [...]".

¹⁸ Note that under Article 67(1)(e) the Accused has the right to examine witnesses against him.

¹⁹ Article 66(2); see also *Prosecutor v. Oric*, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para.7.

²⁰ ICC-01/04-01/06-925 OA8, para.19, Sep.Op.: "Equality of arms is another element of a fair trial [...]".

²¹ Article 54(1)(a). See above fn. 17

²² ICC-01/04-01/07-1665-corr., para.67; ICC-01/04-01/06-T-259 ENG, p.27, ln.21 to p.29, ln.1;

²³ Article 69(3).

element when assessing the weight and probative value of a witness' evidence, in the backdrop of all the evidence presented in the trial.²⁴

(b) The First Issue affects the expeditious conduct of the proceedings

20. The Prosecution submits that the issue also affects the expeditious conduct of the proceedings.²⁵

21. Leading questions permit the parties to rapidly and efficiently identify and present the disputed issues and therefore save court time.²⁶ In particular, the use of this mode of questioning has been proven to be an expeditious tool to elicit evidence from hostile witnesses disinclined to answer without hedging or elaboration when the response does not support their preferred outcome. In this sense, the First Issue affects the timely and efficient conduct of proceedings²⁷ since the unavailability of leading questions can slow the trial.²⁸

²⁴ ICC-01/04-01/07-T-190 ENG, p.5, lns.11-17. Trial Chamber II stated that: "factors such as the personality of the witness, his demeanour in the courtroom, the manner in which he testified [...] or the consistency of his testimonies are all factors to be taken into consideration in the evaluation of the credibility of his testimony". See also ICC-01/05-01/08-1028, para.13, where Judge Ozaki noted that "The Chamber will lose the benefit of the live oral testimony" as a result of the shortening on the Prosecution's questioning.

²⁵ The Prosecution's longstanding position has been that if an issue affects the fair conduct of the proceedings, any further showing that the issue also affects the expeditious conduct of the proceedings is rendered superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d). In that regard, Trial Chamber II agrees has granted leave to appeal after finding only that an issue "may significantly affect" or "clearly has a bearing on" the fairness of the proceedings and therefore "the first requirement of Article 82(1)(d) of the Statute is met". See ICC-01/04-01/07-2032, para.28; ICC-01/04-01/07-1859, para.18. On the other hand, Trial Chamber II has rejected this position: ICC-01/04-01/06-2463, paras.27-28.

²⁶ M. Stone, *Cross-examination in Criminal Trials*, 3rd Revised edition (West Sussex, Tottel Publishing: 2009), p.113. Trial Chamber I allowed for leading questions on non controversial issues during examination in chief to avoid "slow[ing] this trial down". See ICC-01/04-01/06-T-107 ENG, p.73, lns.3-7.

²⁷ Expeditious proceedings are intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para. 6); "we can only do justice that is expeditious, fair and efficient" (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings".

²⁸ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

22. In addition, Trial Chambers I and II have allowed leading questions to witnesses of another party, or when a party's own witness is declared hostile.²⁹ This is also the general rule in other international criminal courts.³⁰ Given the split between this Chamber's approach and the other Chambers in this and other tribunals, the issue is certain to be raised in an appeal from a final judgment in this case. In this regard, Pre-Trial Chamber II has considered that one aspect of expeditiousness is if an issue "would entail the risk that lengthy and costly trial activities are nullified at a later stage."³¹ That consideration applies in this instance.

(c) The First Issue affects the outcome of the trial

23. The requirement that an issue affects the outcome of the trial is an alternative basis for granting leave to appeal under Article 82(1)(d).³² In other words, an issue only needs to impact on the fair and expeditious conduct of the proceedings or the outcome of the trial.³³

24. The First Issue affects the outcome of the trial as it will restrict the ability of each party to fully test the direct testimony of witnesses called by the other party (or the reliability of their evidence), or of its own hostile witnesses. Hence, the Chamber may lack relevant and necessary information to assess the weight and probative value of evidence that could have been otherwise obtained through leading questions. Considering that the Chamber's final judgment has to be predicated on "its evaluation of the evidence and the entire proceedings",³⁴ the First Issue can have a detrimental impact on the outcome of the trial.

²⁹ ICC-01/04-01/06-T-104, pp. 35-37; ICC-01/04-01/06-T-259 ENG, p.27, ln.21 to p.29; ICC-01/04-01/07-1665-Corr, paras. 74,67.

³⁰ See for instance Prosecutor v. Vojislav Seselj, IT-03-67-PT, Transcript of 22 July 2008, p.9673, lns.1-10.

³¹ ICC-02/04-01/05-20 (unsealed pursuant to ICC-02/04-01/05-52), para. 36. The Prosecution notes that this can also be properly viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. ICC-01/04-168 OA3, para.16.

³² ICC-02/04-112, para.17; ICC-01/04-01/06-1417, paras.17-18; ICC-01/04-01/06-1473, paras.21-22.

³³ ICC-01/05-01/08-75, para.8.

³⁴ Article 74(2).

25. The Appeals Chamber has stated that under this limb of Article 82(1)(d) the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”³⁵ Trial Chamber II has further indicated that it will suffice to simply analyze the potential impact of the disputed issue. It should be beyond dispute that depriving the trial record of relevant information that can be reached through the use of leading questions (either to the credibility and reliability of the parties’ evidence or to the merits) must necessarily impact on the final outcome of the case.³⁶

Second Issue: Whether it is mandatory for the cross-examining party to put its case to the testifying witness

(a) The Second Issue affects the fair conduct of the proceedings

26. This Second Issue involves a result that is unfair, first towards the witnesses of either party who are deprived of the opportunity to explain potential contradictions in their evidence or respond to accusations to their credibility.³⁷ If the Defence offers testimony to contradict in whole or in part the evidence of a Prosecution witness, there should be a process that requires that the Defence put its propositions to the witness during cross-examination. Such a process will enable the witness to respond directly to the Defence allegations. It also enables the Chamber to better discover the truth if witnesses are afforded an adequate

³⁵ ICC-01/04-168 OA3, para.13.

³⁶ ICC-01/04-01/07-2404, para.30.

³⁷ The fair evaluation of the witnesses’ evidence is a principle embraced in the Statute. See Article 69(4). See also ICC-01/04-01/06-2463, para.30: Trial Chamber I has recognised that in certain circumstances, the treatment of particular individuals (such as victims or witnesses) may have a significant impact on the overall fairness of the proceedings.

opportunity to explain and if the Chamber can observe their *in situ* and spontaneous reaction and thus assess their credibility.³⁸

27. This Second Issue also creates unfairness for the Prosecution, which may find itself ambushed with an unexpected line of defence at a later stage of the proceedings, forcing it to seek ways to address allegations that could have easily and effectively been dealt with while the relevant witness was giving evidence. It is important to recall that most of the witnesses testifying before this Court travel from remote locations. Many are also vulnerable witnesses; they are victims or witnesses of the most serious atrocities, and/or face consequences within their communities, including harm, as a result of their collaboration with the Court. Allowing the Defence to withhold a line of examination during the questioning of a Prosecution witness may require that a vulnerable witness be recalled; if the witness becomes unavailable in the interim, the opportunity to present the witness's response to those allegations will be lost.

28. This will also impact on the Prosecution's duty to establish the truth and to equally investigate incriminatory and exculpatory evidence (and disclose them to the Defence).³⁹

29. The accumulated experience of the Court so far shows that the Prosecution's concerns are well-founded: in the *Lubanga* trial the Defence chose to not reveal its defence until the opening of its case, almost a year after the trial started. As a result, only then the Prosecution became aware of key information that it then used to identify new materials that fell under Rule 77 as being relevant to the preparation of the defence's (new) case. Had it learned about the defence case before, it would have provided this information at an earlier stage, and investigate the allegations launched against some of the Prosecution witnesses.

³⁸ On the inherent spontaneity of trials, see ICC-01/04-01/07-T-112 ENG, p.3, lns.20-22: "the Chamber recalls the importance of the oral nature of proceedings, and with that the inevitable and necessary portion of spontaneity which results from that".

³⁹ ICC-01/04-135-tEN, paras.38-39. Fairness also "means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54". Also, In turn, this will also negatively impact on the accused's rights to be provided with this material on a timely manner.

(b) The Second Issue affects the expeditious conduct of the proceedings

30. The Second Issue also impacts on the expeditiousness of the proceedings. As noted above, if the Defence only presents matters related to the credibility of Prosecution witnesses during its own case, the Prosecution may have to recall them or present rebuttal evidence on issues that could have been easily addressed by simply questioning the witnesses when they were before the Chamber. This will obviously impact on the expeditious conduct of the proceedings - as it has occurred in the *Lubanga* trial. As indicated above, in that case the Defence failed to put its contrary submissions to the witnesses, instead challenging the credibility of some of the Prosecution witnesses for the first time after the Prosecution rested. The Prosecution thereafter had to seek leave from the Chamber to recall two and present seven rebuttal witnesses. Had the Defence put its case to the Prosecution witnesses in cross-examination it would have saved Court time and resources.
31. In addition, having learned of new areas that initially did not reasonably fall within the scope of Rule 77 but later became relevant, the Prosecution had to conduct additional and repeated searches through its databases to identify (newly) relevant material. Had the Defence fully complied with its duty to put its case to the Prosecution witnesses – as mandated by Trial Chamber I –⁴⁰ the Prosecution would have identified those materials at an earlier stage, avoided unnecessary searches and saved invaluable time.⁴¹

⁴⁰ ICC-01/04-01/06-1140, para.32. See also ICC-01/04-01/06-T-337-ENG (25 November 2010), p.46, lns.20-25 to p.47, lns.1-15.

⁴¹ ICC-01/04-01/06-1191, para.48. Trial Chamber I has found that “[t]he additional requirements of inspection and provision of material could affect the expeditiousness of the proceedings, to the extent that this may have an impact on the evidence and the issues canvassed during the trial.”

(c) The Second Issue affects the outcome of the trial

32. As with the First Issue, the Second Issue also affects the outcome of the proceedings.⁴² Should the Defence choose not to put their case to the testifying witnesses, the Prosecution may be compelled to seek leave from the Chamber to recall them. Witnesses may become unavailable, or refuse to testify again. Hence, the Trial Chamber can end up having before it an incomplete presentation of the facts, which will directly affect the outcome of the trial and its final judgment.⁴³

33. As already advanced, if the Defence is asked to put its case timely to the testifying witnesses, then the Chamber will be in a position to appreciate the witnesses' reaction at the time of his or her testimony, a factor to be considered when assessing the weight and probative value of the evidence that will inform the final judgment.⁴⁴

Immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings

34. Immediate resolution of these issues will materially advance the proceedings. Considering that the Decision departs on the two issues described above from decisions of the other Trial Chambers,⁴⁵ a "prompt reference of the issue[s] to the court of appeal" and its "authoritative determination" will help these proceedings "'move forward' by ensuring that the proceedings follow the right course" thus

⁴² As indicated above an issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial. See inter alia ICC-01/05-01/08-75, para.8.

⁴³ ICC-01/04-168 OA3, para.13.

⁴⁴ ICC-01/04-01/07-T-190 ENG, p.5, lns.11-17.

⁴⁵ On leading questions in cross-examination and hostile witnesses see Trial Chamber I and II respectively (ICC-01/04-01/06-T-104 ENG, p.35-37, and ICC-01/04-01/06-T-259 ENG, p.27, ln.21 to p.29, ln.1; ICC-01/04-01/07-1665-Corr, paras.74, 67) ; on the obligation of parties to put their case to the testifying witnesses, including issues of credibility or contradictions (ICC-01/04-01/06-1140, para.32 and ICC-01/04-01/06-T-337-ENG (25 November 2010), p.46, lns.20-25 to p.47, lns.1-15; ICC-01/04-01/07-1665-Corr, paras.69-70,73,76)

removing any doubts about its correctness. A decision from the Appeals Chamber will ensure that the trial continues “along the right lines provid[ing] a safety net for the integrity of proceedings.”⁴⁶ If not resolved now, there is a significant risk that the trial may proceed on flawed grounds. If so, that will risk reversal of the judgment on a final appeal.⁴⁷

35. Considering the importance of the issues, and the differences of approach between this Chamber and Trial Chambers I and II, a decision from the Appeals Chamber on the permissibility of leading questions in certain scenarios and the scope of cross-examination will provide a much needed uniformity and coherence on such important matters that will assist to advance not only these, but also future proceedings before this Court.⁴⁸

⁴⁶ ICC-01/04-168 OA3, paras.14-15,18.

⁴⁷ ICC-01/04-168 OA3, para. 16.

⁴⁸ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic et al*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

Relief sought

36. For the reasons set out above, the Prosecution requests that the Trial Chamber

- (a) grant leave to appeal pursuant to Article 82(1)(d) on the Second Issue; or
- (b) in the event that the Chamber's ruling forbids the use of leading questions throughout the proceedings, grant leave to appeal on both issues.



Luis Moreno-Ocampo, Prosecutor

Dated this 29th day of November 2010

At The Hague, The Netherlands