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No.: ICC-02/11-01/15

Date: 23 March 2016

TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Geoffrey Henderson
Judge Olga Herrera-Carbuccia

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public

**Request for leave to appeal against the Trial Chamber's oral decision of 17 March
2016 authorising the Prosecution to re-examine Witness P-0625**

Source: Defence team for Laurent Gbagbo

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence of Laurent

Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Counsel for the Defence of Charles Blé

Goudé

Mr Geert-Jan Alexander Knoop

Mr Claver N'Dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman Von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Background

1. On 3 September 2015, the Trial Chamber issued a decision on the conduct of the proceedings.¹ The Chamber adopted the following procedure for the questioning of witnesses: (1) examination by the calling party, during which questions are neutral,² (2) examination by the non-calling party, during which leading questions are permissible,³ (3) possible examination by the LRV,⁴ and (4) in exceptional circumstances, re-examination by the calling party.⁵

2. On 3 February 2016, the Presiding Judge delivered an oral decision modifying the decision of 3 September 2015 and ruling out leading questions by the non-calling party.⁶

3. On 4 February 2016, the parties made an oral request for leave to appeal against the decision of 3 February 2016. The Defence for Laurent Gbagbo explained, in particular, that

[TRANSLATION] the calling party and the non-calling party are never on the same footing, since their perspectives and the aims they pursue are different. [...] If the non-calling party [...] were not able to test the way in which it wants the witness's account, then the rights of the defence would be violated, would be violated, and the trial would be considered unfair from the outset.⁷

4. On 5 February 2016, the Chamber denied the parties' requests for leave to appeal, considering that the idea that:

the decision impacts on the fairness and expeditiousness of the proceedings or the outcome of the trial cannot be predetermined in the abstract but will depend on how the impugned decision is implemented on a case-by-case basis in the sense of how this control will be exercised.⁸

¹ ICC-02/11-01/15-205.

² *Ibid.*, para. 34.

³ *Ibid.*, para. 36.

⁴ *Ibid.*, para. 37.

⁵ *Ibid.*, para. 38.

⁶ ICC-02/11-01/15-T-13-CONF-ENG ET, p. 2, lines 4 and 5.

⁷ ICC-02/11-01/15-T-14-FRA ET, p. 8, line 19, to p. 9, line 6.

⁸ ICC-02/11-01/15-T-CONF-ENG ET, p. 6, lines 16-19.

5. On the same date, Judge Henderson explained in a dissenting opinion that:

[I]n the context of adversarial proceedings, generally the purpose of examining a witness by the party that has not called that witness is with a view to either adding further evidence from that witness or with the intention of contradicting the evidence that was given when examined by the calling party. Examinations by the non-calling party differ in that the – and I have to say in my respectful view – settled practice is that leading questions have always been permitted. In the context of adversarial proceedings where such a party fails to confront a witness on his evidence or on every aspect of it, this amounts to an implied acceptance of the evidence and the party ought not to challenge the evidence in closing speeches. The reason for the rule is to ensure fairness both to the witness and to the fact finders in that such examinations give the witness an opportunity to put his version of the events forward in the face of any contradictions proposed by counsel in the form of leading questions which were made to test the veracity of the witness's testimony.⁹

6. On 15 March 2016, the Defence, while putting questions to Witness P-0625 during cross-examination, and in response to an objection raised by the Prosecution, pointed out the difference between examination and cross-examination.¹⁰ The Presiding Judge then explained that “examination-in-chief and cross-examination do not exist in the Rome Statute. The terms examination-in-chief and cross examination do not exist in the Rome Statute so I would not refer to this.”¹¹

7. On 17 March 2016, the Defence for Laurent Gbagbo objected to the Prosecution's re-examination of P-0625, explaining that once the Bench had decided that there was no difference between examination and cross-examination, and that the parties were therefore on an equal footing, with the same means at their disposal vis-à-vis the witness, such a re-examination was no longer justified. The Defence pointed out that that approach in itself had implications that differed from those of common law proceedings:

[TRANSLATION] [I]n common law proceedings, things are clear. There is a kind of cogwheel mechanism, as it were. First cogwheel: examination with its own particular logic and some room for manoeuvre for counsel calling the witness. Then there is a second cogwheel which is connected to the first, the cross-examination, but which turns in the opposite direction. The non-calling counsel's room for manoeuvre is different because the purpose of cross-examination is different.

And because this is a mechanism, it is logical that there should be a third cogwheel, if I may say, if I may use this image, which enables the calling party to revisit points which

⁹ ICC-02/11-01/15-T-15-CONF-ENG ET, p. 11, lines 2-16.

¹⁰ Draft transcripts of the hearing of 15 March 2016, ICC-02/11-01/15-T-30-FRA RT, p. 16, lines 4-15.

¹¹ Draft transcripts of the hearing of 15 March 2016, ICC-02/11-01/15-T-30-ENG RT, p. 16, lines 9-12.

have not ... new, addressed by the non-calling party, so that everything is covered, but from different perspectives.¹²

8. On 17 March 2016, the Chamber delivered an oral decision (the “impugned decision”) granting the Prosecution leave to re-examine Witness P-062, stating that: “[T]he re-examination by the calling party is allowed”.¹³

II. Submissions

Introduction:

9. The witness questioning procedure established in the decision on the conduct of the proceedings derives from a common law context. Examination, cross-examination and re-examination form part of a mechanism used consistently by all the Chambers of the ICC. The role of each of the protagonists within this mechanism is clear: the calling party conducts the examination-in-chief, during which leading questions are not permitted since the procedure simply involves giving the witness the opportunity to relate the facts as he or she experienced them. Then, the non-calling Party conducts the cross-examination, during which leading questions are permitted since the purpose is to test the witness’s credibility. Thus, the means at the disposal of the two parties are different because the purpose of examination and cross-examination is different. Otherwise put, the difference between these two stages in the questioning of a witness is essentially a difference in perspective. And it is because there is a difference in perspective that re-examination is allowed in exceptional circumstances. The purpose is to cover all the facts from both perspectives. That is why the calling party may be granted leave to re-examine the witness on points not raised during examination, but addressed during cross-examination. It is only logical that it also be possible to test the credibility of the witness on these points, hence the possibility, provided for by the decision, for the non-calling party to conduct a final cross-examination on the new points.

¹² Draft transcripts of the hearing of 17 March 2016, ICC-02/11-01/15-T-32-FRA RT, p. 45, line 1 to p. 46, line 15.

¹³ Draft transcripts of the hearing of 17 March 2016, ICC-02/11-01/15-T-32-ENG WT, p. 54, lines 13-14.

10. The Defence attempted to explain the logic of this mechanism at the hearing of 17 March 2016, to demonstrate that re-examination is justified in such circumstances, as it is a cogwheel in a more comprehensive mechanism based on a different approach by each of the parties. Examination is the first cogwheel in this mechanism. That cogwheel enables information to be elicited from the witness. The second cogwheel, cross-examination, makes it possible to test what that witness has said. It is only then that the Bench is able to draw on what comes out of the mechanism as a whole, that is, from the examination, the cross-examination and the re-examination, if any, taken together.

11. It is another thing to consider that the Parties engage, in turn, in the same exercise, in the same circumstances, using the same approach and using the same means, as the Chamber has done in this case. This, then, is no longer a comprehensive mechanism, but merely two examinations, one after the other, approached from the same angle: to obtain an account of the facts from the witness.

12. The Chamber has changed the judicial process which allowed for two complementary examinations because they are approached from two different perspectives and, as a result, has restricted the room for manoeuvre of the non-calling party in the conduct of its examination of the witness: it can no longer test the credibility of the witness, or can no longer test it freely.

13. Above all, according to the new approach adopted by the Chamber, there is no justification for re-examination, initially provided for by the decision on the conduct of the proceedings, since the two preceding examinations are no longer conducted from different perspectives. In so far as the Bench considers that the examinations by the calling party and the non-calling party are not connected, in that they are no longer complementary because they are approached from two different perspectives, what then is the justification for the calling party to be granted leave to re-examine the witness?

14. To deny the non-calling party the opportunity to test the witness's credibility or to arbitrarily restrict its capacity to test the credibility of the witness undermines the fairness of the trial. Moreover, allowing the calling party to "re-examine", that is,

to add to that to which the non-calling party will be unable to respond – in terms of testing the witness's credibility – augments the unfairness of the proceedings. Hence this request for leave to appeal.

1. The appealable issue: no justification for re-examination of P-0625 by the calling party.

15. In the impugned decision, the Chamber failed to take account of its earlier decisions concerning the nature of the examinations conducted by the calling party and the non-calling party.

16. Having modified its decision on the conduct of the proceedings with regard to the procedure for questioning witnesses, the Chamber should have aligned the old procedure with the new, in terms of the possibility or otherwise of retaining the re-examination.

17. In fact, in so far as these two examinations are currently on the same footing, re-examination, initially provided for in exceptional circumstances in the decision on the conduct of the proceedings, is no longer justified.

18. By failing to recognise the implications of the procedure which it itself adopted, the Chamber has deprived its decision of a legal basis.

2. The appeal is necessary at this stage.

19. The impugned decision undermines respect for the adversarial principle and calls into question the balance of the trial. By placing the calling party and the non-calling party on an equal footing, the Chamber reduces the room for manoeuvre of the non-calling party, in this case the Defence, and affects the fairness of the trial.

20. Immediate resolution by the Appeals Chamber, by providing a definitive response to the issues raised, would rid the judicial process of an error which creates an imbalance to the detriment of one of the parties that might taint the fairness of the proceedings or compromise the outcome of the trial.¹⁴ In fact, if this issue were

¹⁴ ICC-02/04-177.

contingent, for resolution and a ruling in favour of the Defence, on an appeal against a future judgment, there would be no adequate remedy so late in the proceedings.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I, TO:

Considering article 82(1)(d) of the Statute, rule 155(1) and regulation 65,

▯ **GRANT** the Defence leave to appeal the impugned decision.

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 23 March 2016

At The Hague, the Netherlands