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**International
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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Response to the requests for leave to appeal made by Mr Gbagbo and Mr Blé Goudé against the direction on the conduct of witness questioning (ICC-02/11-01/15-T-14-ENG ET)

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Legal Representative of the victims admitted to participate in the proceedings submits that Mr Gbagbo's and Mr Blé Goudé's requests (the "Requests") for leave to appeal the Chamber's direction on the conduct of witness questioning (the "Decision")¹ do not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. The Requests do not demonstrate that the alleged issue identified by the Defence, namely the prohibition of "leading questions" during the questioning of the witnesses (the "Issue"),² arises from the Decision and can be the subject of an interlocutory appeal, nor do they show how said issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Request merely represents the Defence's disagreement with the ruling of the Chamber.

II. Submissions

1. The issue identified by the Defence does not arise from the Decision

3. The Issue does not arise from the Decision, but from the Defence's misreading of the term "leading question" therein.

4. The Defence contends that they have been deprived of the possibility of confronting witnesses called by other parties or participants because they cannot make use of "leading questions" during their examination of said witnesses.³

¹ See the transcript of the hearing held on 4 February 2016, No. ICC-02/11-01/15-T-14 ENG ET (the "transcript"), p. 4, lines 1-2.

² *Idem*, p. 11, lines 7-9; p. 16, lines 15-23; and p. 17, lines 11-12.

³ *Ibid.*, p. 10, lines 23-24 to p. 11, lines 1-2; and p. 16, lines 10-14.

5. However, the Chamber has expressly clarified that “[i]t is not considered to be leading [...] to confront a witness with facts or circumstances such as documents, prior statements of the witness, or other persons, et cetera, which are or appear to be in contradiction with the testimony given by the witness while in the stand, casting doubts on his or her credibility. And to ask questions and/or clarifications on these contradictory facts or circumstances”.⁴

6. The only limitation established by the Chamber is that “[t]he Presiding Judge will, in no case, allow counsel to unduly direct or influence evidence to be provided to be provided by a witness, by framing the question in a manner which predetermines the answer or [...] read somewhere the expected answer”.⁵

7. Accordingly, the Decision does not deprive the Defence of its opportunity to challenge the testimony already provided by the witnesses. The Decision only establishes a limit as to the manner in which the non-calling party may conduct its questioning in order to challenge the testimony of the witness.

2. The issue identified by the Defence does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

8. Since it is clear that the issue identified by the Defence does not arise from the Decision, the Requests must be dismissed on this basis alone. Assuming *arguendo* that said issue arises from the Decision, namely the impossibility for the Defence to confront the witnesses by way of “leading questions”, the Legal Representative opposes the Defence’s contentions that it significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

9. The Legal Representative submits that the Decision does not affect the fair conduct of the proceedings because it does not give rise to inequality between the

⁴ *Ibid.*, p. 4, lines 10-17 (emphasis added).

⁵ *Ibid.*, p. 4, lines 3-7.

calling and non-calling party; it cannot be said to have had a substantive impact on the preparations of the non-calling party; and it is legitimately different from the rulings of other Chambers of the Court and other international criminal tribunals.

10. Firstly, contrary to the Defence's contention, the Legal Representative submits that the Decision does not give rise any imbalance between the calling and the non-calling party when questioning the witnesses.⁶

11. In this regard, it must be noted that the Defence will be calling in turn witnesses and that the Prosecution will be subject at that time to the same alleged limitation in its questioning of those witnesses. Consequently, both the Prosecution and the Defence will question in the same conditions witnesses called by the other party.

12. Secondly, contrary to the Defence's submissions, the prohibition of confronting witnesses by means of "leading questions" cannot be said to have a substantive impact on the preparations of the non-calling party.⁷ Despite the calls made by the Presiding Judge,⁸ the Defence has failed to clarify how in particular the Decision has affected the manner in which it has already prepared its questioning of the witnesses. In addition, the Decision makes it clear that it is open to the Defence to challenge the witnesses' testimony by any other means different than "[b]y *framing the question in a manner which predetermines the answer*".⁹

13. Finally, the Decision cannot be said to affect the fairness of the proceedings merely because of its alleged inconsistency with the rulings issued by other Chambers in other cases or by other international criminal tribunals.¹⁰

⁶ Cf. the transcript, *supra* note 1, p. 10, lines 12-25; and p. 13, lines 1-7.

⁷ Cf. the transcript, *supra* note 1, p. 15, lines 2-14.

⁸ See the transcript of the hearing held on 3 February 2016, p. 89, lines 12-14.

⁹ See the transcript, *supra* note 1, p. 4, lines 5-6.

¹⁰ Cf. the transcript, *supra* note 1, p. 11, lines 6-9; p. 15, lines 15-20; and p. 17, lines 11-17.

14. In this regard, the Legal Representative notes that each Chamber is independent in the adoption of its decisions, being only bound by the legal texts of the Court and the facts before it (article 21 of the Rome Statute). On this basis the Decision cannot be said to be unfair, since it is expressly premised on the powers granted to the Chamber by the Rome Statute and the Rules of Procedure and Evidence, namely article 64(8) and rule 140.¹¹

15. Even if consideration is made of the decisions rendered by other Chambers of the Court on the use of “leading questions” by the non-calling party, it is far from settled that the practice is entirely consistent in this regard.¹² Moreover, the Appeals Chamber has still not issued a ruling on this matter.

16. The Legal Representative incidentally notes that the Defence supports its request under article 82(1)(d) of the Rome Statute with the allegedly frequent use of “leading questions” before other international criminal tribunals.¹³ Regardless of the fact that this substantive argument could only be addressed if the issue was already for adjudication before the Appeals Chamber, it must be noted that the latter has repeatedly referred to “[t]he different statutory provisions that apply to [the ICTY], [and the] non-binding nature of [its] jurisprudence upon this Court” pursuant to article 21 of the Rome Statute.¹⁴

¹¹ See the transcript, *supra* note 1, p. 3, lines 6-10.

¹² Cf. the transcript of the hearing held on 16 January 2009, No. ICC-01/04-01/06-T-104 ENG ET, p. 36, lines 10-11 (leadings questions allowed), with the “Decision on Directions for the Conduct of the Proceedings” (Trial Chamber III), No. ICC-01/05-01/08-1023, 19 November 2010, para. 15 (leading questions not admitted)

¹³ See the transcript, *supra* note 1, p. 21, lines 17-22.

¹⁴ See the “Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” (Appeals Chamber), No. ICC-01/09-01/11-414 OA03 OA04, 24 May 2012, para. 31. See also the “Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” ((Appeals Chamber), No. ICC-01/09-02/11-425 OA04, 24 May 2012, para. 37; and the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386 OA05 OA06, 3 May 2011, para. 56.

17. The Legal Representative submits that the Defence equally fails to show how the Issue has a “significant” impact on the expeditiousness of the proceedings at hand. The argument that the exclusion of “leading questions” will necessarily lead to longer proceedings is hypothetical and merely speculative.¹⁵ In this regard, it is recalled that article 82(1)(d) of the Rome Statute cannot be used to litigate “abstract or hypothetical issues”.¹⁶

18. Indeed, as mentioned *supra*,¹⁷ the Defence argument on the one hand is based on the wrong assumption that not being able to pose leading questions would entail its impossibility to efficiently confront the witness with possible contradictions in previous statements or declarations;¹⁸ and on the other hand it is grounded solely on the amount of witnesses expected to be called by the Prosecution and does not consider the exercise of judicial discretion in allowing particular questions.

19. In fact, the Legal Representative submits that the non-calling party may still conduct focused examinations and address the testimony already provided to the calling party by confronting the witness “*with facts or circumstances such as documents, prior statements of the witness, or other persons*”¹⁹ and without the need of “*unduly direct or influence evidence to be provided by [the] witness*”.²⁰

20. Furthermore, it is recalled that according to article 64(2) and (8) of the Statute the Chamber has on the one hand the duty of ensuring that the trial is expeditious and is conducted with full respect of the rights of the accused and of the protection of victims and witness; and on the other hand the power to control the questioning. In

¹⁵ See transcript, *supra* note 1, p. 12, lines 6-15.

¹⁶ See the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’” (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6, and references contained therein.

¹⁷ See *supra*, para. 10

¹⁸ See transcript, *supra* note 1, p. 10, lines 23-25.

¹⁹ *Idem*, p. 4, lines 12-13.

²⁰ *Ibid.*, p. 4, lines 4-5.

this regard, it is also submitted that the Chamber has already provided appropriate guidelines to control the questioning.²¹

21. Finally, the Decision cannot be said to significantly affect the outcome of the trial since it is not possible to ponder the possible implications of the issue identified by the Defence on the outcome of the case.²²

22. In this regard, the Defence merely makes reference to the high number of witness expected to be called by the Prosecution, without further elaboration.²³ By contrast, the Legal Representative notes that the Decision is clear in its terms – being as it is a clarification of a prior oral decision –, that no questions have been made so far by the non-calling party, and that the Decision expressly grants a broad scope of action to the non-calling parties in the conduct of their questioning.²⁴

3. An immediate resolution by the Appeals Chamber of the issue identified by the Defence may not materially advance the proceedings

23. The Legal Representative submits that, since the issue identified by the Defence does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁵

24. Nonetheless, the Legal Representative wishes to underline that the arguments put forward by the Defence in this regard do not show how the fact that a party

²¹ *Ibid.*, p. 3, lines 6-10.

²² See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 13.

²³ Cf. the transcript, *supra* note 1, p. 18, lines 17-23.

²⁴ See *supra* para. 4.

²⁵ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 26.

cannot “*unduly direct or influence evidence*”²⁶ could fatally flaw the entire procedure.²⁷ On the contrary, the Defence once again merely refers to abstract and hypothetical considerations, which as such cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.²⁸

III. Conclusion

25. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Requests.



Paolina Massidda
Principal Counsel

Dated this 4th day of February 2016

At The Hague, The Netherlands

²⁶ See the transcript, *supra* note 1, p. 4, lines 4-5.

²⁷ *Idem*, p. 13, lines 19-27.

²⁸ See the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’” (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6.