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**International
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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, President
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

Consolidated Response to ICC-02/11-01/15-468 and to ICC-02/11-01/15-469

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 Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ supports the Prosecution’s request (the “Prosecution’s Request”)² to clarify the scope of the Chamber’s oral decision of 17 March 2016 limiting the use of material in re-examination (the “Decision”).³

2. The Legal Representative is of the opinion that the Request demonstrates that a clarification of the Decision is needed in order to enable the parties and participants to present all the evidence relevant for the case and for the Chamber to discharge its obligations to both determine the truth and to ensure the fairness and expeditiousness of the trial.

3. The Legal Representative also supports the alternative application for leave to appeal the Decision for the reasons identified by the Prosecution in its Request.

4. The Legal Representative finds, on the contrary, that the application for leave to appeal filed by Mr. Gbagbo’s Defence should be rejected because it does not identify an appealable issue arising from the Decision in the terms of article 82(1)(d) of the Rome Statute.

II. Background

5. On 17 March 2016, the Chamber issued an oral Decision, ruling that “[t]he re-examination by the calling party is allowed and the documents he can use is limited to the

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² See the “Prosecution’s request to clarify the scope of the Chamber’s oral decision of 17 March 2016 limiting the use of documents in re-examination and in the alternative, leave to appeal the decision”, No. ICC-02/11-01/15-469, 23 March 2015 (the “Prosecution’s Request”).

³ See the Transcript of the hearing held on 17 March 2016, No. ICC-02/11-01/15-T-32-ENG RT, 17 March 2016, page 54 lines 11-17 (the “Decision”).

documents which are already submitted to the Chamber during the testimony of the witness, meaning without the possibility to use new documents”.

6. On 23 March 2016, the Prosecution filed the Request, asking the Chamber, “to clarify the scope of its Decision prohibiting the use of materials not previously submitted to it, and confirm that it intends to maintain a flexible and case-by-case determination of the material that may be used in re-examination”, and in the alternative, to be granted leave to appeal the Decision.

7. On the same day, the Defence for Mr. Gbagbo filed a Request, asking the Chamber leave to appeal the Decision, in so far it authorised the Prosecution to re-examine witness P-0625 (the “Defence Request”).⁴

8. Pursuant to regulations 24(2) and 65(3) of the Regulations of the Court, the Legal Representative submits a consolidated response to the Prosecution’s Request and the Defence’s Request.

III. Submissions

1. The implementation of the Decision will not allow the Chamber to fully discharge its obligations to both determine the truth and to ensure the fairness and expeditiousness of the trial

9. Implementing the Decision in its plain terms will limit the use of material during the re-examination by the calling party to material previously submitted during the witness’s testimony. Therefore, the Legal Representative supports the Prosecution’s Request in so far as the implementation of the Decision will impact on the rights of the parties and participants to present all the evidence relevant for the case and to fully explore the evidence presented before the Chamber.

⁴ See the “Demande d’autorisation d’interjeter appel de la décision orale du 17 mars 2016 de la Chambre de première instance autorisant le Procureur à procéder au réexamen du témoin P-0625”, No. ICC-02/11-01/15-468, 23 March 2016 (the “Defence Request”).

10. Moreover, said implementation of the Decision will impact on the victims' core interest to the determination of the facts, the identification of those responsible of the crimes they have suffered from and the adjudication of their responsibility, which is "*at the root of the well-established right to the truth for the victims*".⁵

11. The Legal Representative concurs with the Prosecution's Request and submits that a clarification on the implementation of the Decision is not only possible but also in line with the previous Decision on the submission and admission of evidence.⁶ Indeed, limiting the use of material during the re-examination would contradict the general principles already established in said decision⁷ and would, in particular, unduly: (i) restrict the Chamber's power to fully assess a particular topic of the witness testimony raised by the non-calling party in light of the relevant evidence that the calling-party would have produced during the re-examination; and (ii) hinder the Chamber from "*adequately exercis[ing] its authority to request the submission of all evidence it considers necessary for the truth*".⁸

12. In this regard, limiting the use of material during the re-examination to the ones previously submitted – either during the questioning by the calling party, the Legal Representative or the non-calling party – creates an imbalance in the manner in which parties and participants can elicit the evidence from a witness.

13. The calling party cannot be expected to anticipate, within the list of material to be used for the questioning of a witness, all the topics likely to be covered during the questioning of the other party and/or participant. It is thus submitted that the

⁵ See, *inter alia*, the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, para. 32.

⁶ See the "Decision on the submission and admission of evidence", (Trial Chamber I), No ICC-02/11-01/15-405, 29 January 2016.

⁷ *Idem*, paras. 12-17.

⁸ *Ibidem*, para. 17.

requirement that the calling party can only rely on the initial lists of material communicated before the testimony undermines the principle of equality of arms and hinder the Chamber from ensuring the fairness of the proceedings.⁹ In other words, the calling party should be allowed to react to issues newly raised by the non-calling party or participant in their respective questioning. On occasion, this could imply the unanticipated use of material, as long as this exercise will allow the Chamber to freely forming its judgement.¹⁰

14. Indeed, if it is permissible for the non-calling party to question a witness on topics that were not discussed during the questioning by the calling party, then it should follow that those topics are to be explored in the same exhaustive manner during the re-examination by the calling party. If not, the calling party would be systematically prevented from effectively questioning a witness¹¹ on issues raised by the non-calling party or participant in their questioning, and thus would not be in a position to properly test a witness on either completely new topics or on possible inconsistencies arising from the questioning of the non-calling party or participant.

15. As previously stated by Trial Chamber I in the *Lubanga* case, “[o]n the issue of later (secondary) questioning by the party calling the witness, the Chamber is of the view that it is necessary for both the Prosecution and the Defence to have the opportunity to explore issues raised in questions by the opposing party. If this does not occur, the evidence may be presented in an incomplete and unfair manner”.¹²

16. Accordingly, the Legal Representative submits that depriving the calling party of the opportunity to rely on material other than the ones already submitted or

⁹ *Ibid.*, para. 10.

¹⁰ See the “Decision on various issues related to witnesses’ testimony during trial” (Trial Chamber I), No. ICC-01/04-01/06-1140, 29 January 2008, para. 34.

¹¹ On the need for necessary documentary and visual support for a meaningful questioning, see the Prosecution’s Request, *supra* note 2, para. 15.

¹² See transcript of the hearing held on 16 January 2009, No. ICC-01/04-01/06-T-104-ENG ET WT SZ T, 16 January 2009, page 37 lines 1-6.

contained in its original list or in the lists of the non-calling party or participant would not serve the purpose of assisting the Chamber in its truth finding function.¹³

17. Indeed, on the one hand, it would unduly limit the exercise of the rights of the parties and participants in pursuing their legitimate interests in the proceedings;¹⁴ and, on the other hand, it could result in the witness providing only a partial account of events – situation which is obviously of limited assistance to the Chamber's determination in the case.

18. In this regard, the use of material may become relevant only after the examination by the non-calling party or participant. In said circumstances, if a thorough examination of the witness is not permitted by the Chamber, more disruptions and delay may be caused to the proceedings. As indicated by the Chamber, *"it is not indeed exceptional that the relevance of a particular item only emerges in light of material submitted at a later stage"*.¹⁵

19. The Legal Representative also concurs with the Request that a strict implementation of the Decision will have a direct impact on the Chamber's goal to ensure the expeditiousness of the proceedings. Indeed, the calling party will not be in a position to thoroughly test its own witness on topics raised by the non-calling party or participant; as a result the evidence elicited from the witness will necessarily be partial, one sided and *"effectively unchallenged on the record"*.¹⁶ In these circumstances the calling party will have no other remedy than to recall the witness concerned to testify on issues newly raised by the questioning of the non-calling party or participant and which it was prevented to re-examine. In this regard, the Legal

¹³ See the "Decision on the submission and admission of evidence", *supra* note 6, para. 12.

¹⁴ See the "Decision on the 'Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision' filed by the Defence of Saif Al Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-556, 11 June 2014, para. 22.

¹⁵ See the "Decision on the submission and admission of evidence", *supra* note 6, para. 14.

¹⁶ See the Prosecution's Request, *supra* note 2, paras. 16-19.

Representative recalls that in the *Lubanga* and *Katanga* cases, witnesses were recalled for further questioning after post-testimony submission of evidence.¹⁷

2. The Prosecution's alternative request for leave to appeal the Decision

20. In the alternative, the Legal Representative supports the Prosecution's application for leave to appeal the Decision on the following issue:

"Whether the Trial Chamber, in limiting the use of material during re-examination by the calling party to only that already submitted with that witness, prevented the presentation of genuine, undistorted and effective viva voce evidence which is relevant to the Chamber's determination of the truth" (the "Issue").

2.1. The issue arises from the Decision

21. According to the established jurisprudence, an "issue" for the purposes of article 82(1)(d) of the Rome Statute is "[a]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".¹⁸ It is constituted "[b]y a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination".¹⁹ Furthermore, the identified issue must arise from the relevant decision and cannot refer to abstracts legal questions or hypothetical concerns.²⁰

¹⁷ See transcript of the hearing held on 15 October 2010, No. ICC-01/04-01/06-T-317-Red2-ENG WT, 15 October 2010, page 38 lines 5-8. See also transcript of the hearing held on 4 March 2010, No. ICC-01/04-01/07-T-112-CONF-ENG ET, 4 March 2010, page 5 lines 7-25 to page 6 line 3.

¹⁸ 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. 9.

¹⁹ *Idem.*

²⁰ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 8.

22. The Legal Representative submits that the Issue squarely arises from the Chamber's ruling that "[t]he re-examination by the calling party is allowed [...] without the possibility to use new documents".²¹ In this regard, the Legal Representative contends that the issue identified by the Prosecution is a discrete and identifiable subject and that its resolution is essential for the determination on whether the limitation in the use of material during re-examination hinders the Chamber in its truth-seeking function.

23. Therefore, the issue – far from being a mere disagreement of the Prosecution with the Chamber's rulings – identifies a concrete legal question and impending concern that impact on the rights of the parties and participants and, as such, can form the object of an appeal in the sense of article 82(1)(d) of the Rome Statute.

2.2. The issue identified by the Prosecution affects the fair and expeditious conduct of the proceedings

24. Moreover, the Legal Representative submits that the Issue "significantly affects" the fair and expeditious conduct of the proceedings, in the sense of having "[t]he potential [...] to significantly hinder, limit or otherwise have a considerable bearing on the scope and the exercise of the rights of the parties in pursuing their legitimate interests in the proceedings before the Court",²² and being "[c]losely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned".²³

25. The Issue also significantly affects the fairness of the proceedings since the limitation on the use of material during re-examination will lead to an incomplete and unfair presentation of the evidence before the Chamber²⁴ which in turn will

²¹ See the Decision, *supra* note 3.

²² See the "Decision on the 'Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision' filed by the Defence of Saif Al Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-556, 11 June 2014, para. 22.

²³ *Idem*, para. 18.

²⁴ See *supra*, paras. 17 and 19.

result in submitting in the record of the case only partial, one sided and distorted evidence elicited from the witness.

26. As regards the impact on the expeditiousness of the proceedings, the Legal Representative recalls the observations *supra*.²⁵

2.3. The issue identified by the Prosecution affects the outcome of the trial and the Appeals Chamber's immediate resolution of the issue may materially advance the proceedings

27. The Legal Representative concurs with the Request that the Issue is likely to affect the outcome of the trial. In this regard, the Appeals Chamber ruled that in order to determine whether an issue would significantly affect the "outcome of the trial" under article 82(1)(d) of the Rome Statute, "[t]he Pre-Trial or Trial 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".²⁶

28. The Legal Representative submits that the oral testimony of witnesses is likely to constitute the prevalent type of evidence that will be presented at trial by the parties and participants and, as such, it is crucial for the proceedings. Therefore, limiting *a priori* relevant evidence to be submitted would unduly hinder the Chamber from "*adequately exercise its authority to request the submission of all evidence it considers necessary for the truth*"²⁷ and affect the whole outcome of the trial.

29. The Legal Representative also concurs with the Request that granting the application in respect of the Issue will materially advance the proceedings. The Appeals Chamber interpreted the sentence "materially advance the proceedings" as

²⁵ See *supra*, paras. 19.

²⁶ 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", *supra* note 18, para. 13.

²⁷ See the "Decision on the submission and admission of evidence", *supra* note 6, para. 17.

to “move forward” “[b]y ensuring that the proceedings follow the right course”.²⁸ Whether this is the case involves an assessment by the relevant Chamber as to whether the authoritative decision by the Appeals Chamber will rid “[t]he judicial process of possible mistakes that might taint either the fairness of the proceedings or the outcome of the trial”.²⁹

30. In light of the arguments presented *supra* in relation to the likely impact of the Issue on the fairness³⁰ and the outcome of the trial,³¹ the Legal Representative contends that the immediate resolution of the Issue would materially advance the proceedings in so far it would avoid that the lack of complete, genuine and undistorted evidence vitiates the fairness of the whole proceedings, potentially constituting a subject of appeal at the end of the trial.

3. The Defence’s request for leave to appeal

31. The Legal Representative finds, on the contrary, that that Defence Request for leave to appeal the Decision does not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

32. The Defence for Mr. Gbagbo appears to request leave to appeal the Decision in so far it authorised the Prosecution to re-examine witness P-0625.³²

33. The Legal Representative submits that the Defence Request does not identify and appealable issue arising from the Decision. The application merely represents the Defence’s disagreement with the ruling of the Chamber.

²⁸ See "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 18, para. 15.

²⁹ *Idem*.

³⁰ See *supra*, paras. 13 and 14.

³¹ See *supra*, paras. 27 and 28.

³² See the Defence Request, *supra* note 4, para. 8.

34. In this regard, the Legal Representative submits that authorising the calling party to re-examine a witness is within the discretionary power of the Chamber in directing the conduct of the proceedings under article 64(8)(b) of the Rome Statute as confirmed by the decision issued on 3 September 2015³³, as well as, by subsequent oral rulings of the Chamber.³⁴

35. The mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient basis to be granted leave to appeal a decision.³⁵ Since no issue arising from the Decision has been identified by the Defence, the Request should be dismissed on that basis alone. Assuming *arguendo* that the alleged "issue" arises from the Decision, the Legal Representative contends that the Defence does not show how said issue would significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

36. Indeed, the Decision does not impact in any prejudicial way on the rights of the Defence given that during the Defence case, both Defence teams of Mr. Gbagbo and Mr. Blé Goudé will have the opportunity to re-examine a witness after the questioning from the non-calling party and the Legal Representative. As regard a possible impact on the expeditiousness of the proceedings, the Legal Representative notes that the Defence does not provide any support to this contention and thus will not further address this topic.

37. Finally, since the alleged "issue" mentioned in the Defence Request does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial,

³³ See the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, para. 38.

³⁴ See the transcript of the hearing held on 3 February 2016, No. ICC-02/11-01/15-T-13-CONF-ENG ET (open session), 3 February 2016, page. 2, lines 6-7. See the transcript of the hearing 11 February 2016, No. ICC-02/11-01/15-T-25-CONF-ENG ET (open session), 7 March 2016, p. 4, lines 6-15.

³⁵ See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁶

IV. Conclusion

38. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to clarify the scope of the Chamber's oral decision of 17 March 2016 limiting the use of material in re-examination. In the alternative, the Legal Representative respectfully requests the Chamber to grant the Prosecution's Request for leave to appeal the Decision. The Legal Representative also requests the Chamber to reject the Defence Request for leave to appeal because it does not identify an appealable issue arising from the Decision.



Paolina Massidda
Principal Counsel

Dated this 29th day of March 2016

At The Hague, The Netherlands

³⁶ 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.