Cour
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Court

Original: **French**

No.: **ICC-02/11-01/15**
Date: **29 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

Defence response to 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" (ICC-02/11-01/15-469)

Source: **Defence team for Laurent Gbagbo**

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

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I. Background

1. On 3 September 2015, the Chamber delivered a decision entitled "Directions on the conduct of the proceedings".[1] That decision made no provision for new material to be used at the witness re-examination stage.[2]

2. On 17 March 2016, the Prosecution provided the Chamber and the parties and participants, by e-mail, with a "list of material that will be used by the Prosecution in the re-examination of P-0625",[3] mentioning 10 items that had not been used either during examination by the calling party or during examination by the non-calling party.

3. On the same date, the Defence raised an oral objection.[4]

4. On the same date, the Chamber delivered the following oral decision:

> The re-examination by the calling party is allowed, and the documents he can use is limited to the documents which are already submitted to the Chamber during the testimony of the witness, meaning without the possibility to use new documents.[5]

5. On 23 March 2016, the Prosecution filed a "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".[6]

II. *In limine*

6. The Defence notes that the Prosecution's request exceeds the number of pages permitted for presentation of a document to the Chamber. In fact, the request runs to

[1] ICC-02/11-01/15-205.
[2] *Ibid*., paras. 42-46.
[3] Prosecution's email to the Chamber, the parties and the participants dated 17 March 2016 at 12.48.
[4] French real time transcripts of the hearing of 17 March 2016, ICC-02/11-01/15-T-32-FRA RT, p. 48, line 25, to p. 53, line 7.
[5] Edited English transcript of the hearing of 17 March 2016, ICC-02/11-01/15-T-32-ENG, p. 46, lines 19-23.
[6] ICC-02/11-01/15-469.

21 pages and the word count (6,735) exceeds the 6,000 words allowed by the regulations.

7. The fact that the Prosecution's request comprises two elements – a request for clarification and in the alternative, a request for leave to appeal – is immaterial as it is (1) one document and (2) one request based on a single argument.

8. The Request must therefore be rejected.

III. Submissions

9. What the Prosecution presents as a request for clarification is in essence a request for review by the Chamber of a clear decision taken by the Bench. In its request, the Prosecution calls on the Chamber to amend its decision and allow the calling party, during re-examination, to use documents not submitted to the Chamber during the examination conducted by the calling party and the examination conducted by the non-calling party. In these circumstances, the request must be rejected in its entirety.

10. If the Prosecution request is taken to be a request for leave to appeal, it must be noted that it does not satisfy the criteria of article 82(1)(d).

11. Firstly, the Prosecution fails to identify any error of law or of fact committed by the Chamber. It would have found it difficult to do so, since the Chamber simply applied its own decision on the conduct of the proceedings, which makes no provision for the party re-examining the witness to use new material not already submitted to the Chamber.

12. To conceal the fact that it relies neither on an error of law nor on an error of fact, the Prosecution shifts the debate and instead of focusing it on the content of the decision, focuses it only on what it claims are the consequences of the decision. To build its argument, it relies on what it refers to as two "premises"[7] and states that

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[7] *Ibid.*, para. 25.

"both premises flow as real consequences of this Decision, and thus arise from it".[8] Firstly, it uses the term "premise" incorrectly to mean consequence, whereas a premise must precede the issue under discussion. Secondly, discussion of the consequences of a decision does not amount to identification of an error of fact or of law in the decision itself.

13. Consequently, the request for leave to appeal must be rejected for failure to identify any error of fact or of law.

14. It is all the more important that the request be rejected because the Prosecution fails to establish the need for an immediate appeal.

15. The Prosecution restricts itself to general statements concerning the determination of the truth by the Chamber, without explaining how the fairness of the proceedings or the outcome of the trial would be called into question by the impugned decision.

16. The Prosecution fails to show how determination of the truth would be affected by not being permitted to use new material. The Prosecution has had sufficient time to prepare its case and decide well in advance which questions to ask the witness during the examination-in-chief to bring out the truth. If it deliberately chose not to broach certain issues during the examination-in-chief, that was its choice. It is by definition because it considered that discussion of these issues was not useful to discovery of the truth. For example, during the examination of P-0625, it declined to raise a number of issues that it had nevertheless raised in its earlier successive encounters with the witness.

17. The Prosecution's statement that the decision "affects the calling party's discretion to present and argue its best case"[9] is therefore baseless, because it is during the examination-in-chief that the calling party is supposed to present "its best case" and not during any hypothetical and exceptional re-examination.

18. Furthermore, it must be borne in mind that re-examination is not automatic. On the contrary, a re-examination must be authorised, in exceptional circumstances

[8] *Idem*.
[9] *Ibid*., para. 34.

and on specific issues.[10] That being the case, the truth is not determined during re-examination.

19. The Prosecution also cites what it calls "the Prosecution's duty to establish the truth under article 54(1)(a)".[11] However, this provision is not relevant to this discussion. In fact, article 54(1)(a) provides that the Prosecutor shall: "[I]n order to establish the truth, **extend the investigation** to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally". It is therefore clear that article 54(1)(a) applies only to the Prosecution's investigation stage and concerns only its obligation to investigate incriminating and exonerating circumstances. Article 54(1)(a) does not therefore apply to the presentation of evidence at trial.

20. Lastly, the Prosecution fails to explain how either the expeditiousness of the proceedings or the outcome of the trial would be affected.

21. As regards the expeditiousness of the proceedings, the Chamber's impugned decision on the contrary requires the re-examining party to actually focus on what was raised for the first time during cross-examination. However, analysis of the new documents that the Prosecution sought to use during the re-examination shows that it intended to use the re-examination to complement its examination-in-chief, by developing points that had already been raised in it.

22. As regards the outcome of the trial, the Prosecution submits that the effect of the decision would be to limit the volume of material that could be used to reach the final Judgment pursuant to article 74. That argument cannot be entertained. According to the Prosecution, the parties should be at liberty to introduce any evidence at any stage of the proceedings. However, there must be rules and the automatic effect of those rules is to limit the number of items of evidence used by the parties. The purpose of the disclosure and admissibility procedures is precisely to organise the use of evidence such that the preparations of the other party are not

[10] ICC-02/11-01/15-205, para. 38.
[11] ICC-02/11-01/15-469, para. 32.

affected by the tardy use of evidence that it cannot contest. Otherwise put, there can be no fair trial without limits, including time limits, on the parties on introducing evidence. Here, the Chamber's decision rightly safeguards the fairness of the trial by limiting the Prosecution's opportunity to introduce new material at the eleventh hour, shortly before re-examination, which would affect the Defence's ability to prepare adequately.

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

Considering article 82(1)(d) of the Statute;

– **Reject** the Prosecution's request.

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 29 March 2016

At The Hague, the Netherlands