

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution's response to Laurent Gbagbo's and Charles Blé Goudé's oral applications for leave to appeal Trial Chamber I's oral ruling prohibiting leading questions

Source: Office of the Prosecutor

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

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Introduction

1. On 3 February 2016, Trial Chamber I amended its protocol on the conduct of proceedings and prohibited the use of leading questions at trial by the parties (both calling and non-calling parties).¹ On 4 February 2016, the Trial Chamber confirmed that such questions would not be allowed,² defined what it meant by a leading question³ and clarified that the parties were not prohibited from confronting witnesses with contradictory information which could cast doubt on their credibility.⁴

2. On 4 February 2016, the Defence for Laurent Gbagbo and Charles Blé Goudé (“Defence”) orally sought leave to appeal the Trial Chamber’s Decision.⁵

3. The Applications meet the requirements of article 82(1)(d) and should be granted. The Decision seriously encroaches upon the parties’ right to present their cases, the Prosecution’s duty to establish the truth, and entails an abrupt departure from consistent jurisprudence of this and other international criminal courts. As such the Decision may have a detrimental impact on the outcome of these proceedings and requires immediate appellate intervention.

Submissions

i. The Issue arises from the Decision

4. According to the Defence, the Trial Chamber erred – in law and/or by abusing its discretion - in prohibiting the use of leading questions when a non-calling party questions a witness.⁶ The Trial Chamber defined a leading question as one which “fram[es] the question in a manner which predetermines the answer or [...] the

¹ ICC-02/11-01/15-T-13-ENG, p.2, lns.8-9 (“Decision”).

² ICC-02/11-01/15-T-14-ENG, p.4, lns.1-2.

³ ICC-02/11-01/15-T-14-ENG, p.4, lns.3-9.

⁴ ICC-02/11-01/15-T-14-ENG, p.4, lns.10-21.

⁵ ICC-02/11-01/15-T-14-ENG, pp.9-22 (“Applications”).

⁶ ICC-02/11-01/15-T-14-ENG, pp.12, 16-17. The same error would apply to the prohibition of leading questions to hostile witnesses by the calling party. If leave is granted, the Appeals Chamber could also address this matter.

expected answer”.⁷ In the Chamber’s view, such questions are “unfair to the witness, to the parties, and even more, undermines the Chamber’s duty to establish the truth.”⁸

5. The issue arises from the Decision and meets the requirements of article 82(1)(d). The Trial Chamber erroneously assumed that leading questions are necessarily misleading and therefore unfair to a witness and contrary to the Chamber’s truth-seeking mission. This is incorrect. As will be developed if leave to appeal is granted, the use of leading questions which fully respect the Court’s statutory regime has proven to be an essential tool for both the Prosecution and the Defence in exercising their rights to cross-examine a witness or to impeach a hostile witness. Moreover, the prohibition on leading questions is very likely to deprive the Chamber from key and necessary testimony to inform its final judgment. The importance of allowing leading questions is further confirmed by the constant and consistent use of such questions by this and other international criminal jurisdictions. Indeed this form of questioning has been used successfully to assist trial courts to elicit truthful testimony in proceedings before this Court and other international criminal courts for many years now. The Decision would be the first ruling which effectively prohibits the use of leading questions by non-calling parties.

ii. The article 82(1)(d) test is met

(a) Fairness

6. First, the issue affects the fairness of the proceedings. By prohibiting the use of leading questions by non-calling parties, the Chamber has taken away from the parties what has been an essential tool to test the credibility of witnesses, and substituted a vague, unclear and wholly discretionary direction. The issue thus affects the parties’ ability to present their cases.⁹ Not only is the right of both

⁷ ICC-02/11-01/15-T-14-ENG, p.4, lns.5-7.

⁸ ICC-02/11-01/15-T-14-ENG, p.4, lns.7-9.

⁹ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

Accused under article 67(1)(e) negatively affected,¹⁰ but so too the Prosecution's duty to establish the truth under article 54 is seriously curtailed.¹¹

7. As the Defence for Mr Blé Goudé argued, the Chamber's clarification which allows the non-calling party to confront witnesses with prior contradictory information is not sufficient to fully – and fairly – explore the witnesses' credibility.¹² The non-calling parties should be allowed to explore with leading questions credibility issues which go beyond contradictions in documents and facts. Leading questions in this context are not automatically unfair to the witnesses; nor do they undermine the Chamber's duty to establish the truth.¹³

8. Moreover, the Decision is unfair to the parties because they had prepared their questioning on the basis that leading questions would be permitted by non-calling parties (and by calling parties with hostile witnesses). The Decision not only departs from the protocol issued in this case on 3 September 2015 which permits leading questions in this case,¹⁴ but also from the constant and consistent jurisprudence and practice from Chambers of this Court (including the Appeals Chamber) and other international criminal tribunals where leading questions by non-calling parties are the rule.¹⁵ The use of leading questions by a non-calling party to explore a witness' credibility – as long as the rights of the witness and the parties are respected – cannot be something which can be abridged purely on the basis of a Chamber's discretion. While acknowledging the statutory framework and the judges' broad discretion to manage the proceedings, the Chambers should also respect some basic and

¹⁰ ICC-02/11-01/15-T-14-ENG, p.12, lns.3-6 ; p.12, ln.25 to p.13, ln.7 ; p.16, lns.10-14.

¹¹ ICC-01/04-135-tEN, paras. 38-39.

¹² ICC-02/11-01/15-T-14-ENG, p.16, lns.10-23.

¹³ ICC-02/11-01/15-T-14-ENG, p.16, lns.23-25.

¹⁴ ICC-02/11-01/15-205, paras. 34-36.

¹⁵ Lubanga Trial Chamber: ICC-01/04-01/06-2127, para.23 and ICC-01/04-01/06-T-104-ENG, p.37; Lubanga Appeals Chamber: ICC-01/04-01/06-3083 A4 A5 A6, pp.5-6; Katanga: ICC-01/04-01/07-1665, paras. 66, 67, 74, 75; Bemba: ICC-01/05-01/08-1086, paras. 18-19 clarifying ICC-01/05-01/08-1023, para.15; and Ntaganda: ICC-01/04-02/06-619, paras. 26, 28.

fundamental rules and practices of criminal procedure which enable the parties to proceed on certain ground.¹⁶

9. Finally, the Chamber's indication that it would rule on a case-by-case basis does not cure the unfair consequences of the Decision,¹⁷ and only adds more uncertainty to the proceedings.¹⁸

(b) Expeditiousness and outcome

10. Second, and as submitted by the Defence, the issue will also affect the expeditiousness of the proceedings because the unavailability of leading questions will likely slow down the pace of the trial.¹⁹ Leading questions permit the parties to rapidly and efficiently identify and present disputed issues to a witness and thereby save court time.²⁰ The use of this form of questioning is an effective forensic tool enabling evidence to be elicited from a witness who may be disinclined to answer without hedging or elaboration when the response does not support their preferred outcome.

11. Third, the issue significantly affects the outcome of the proceedings because the non-calling party will not be in a position to fully test the credibility and reliability of the evidence called by the other party (or in relation to 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

¹⁶ ICC-02/11-01/15-T-14-ENG, p.15.

¹⁷ ICC-02/11-01/15-T-14-ENG, p.4, lns.22-25.

¹⁸ ICC-02/11-01/15-T-14-ENG, p.18.

¹⁹ ICC-02/11-01/15-T-14-ENG, p.12, lns.6-12 ; p.13, lns.8-11 ;

²⁰ 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.

predicated on “its evaluation of the evidence and the entire proceedings”,²¹ this issue can have a detrimental impact on the outcome of the trial.

(c) Intervention by the Appeals Chamber

12. Finally, immediate resolution of this issue will materially advance the proceedings. Considering that the Decision impacts on the way in which the parties will conduct their cross-examination throughout the trial, and departs from consistent and constant jurisprudence of this Court, 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.”²² If not resolved now, there is a significant risk that the trial could proceed on flawed grounds, thus risking reversal of the judgment on a final appeal and even a re-trial (with its obvious concomitant negative effects for the Court, the Accused, the witnesses and affected communities).²³

13. Moreover, consistency and predictability of Court proceedings are essential. A Court with limited resources and a large workload can ill-afford abrupt changes in its practice and case law; in those (hopefully) rare situations where such conflicts arise, the role of the Appeals Chamber should be precisely to unify such conflicting jurisprudence. The broad discretion of Trial Chambers in managing their proceedings should not be construed as an insurmountable barrier effectively depriving the Appeals Chamber from performing its basic tasks. A decision from the Appeals Chamber on the permissibility of leading questions will provide much needed uniformity and coherence on an important matter that will assist to advance not only these, but also future proceedings before this Court.

²¹ Article 74(2).

²² ICC-01/04-168 OA3, paras.14-15,18.

²³ ICC-01/04-168 OA3, para. 16.

Relief Sought

14. The Defence's Applications meet the requirements under article 82(1)(d) and should, therefore, be granted.

15. The Prosecution respectfully requests that the Decision be stayed until the Trial Chamber rules on the Applications (and in the event leave is granted, until the Appeals Chamber rules on the appeal). In the interim the original protocol on the conduct of proceedings should apply.²⁴ In this context, the Chamber should ensure that leading questions are not misleading and therefore that no prejudice is caused to witnesses. Without such a suspension of the Decision there is a risk that witnesses may need to be recalled for questioning. Recalling witnesses may have a detrimental effect on their psychological well-being and cause re-traumatisation. It could also have an impact on their security situation and will undoubtedly impinge on the Court's resources.



Fatou Bensouda, Prosecutor

Dated this 4th day of February 2016

At The Hague, The Netherlands

²⁴ If leave is granted, suspensive effect will then be requested to the Appeals Chamber.