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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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 document

Prosecution's response to the Defence for Mr Gbagbo's application for leave to appeal the oral decision of 17 March 2016 authorising the Prosecution to re-examine Witness P-0625

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. The Defence for Mr Gbagbo's application for leave to appeal¹ Trial Chamber I's oral ruling authorising the Prosecution to re-examine Witness P-0625² must be dismissed. The Application, which really seeks to litigate the appropriateness of re-examination in this case,³ does not identify a discrete issue arising from the Decision. Rather, the Application is a disagreement with the Chamber's prior decisions allowing for confined re-examination.⁴ The Application is also premised on a series of misunderstandings. In particular, and contrary to the Defence's submissions, the Trial Chamber permits to test the witnesses' credibility by confronting them with material which appears to be in contradiction with their testimony.⁵

2. Further, and even if the Trial Chamber finds that the Issue arises, it does not meet the remaining requirements under article 82(1)(d). The Application fails to address all mandatory prongs under article 82(1)(d). And even if it did, the Application equally fails. Notably, the Issue does not significantly affect the fairness of the proceedings because the Defence tested Witness P-0625's credibility and had the possibility to ask him further questions after the Prosecution's re-examination.

¹ ICC-02/11-01/15-468. ("Application")

² ICC-02/11-01/15-T-32-ENG ET ("Transcript 17 March 2016"), p. 46, lns. 18-23. ("Decision"). The Defence refers to the real time transcript: ICC-02/11-01/15-T-32-FRA RT, p. 56, lns. 14-18 and ICC-02/11-01/15-T-32-ENG RT, p. 54 lns. 11-17.

³ Application, paras. 15-18 ("the Issue").

⁴ ICC-02/11-01/15-T-13-Red-ENG ("Transcript 3 February 2016"), p. 2, lns. 6-7 where the Trial Chamber stated that "a re-examination by the calling party is allowed insofar as it only relates to issues raised for the first time during the questioning by the non-calling party" ("Decision of 3 February 2016"). *See also* ICC-02/11-01/15-205 ("Directions on Conduct of Proceedings"), para. 38: "In exceptional circumstances, the calling party may be permitted to re-examine its witness, but shall be limited to issues raised for the first time during questioning by the non-calling parties or the LRV. If the Chamber permits the Prosecution to re-examine its witness, the Defence teams will be permitted to ask any final questions of the witnesses in accordance with Rule 140(2)(d) of the Rules".

⁵ ICC-02/11-01/15-T-14- ENG ET ("Transcript 4 February 2016"), p.3 lns. 15 – 25 and ICC-02/11-01/15-T-15-Red-ENG ("Transcript 5 February 2016"), p. 14, ln. 22-p. 15, ln. 25.

Submissions

A. The Issue is not an appealable issue

3. The Issue identified by the Application, namely “P-0625’s re-examination by the calling party was not justified” is not an appealable issue arising from the Decision.⁶

4. First, although the Application refers to P-0625’s re-examination, it really challenges the appropriateness of re-examination in this case. This Issue does not arise from this Decision; rather Trial Chamber I, in its prior and current composition, has allowed for confined re-examination by the calling party in its decisions of 3 September 2015 and of 3 February 2016, respectively. The Defence did not seek leave to appeal those decisions.

5. On 3 September 2015, Trial Chamber I in its previous composition issued its Directions on Conduct of Proceedings whereby it permitted re-examination by the calling party on new topics raised in cross-examination. It also recalled that the Defence would ask the last questions to the witnesses in accordance with rule 140(2)(d).⁷ The Defence did not seek leave to appeal the Directions. On 3 February 2016, Trial Chamber I in its new composition partially amended the Directions. However, it did not modify the Directions with respect to re-examination, which was “allowed insofar as it only relates to issues raised for the first time during the questioning by the non-calling party”.⁸ The Defence did not seek leave to appeal the Decision of 3 February 2016 either.

6. In sum, the Application should be dismissed because the purported Issue does not arise from the Decision.

⁶ Application, paras. 15-18.

⁷ Directions on Conduct of Proceedings, para. 38.

⁸ Decision of 3 February 2016.

7. Second, the Issue is premised on a series of misunderstandings. The Defence argues that, according to the Trial Chamber, (1) there is no difference between the questioning by the parties and that (2) neither of them can test the witnesses' credibility because leading questions are not permitted. As a result, and according to the Defence, the Trial Chamber has modified the aim and scope of the Parties' questioning and re-examination by the calling party should not be allowed.⁹ Neither of these premises is correct. Nor the Chamber's amendments have modified the Parties' questioning in practice.

8. On 15 March 2016, and in the context of a Prosecution's objection to a Defence's question to Witness P-0625, the Presiding Judge indicated to Counsel for Mr Gbagbo that "[t]he *terms* 'examination-in-chief' and 'cross-examination' doesn't [*sic*] exist in the Rome Statute"¹⁰ so he would not use those terms. This comment does not have the wide-ranging implications on the Parties' questioning and rights that the Defence alleges;¹¹ rather, the Presiding Judge simply indicated that those *terms* are not expressly listed in the statutory framework. Further, although the Trial Chamber prohibited the use of leading questions by both Parties, it later clarified that it would not consider as "leading" - and would therefore permit - questions or clarifications posed to witnesses on potentially contradictory information appearing in documents or other material. Therefore, the Parties are permitted to test the witnesses' credibility.¹²

9. The Trial Chamber repeated and endorsed the words of Mr Gbagbo's Defence that "the non-calling party has a duty during cross-examination to shed light on the contradictions and flaws of the witness' account and to challenge, to test whether the account is consistent in light of all the evidence at the disposition of the parties. That is the only way that the truth can come out". The Trial Chamber reiterated that "[it] couldn't agree more with this statement and it is exactly in this perspective that the

⁹ Application, paras. 9-18.

¹⁰ ICC-02/11-01/15-T-30-Red-ENG ("Transcript 15 March 2016"), p. 13, Ins. 2-5. Emphasis added. See Application, para. 6.

¹¹ *Contra*, Application, paras. 6-7, 11, 13, 17.

¹² Transcript 4 February 2016, p.3 Ins. 15 – 25 and Transcript 5 February 2016, p. 14, ln. 22-p. 15, ln. 25. *Contra*, Application, paras. 12, 14.

ruling was given” and added that “this Chamber, will uphold the fairness of the proceedings and the fair trial rights of Mr Gbagbo and Mr Blé Goudé”.¹³

10. For the foregoing, the purported Issue is premised on a misunderstanding of the Chamber’s rulings and should be therefore dismissed. Because the article 82(1)(d) criteria are cumulative, the Defence’s failure to demonstrate that the Issue is appealable is fatal to the Application.¹⁴ Nevertheless, even if, *arguendo*, the Issue was an appealable issue arising from the Decision, it does not meet the criteria for leave to appeal under article 82(1)(d).

B. The Issue does not meet the criteria for leave to appeal under article 82(1)(d)

11. The Defence fails to advance any argument on the impact of the Issue on the expedition and outcome of the proceedings. As expedition is a cumulative requirement to fairness – and the impact on the outcome is an alternative requirement to fairness and expedition, the Application should be dismissed as unsubstantiated.

12. Even if the Trial Chamber was minded to consider the Defence’s arguments on the other prongs, the Application equally fails. The Issue does not significantly affect the fairness of the proceedings nor would its resolution by the Appeals Chamber materially advance them.¹⁵ The Defence’s arguments are speculative and unfounded: the Defence is not placed on disadvantageous position. As noted above, it can still test the witnesses’ credibility and enquire on contradictions between the witnesses’ testimony and other supporting material – as it did with Witness P-0625.¹⁶ Moreover, the Defence had the possibility to pose the last questions to the Witness.¹⁷

¹³ Transcript 5 February 2016, p. 15, lns. 15- 25.

¹⁴ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria are cumulative, and “[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal.”

¹⁵ *Contra*, Application, paras. 19-20.

¹⁶ *See for example*, ICC-02/11-01/15-T-29-CONF-ENG ET, p. 75, ln. 17 – p. 78, ln. 15.

¹⁷ ICC-02/11-01/15-T-33-ENG ET, p. 18, ln. 25 – p. 19, ln. 1.

Relief Requested

13. For the above reasons, the Prosecution requests the Chamber to dismiss the Application.



Fatou Bensouda, Prosecutor

Dated this 29th day of March 2016

At The Hague, The Netherlands