

1 International Criminal Court
2 Trial Chamber I - Courtroom 1
3 Situation: Republic of Côte d'Ivoire
4 In the case of The Prosecutor v. Laurent Gbagbo and Charles
5 Blé Goudé
6 ICC-02/11-01/15
7 Presiding Judge Cuno Tarfusser, Judge Olga Herrera Carbuccion and
8 Judge Geoffrey Henderson
9 Trial Hearing
10 Thursday, 4 February 2016
11 (The hearing starts in open session at 9.38 a.m.)
12 THE COURT USHER: All rise.
13 The International Criminal Court is now in session.
14 Please be seated.
15 PRESIDING JUDGE TARFUSSER: Good morning. Excuse for the delay, but
16 obviously the argument we are going to clarify upon is also very much discussed inside
17 the Chamber, of course, and that's the reason for this delay. Let me say at the outset
18 before reading out the decision that I think that there is much more disagreement on the
19 basis of what we mean by leading question or not, more than a substantial disagreement.
20 But now I will read out this decision, the ink of which is still wet.
21 The Presiding Judge, having listened to the reasoned "request for clarification" by the
22 Defence of Mr Gbagbo on the "leading question" issue; having heard the submissions
23 thereto of all other the parties (Defence of Mr Blé Goudé, Legal Representative of Victims,
24 and Office of the Prosecutor in this order); having discussed with the colleagues of the
25 Bench by majority clarifies as follows:

1 First of all, the Presiding Judge is cognizant that there is a certain degree of discrepancy
2 on this issue as Chambers have taken slightly different approaches on the conduct of the
3 proceedings. However, the system for the conduct of the proceedings is open and each
4 Chamber has discretion to apply this rule as it deems appropriate.

5 This said, it has to be clarified that there cannot be any reasonable comparison between
6 the legal framework of "the other international tribunals" on the one side, and the legal
7 framework of the ICC on the other, on the one side, on the other. The former being
8 known as common law oriented, the latter being a system of its own which encompasses
9 notions of both, the common law and the civil law legal system.

10 As far as, in particular, the witness questioning is concerned:

11 A. None of the terminology, institutes or concepts, such as "leading questions,
12 examination-in-chief, cross-examination, hostile witnesses, Prosecution witnesses,
13 Defence witnesses," among others, are mentioned in the ICC legal texts;

14 B. Witnesses are called in front of the Chamber in order to be questioned, potentially
15 by all parties and also by the Judges, on facts and with the precise obligation, under the
16 threat of perjury, to tell the truth (Articles 69, 70 and Rule 140);

17 C. The Chamber itself has the authority to request the submission of evidence,
18 including calling witnesses for the determination of the truth (Article 69);

19 D. The Presiding Judge may give direction pursuant to Article 64(8) and Rule 140 on
20 order and manner in which the evidence shall be submitted, meaning also the manner in
21 which the witnesses shall be questioned and the evidence shall be admitted at trial.

22 Furthermore, the argument that leading questions is the only way to challenge the
23 credibility of a witness is unfounded. The challenge of the credibility of a witness can
24 be efficient and fairly done in many other ways.

25 As far as the clarification concerns on which directions of the conduct of the proceedings

1 are in force, I limit myself to quoting my initial statements of yesterday when I said that,
2 and I quote: "Questioning of the witnesses requires some amendments to the directions
3 previously given by the Chamber in filing number 205." End of quote.

4 Furthermore, I do not have to teach excellent counsel that a general rule of principle of
5 law is, as I said yesterday, "lex posterior derogat lex priori."

6 This said, the requested clarification is as follows:

7 The direction on the conduct of witness questioning as given yesterday remain in place,
8 meaning that, and I quote: "No leading questions whether by the calling or non-calling
9 party will be permissible";

10 Two, accordingly, the Presiding Judge will in no case allow counsel to unduly direct or
11 influence evidence to be provided by a witness by framing the question in a manner
12 which predetermines the answer - or what I read somewhere the expected answer - and
13 in doing so is unfair to the witness, to the parties and even more, undermines the
14 Chamber's duty to establish the truth;

15 Three, and here I think is the clarification, it is not considered to be "leading" the
16 challenge/confrontation -- or to confront a witness with facts or circumstances (such as
17 documents, prior statements of the witness or other persons, et cetera) which are or
18 appear to be in contradiction with the testimony given by the witness while in the stand
19 casting doubts on his or her credibility, and to ask questions and/or clarifications on
20 these contradictory facts or circumstances. In doing so the contradictory information,
21 read out or shown to the witness, enters in the record of the case and can be used,
22 together with all other elements, also to assess the credibility of the witness.

23 This said in way of principle, the concept itself of "leading question" cannot be entirely
24 defined in the abstract and therefore the Presiding Judge will rule as appropriate on the
25 basis of an objection or motu proprio.

1 I really hope that this clarifies what I consider much more -- what I consider much more
2 something which is not -- was not clear. It is my fault, of course, what was not clear
3 said but what is more a misunderstanding than a matter of substance.

4 So I would now, as I don't see -- well, I see Mr MacDonald --

5 MR MACDONALD: I like to stand up, your Honour.

6 PRESIDING JUDGE TARFUSSER: Yes, please.

7 MR MACDONALD: No, it's not to come back on that decision. Practice makes
8 perfect, but obviously we'll see and read it carefully beyond what I've just said.
9 Now, what I'd like to address right now, your Honour, is a document that we showed
10 you and the witness not being here, it's a map that we presented and after my colleagues
11 at --

12 MR ALTIT: (Interpretation) If I may --

13 MR MACDONALD: It's going to take two seconds.

14 After my colleagues had mentioned that some locations may not be in the right place, we
15 did again a verification, your Honour, and, indeed, there were mistakes on that map.
16 And the reason why I'm standing up and raising it is because we certainly do not want
17 to mislead the Chamber in any way. I understand that that map anyway was not
18 submitted formally, it was just more of a general indication. But nevertheless, I have
19 copies just to show that, indeed, we've clarified the location of the RDR headquarters,
20 which was probably the problematic location.

21 I have the documents and, again, in order to be transparent about the whole thing I can
22 show the Chamber where these are. But I'm sure that the Defence on their documents
23 list have such maps with such locations also, so it's at your discretion. But if you want
24 to see where we place it, I have -- I have maps.

25 PRESIDING JUDGE TARFUSSER: Maître Altit.

1 MR ALTIT: (Interpretation) Thank you, your Honour. Before we come back to the
2 witness, the examination-in-chief and the cross-examination, I would like to thank the
3 Chamber for the clarification. It's a very significant one because it determines the way
4 in which the entire trial is going to be carried out and the leeway for the different parties.
5 In the light of the importance of this decision and in the light of the way in which we see
6 things and given the fact that for us we're talking about respecting the rights of the
7 Defence, because when we talk about leeway or room for manoeuvre it means ability to
8 act, we would like to ask you, your Honours, for permission to spend a few moments
9 reflecting here and now to have a brief suspension of the hearing so that we can perhaps
10 decide whether or not to appeal your ruling.

11 I think that this would be in line with your previous instructions. You very clearly said
12 to us that you were in favour of accelerating the trial and there being rapid oral
13 exchanges, so I think that this would be very much in line with what you've said and
14 that's why I'm asking you whether you would grant us the possibility to discuss the
15 possibility of an appeal and this in the course of a brief interruption.

16 (Trial Chamber confers)

17 PRESIDING JUDGE TARFUSSER: Well, after consultation with my colleagues I was
18 obviously inclined to do so, but I have consulted with the colleagues, which are as well
19 in favour of this. I think if we -- one hour at 11 o'clock we come back together, would
20 this be okay?

21 So we have -- probably we don't have three sessions of one hour and a half today.
22 Probably only two of one hour and a half and just I would also hope that in two hours
23 and one hour and a half, three hours the witness can be released and then tomorrow we
24 can start with a new one, if not earlier, if this is possible.

25 MR ALTIT: (Interpretation) That would be perfect, your Honour.

1 MR MACDONALD: And just to understand, are we to argue an oral application for
2 leave to appeal in an hour? Is that what is being envisioned or is this done in writing?
3 Because I understand you want oral applications and you alluded to potentially oral
4 ALAs, if I'm not mistaken.

5 PRESIDING JUDGE TARFUSSER: Yes, but the leave to appeal is a little bit more
6 complex to put it in oral. I think you should discuss whatever you want to do and then
7 we continue with the witness, and I think this has priority. The request for leave to
8 appeal has its own parcours outside the courtroom, I would say.

9 MR MACDONALD: Noted.

10 PRESIDING JUDGE TARFUSSER: Okay. So we postpone until 11 o'clock.

11 THE COURT USHER: All rise.

12 (Recess taken at 9.53 a.m.)

13 (Upon resuming in open session at 11.03 a.m.)

14 THE COURT USHER: All rise.

15 Please be seated.

16 PRESIDING JUDGE TARFUSSER: I think the word is now to the parties I would say
17 who requested the postponement, the time to think and the postponement.
18 So, Maître Altit, yours the floor.

19 MR ALTIT: (Interpretation) Thank you, your Honour.

20 Your Honours, Mr Knoops and I have prepared a number of arguments regarding this
21 issue of leading questions that could or could not be put during cross-examination, and
22 we would like to make these arguments to the Chamber. Since this is a crucial issue, to
23 our mind, and I think this is much is in -- this is much in keeping with your initial
24 instructions at the beginning of the trial, I think it would be a good idea to deal with this
25 issue quickly and that is why we wish to make oral submissions now with your leave.

1 I will go first and then Mr Knoops will come after and we will spend no more than half
2 an hour on this matter, probably less.

3 PRESIDING JUDGE TARFUSSER: Well, the problem I have with this, if this is
4 somehow to question again the decision taken this morning because if it's -- we can't just
5 play ping pong by continuously talking about the same things. I think I tried to make
6 the decision of this morning as clear as possible, and I think I opened a very big window,
7 which I never wanted to close, by the way.

8 So if this is a sort of request for revisiting, I think we should not, but I give you the floor
9 to clarify better.

10 MR ALTIT: (Interpretation) Thank you, your Honour. It's not a matter of asking for
11 clarification once again. The Chamber did clarify their position and, yes, matters are
12 clear. This is actually a matter of quickly coming to a solution to this issue and to
13 request leave to submit an appeal and we are making our submissions orally right now.
14 Rather than spending more time on the issue, we do hope that we will be able to
15 organise ourselves so that the matter can be dealt with as quickly as possible. To this
16 end, we will make oral submissions to request and hopefully obtain leave to appeal.

17 PRESIDING JUDGE TARFUSSER: Okay. If this is the case, obviously you may
18 make -- it's a leave to appeal what you are taking the floor for? Okay.
19 So I think it's okay. I will give you the floor for a request for leave to appeal. Okay.
20 Yours the floor.

21 MR ALTIT: (Interpretation) Thank you, your Honour. I will be very brief.
22 Your Honours, the majority of the Chamber seems to be of the view that there is no
23 difference between an examination and a cross-examination, no difference in their very
24 natures. That is why they have decided to put both the calling and non-calling parties
25 on an equal footing. And the position seems to be this: Well, there should be no

1 distinction made between the parties and witnesses should not be put under pressure
2 and, thus, the witness will -- can speak only the truth.

3 Our position is this: There is a fundamental difference between examination and
4 cross-examination. During examination, the calling party must avoid leading or
5 influencing the witness that they have called. The calling party cannot intervene,
6 cannot be active. Otherwise, the ability of the witness to express his own truth will be
7 influenced or harmed.

8 On the other hand, it is the duty of the non-calling party during cross-examination to
9 shed light on the contradictions and flaws in the witness's account and to challenge the
10 consistency of the very account by carefully viewing the testimony and comparing it,
11 contrasting it with other items.

12 This is the only way that the truth will come out. Otherwise, the two parties, calling
13 and non-calling, are never on the same footing because their respective perspectives and
14 viewpoints are different.

15 In other words, if one would say at the first -- that there is an imbalance between the
16 calling and non-calling parties when they deal with a witness, in the common law
17 system, well, this apparent imbalance is supposed to remedy another imbalance and
18 places the two parties on the same footing.

19 Particularly since this imbalance at one point because -- well, in the case -- this is the
20 Prosecutor's case. One imbalance is compensated for by another imbalance. The
21 nature of one party's examination and the other's is not the same because the goal is not
22 the same.

23 If the calling party cannot properly challenge in the way they desire the account, if the
24 non-calling party cannot test, challenge the witness's account, the rights of the Defence
25 are violated and can be deemed to be unfair right from the very start.

1 Putting it this way, I now turn to the issue of an appeal, and I wish to make a
2 preliminary remark if you don't mind. I believe that it is necessary to have proper -- a
3 proper understanding of the Court's judicial policy.

4 The ruling impugned is the first one in the history of the ICC. This is the first time we
5 have seen the issue of leading questions during cross-examination being dismissed or
6 swept aside. I think it's important to stress that the rulings by the various Chambers of
7 the Court in relation to leading questions were not based only on the Statute but also,
8 and above all, on the experience that Judges of the Court, including civil law Judges,
9 systematically viewed that if one structures these issues in a logical fashion, if one
10 structures examination and cross-examination logically and this distinction between the
11 two can -- all -- this can only lead to the emergence of the truth.

12 We have reminded the Chamber of this and I would like to say a few words now about
13 the notion of serenity or calm.

14 First of all, the Defence notes that the right to --

15 THE INTERPRETER: Interpreter correction: Not serenity but celerity, the speed of the
16 trial.

17 MR ALTIT: (Interpretation) Now, a person should not be imprisoned unduly for an
18 excessive period of time. This right is in addition to other rights that the accused
19 person enjoys. The accused, under no situation, can this right be -- under no
20 circumstances can there be an obstacle to the other rights of the Defence.

21 The concept of a speedy trial cannot be used as a way to undermine the right of the
22 accused and, in particular, the right to a proper defence and cross-examination.

23 Furthermore, I think we must note, and this is my next point, that the Chamber's ruling
24 far from ensuring a speedy trial will only slow the trial down, in particular because
25 conducting cross-examination without leading questions means that we will have to

1 return to major points, go back once again and deal with them again, ask more questions
2 of the witness, hear longer replies. And the very logical structure that governs the
3 fashion in which cross-examinations are conducted actually means a time savings for the
4 calling party and indeed for all other protagonists.

5 Secondly, the lack of a legal foundation, the Defence is of the view that the discretion of
6 the Chamber is not without limit. More particularly, we note that the right of a party to
7 use leading questions during cross-examination is a general principle of international
8 criminal law, a general principle of international criminal law as we see in the constant
9 practice of a great many international tribunals, including the ICC.

10 Why is an appeal necessary at this stage? Allow me to hark back to the principles of
11 81(d) -- 82(1)(d).

12 Secondly, the ruling touches or deals with the very fairness of the proceedings. The
13 decision keeps the Defence from using their right to mount an effective defence and to
14 challenge, to test the evidence of the Prosecution by so doing, and I hark back to the
15 issue of the apparent imbalance. By so doing, the non-calling party, in this case the
16 Defence, is placed in an inferior position in relation to the calling party.

17 Now let me turn to my third point. The decision also affects the speediness of the trial
18 by keeping one party from focusing the cross-examination on what the witness has
19 already said the contradictions pointed out. I think I've already made arguments in this
20 regard. I won't belabour the point.

21 Fourth, the decision could affect the outcome of the trial insofar as the Defence would
22 not be in a position to effectively test the Prosecution's arguments, and this could lead to
23 some un-credible items of evidence be taken into account in a final ruling, final decision,
24 obviously, affecting the very outcome of the trial.

25 Finally, this issue needs to be dealt with immediately by the Appeals Chamber. Clearly

1 the oral ruling from your Chamber affects the way in which the parties will conduct
2 their cross-examination throughout the course of the entire trial. I think it would be
3 suitable for the Appeals Chamber to settle the matter immediately, otherwise the entire
4 procedure may be fatally flawed. This is what we believe is the case today for the
5 Defence and will be the case for the Prosecution tomorrow.

6 Your Honours, I will keep it at that. I wanted to be brief because I wish to respect the
7 instructions that you provided at the very beginning of the trial. If you wish, after
8 hearing my learned friend Mr Knoops, we can further expand upon these arguments.
9 Thank you.

10 PRESIDING JUDGE TARFUSSER: (Interpretation) Thank you very much, Mr Altit.
11 (Speaks English) Mr Knoops, yours the floor.

12 MR KNOOPS: Thank you very much, Mr President, your Honours.

13 Mr President, we respectfully submit that the Chamber, on this fundamental issue, finds
14 speedy determination at this moment of request for leave to appeal, and we submit that
15 at this stage such an authorization is justified.

16 Yesterday, I developed three arguments I'll mention briefly in the context of Article 82(1)
17 and I will submit three additional arguments within the framework of Article 82(1) to
18 hopefully convince the Chamber that at this stage such an authorization is warranted.
19 And finally, I will suggest a potential solution for the moment the Chamber would
20 decide to grant such authorization.

21 Mr President, as you might recall yesterday, and this relates, I think, to the first
22 appealable issue under Article 82, the protocol of 3 September of last year was adopted
23 by the Bench on a unanimous basis on which the Defence could rely its preparations.
24 The principle of legal certainty, *lex certa*, dictates that no deviation from principles of
25 procedural law which go to the heart of the Defence rights could be accepted to the

1 detriment of an accused person. The principle derives from human rights treaties such
2 as Article 7 of the European Convention on Human Rights whereby the European Court
3 of Human Rights in its consistent jurisprudence has interpreted this lex certa principle as
4 embracing two elements: First, the principle of accessibility of the law; and secondly,
5 the principle of foreseeability of the law.

6 And we will submit that these principles are at this moment at stake in view of the ruling
7 of 3 September last year by unanimous Bench. And this is I think the first appealable
8 issue under Article 82.

9 Secondly, Mr President, as alluded to yesterday, the consistency of the case law before
10 this Court when it concerns the conduct of proceedings before this Court as an
11 institution and in particular to the Defence teams which are practising now and in the
12 future before your Court, Mr President, dictates such an identifiable appealable issue.

13 As my learned friend from the team of Monsieur Gbagbo explained yesterday, there is
14 ample case law within this Court refining protocols for the conduct of proceedings in
15 which an explicit ban on leading questions cannot be found. With all due respect to
16 your clarification of this morning, Mr President, a clarification which allows the
17 non-calling party to confront witnesses, for instance, with prior statements and
18 documents which could show potentially the credibility or the non-credibility, that
19 clarification does not take away the principal stance of your ruling, namely, that
20 non-leading questions are not allowed -- are allowed, pardon me.

21 In this regard, the observation that there are other ways to challenge the credibility of a
22 witness than merely on the basis of leading questions might hold true in certain
23 instances.

24 However, merely on the basis of existing documents and without having a chance to
25 seek recourse to leading questions, especially when it concerns Prosecution witnesses,

1 Mr President, will seriously prejudice the Defence case and the rights of the defendant.
2 For the Defence, Mr President, your Honours, leading questions are sometimes
3 instruments to have the witness admitted to something to which the witness otherwise is
4 not inclined to admit, and that's not a distortion of the truth, but it's simply sometimes
5 the mechanism for the Defence to have a fact being revealed which is otherwise not
6 revealed because the witness is reluctant to accept a certain fact. That is the essence of
7 leading questions. It's not distortion of the truth. It can assist us in a way to bring out
8 certain facts in evidence.

9 Mr President, as you recall yesterday my third argument was the size of this case.

10 This Court faces a Prosecution case comprising 138 Prosecution witnesses which, as for
11 now, to my knowledge, is the most large and complex case before the Court as also
12 confirmed by the Presidency when it clarified the change of the composition of the
13 Chamber in our case. That's document ICC-02/11-01/15-372 annex 1 wherein the
14 Presidency alluded to the Gbagbo and Blé Goudé case as the most complex case.

15 Accordingly, Mr President, in this specific case, the absence of having recourse to
16 leading questions as a general rule as an important Defence tool might cause what I call
17 disproportionate prejudice to this Defence compared to the other cases which are
18 pending before your Court, where Defence teams facing far less complex cases in terms
19 of quantity were able to examine as a non-calling party on the basis of leading questions.
20 Now, your Honours, you can recall these were my arguments to the Chamber of
21 yesterday and, as such, I believe these arguments merit an authorization from the
22 Chamber simply because they inure appealable identifiable issues.

23 Additionally, Mr President, we submit the following arguments which reinforce our
24 request, our humble request to the Chamber to authorize leave to appeal on this
25 fundamental issue. And this also goes to the second prong of the test for leave to

1 appeal under Article 82(1)(d).

2 First, an immediate resolution of this fundamental issue by the Appeals Chamber will
3 definitely, Mr President, expedite the trial proceedings. Why? With all due respect to
4 your ruling, your ruling of this morning still maintained a level of uncertainty as to the
5 precise scope the Presiding Judge will permit during the examination by the non-calling
6 party.

7 In fact, it was Your Honour's prerogative of this morning ruling, I quote: "The concept
8 itself of leading questions cannot be entirely defined in the abstract and therefore the
9 Presiding Judge will rule as appropriate on the basis of an objection or *motu proprio*."
10 Page 2, lines 22-25 of the ruling of this morning.

11 This ruling itself still creates in our view ambiguity and uncertainty and requires the
12 Judge every time to assess the acceptability of a certain question which might be
13 potentially leading.

14 Secondly, it is tenable, Mr President, that a resolution by the Chamber on this matter will
15 fundamentally affect the outcome of the trial. The trial and the proceedings in this case,
16 even more so when we consider that we are at the very start of the first examination by
17 the non-calling party in a case, as mentioned, comprising 138 Prosecution witnesses.

18 The three points upon which we elaborated before make it clear in our submission that,
19 indeed, this fundamental issue goes to the heart of the non-calling party.

20 My last and third point, Mr President, relates to your observation of this morning where
21 you held that, I quote: "It has to be clarified that there cannot be any reasonable
22 comparison between the legal framework of 'the other international tribunals' on the one
23 side, and the legal framework of the ICC on the other."

24 As your Honours explained further, "the former being known as common law oriented,
25 the latter being a system of its own which encompasses notions of both common law and

1 civil law." Unquote. Page 2 of the ruling of this morning.

2 Mr President, with all due respect for the Chamber, we have two observations to this
3 argument on the basis of which in the context of the other arguments you gave ruled out
4 in principle ruling leading questions.

5 First, the comparison we made yesterday with the other cases, and just a few moments
6 ago, pertain to a comparison with the other cases within this Court. I did not mention
7 yesterday the ICTY or the ICTR. We simply referred to the position of Defence teams
8 within this Court and in the future.

9 You remember that I mentioned yesterday that any type of prohibition on leading
10 questions by the non-calling party will put the Defence teams procedurally in different
11 positions within one Court, this Court, the International Criminal Court.

12 The second observation to your remark that this Court cannot be compared as such with
13 the other tribunals pertains to the following observation: The legal framework of the
14 ICTY and the ICTR, certainly in the last decade, transgressed into a more mixed model
15 consisting of common law and specifically law based on the notion of so-called effective
16 court management and expeditiousness.

17 An example thereof is Rule 92 bis of the Rules of Procedure and Evidence of the ICTY
18 which was adopted on 13 December 2000, amended on 13 September 2006, which allows
19 a Chamber to accept evidence, transcripts, statements, without the witness being
20 presented to the Court as such, which is a civil law trait.

21 This rule, Mr President, Rule 92 bis of the ICTY Rules of Procedure and Evidence and
22 also to be found in the ICTR Rules of Procedure and Evidence was clearly fuelled by
23 notions of more effective court management allowing the chambers of the ICTY to
24 dispense with the attendance of a witness in person and instead admit in whole or in
25 part the evidence of a witness in the written form, statement or transcript.

1 To confirm this tendency, this trait, I refer your Honours to the following publication
2 written by my learned colleague, Mr Daryl Mundis, an American senior trial attorney of
3 the Yugoslav tribunal, currently working for the Office of the Prosecution at the Special
4 Court for Lebanon. An article written by him in 2001 in the Leiden Journal of
5 International Law titled "From 'Common Law' Towards 'Civil Law': The Evolution of
6 the ICTY Rules of Procedure and Evidence."

7 You find, your Honours, in the abstract of this article of my colleague Daryl Mundis
8 exactly this confirmation of what we just mentioned. As a result of the perception that
9 trials at the ICTY were too lengthy, a discernible shift in the trial proceedings and
10 practice did occur with greater emphasis on the role that the judges play in controlling
11 the proceedings.

12 Whilst the first few trials at the ICTY closely resembled common law, the level of control
13 being exercised by the chambers of the ICTY in recent cases shifted more into the
14 direction of the civil law approach and, as a result, and this is the conclusion of Daryl
15 Mundis, former senior trial attorney of the Office of the Prosecution of the ICTY, his
16 conclusion is that a thoroughly mixed jurisdiction containing elements both of civil and
17 common law indeed emerged in 2001.

18 Mr President, in other words, with all due respect to your own analysis, even within the
19 ICTY and ICTR systems which shifted towards a civil law approach the element of
20 leading questions in cross-examination or examination by the non-calling party was
21 never being ruled out simply because it goes to the heart of the rights of the Defence and
22 it will still serve the truth.

23 My conclusion, on the basis of these arguments we pray the Chamber to grant the
24 Defence authorization to appeal the decision of this morning while suspending the
25 questioning by the non-calling party of the witnesses pending the final adjudication of

1 this request because, as we submit, as long as this issue is not being adjudicated finally,
2 if your Honours believe that the matter indeed falls within the ambit of Article 82(1), it
3 should not be fair to start with a cross-examination by the non-calling party. It's not to
4 say that the trial proceedings should be suspended its entirety, but as has also been done
5 at the ICTY in cases where I appeared, the examination-in-chief can continue while the
6 cross-examination can be deferred to another moment.

7 Mr President, the outcome of your decision, of your Bench, on this request is first and for
8 all of paramount concern of these two defendants, their lives, their defence, their right to
9 defend, but also could change the future of this Court, the future proceedings of this
10 Court, the procedural nature of this Court which will go into the history that makes it
11 very important that your Honours, indeed, bring this matter to the highest judicial organ
12 within this Court. Thank you.

13 PRESIDING JUDGE TARFUSSER: Legal Representative of Victims?

14 MS MASSIDDA: Thank you very much, your Honour.

15 (Interpretation) I have taken my notes in French and I will, therefore, reply in French.
16 Obviously we object to the request to appeal the decision. I will, first of all, take a look
17 at the question of seeing whether a decision is required on the decision of the Chamber
18 such as it should be brought to the Appeals Chamber.

19 Your Honour, we think that the starting point of Mr Gbagbo's Defence in setting out
20 their arguments is incorrect. Mr Gbagbo's Defence refers to the fact that apparently
21 there's a difference made between the examination and the cross-examination. Our
22 argument is that on the basis of Articles 69, 70 of the Statute of Rome and Rule 140 of the
23 Rules of Procedure, Evidence and Procedure, the Statute of Rome assessed from the
24 Court do not allow for any difference to be made between the questioning put by the
25 Prosecution and the questioning put by the Defence. It's enough just to -- you just need

1 to read the relevant norms of the Statute and the Rules of Procedure and Evidence to see
2 that the only term used is questioning of the witness, so putting questions to the witness.
3 According to us, the upshot of this is that the same rules concerning questioning of the
4 witness shall apply to both Prosecution and Defence and also perhaps to the
5 Representatives of Victims. We are, therefore, not in agreement with the fact that
6 there's no legal basis for the decision taken by the Chamber.

7 What is more, incidentally, the question of apparently there being no legal basis should
8 be dealt with directly by the Appeals Chamber and not at this stage in the proceedings.
9 It's not a question that can be used as a foundation for an appeal.

10 Secondly, as we see things, the Chamber's ruling this morning in point three clearly
11 covers the concerns of the Defence.

12 The third point makes it possible for the parties, possibly participants, to challenge the
13 statements made by the witness as regards to the facts and circumstances covered by the
14 statement of the witness and might also make it possible to put a number of questions
15 that could go to the question of the credibility of the witness and might be covered by
16 what one could call, in inverted commas, "leading questions."

17 Now as regards some of the arguments put by Mr Blé Goudé's Defence, we think, your
18 Honours, that this is quite simply a request to reconsider a decision that's already been
19 taken by the Chamber and let me say that Mr Knoops has developed two relatively new
20 arguments, but fundamentally he used arguments already put to the Chamber and on
21 which the Chamber's also issued a ruling.

22 Therefore, your Honours, I would say that there is no question that stems from the
23 ruling, and I think we could leave it at that because that is -- it is the first decision to be
24 taken by the Chamber in line with Article 82(1)(d) of the Statute of Rome.

25 We'd also like to say that to our mind this question does not have any effect on the fair

1 nature of the proceedings nor on the expedient nature of the proceedings.

2 Indeed, as regards the expediency, this is where Mr Gbagbo's Defence spent time
3 developing its argument. If questioning is in line with the instructions of the Chamber,
4 then the proceedings will not be dragged out. On the contrary, what is more the
5 decision of the Chamber serves to have as much expediency as possible in the
6 proceedings, so we don't think that this line of arguing -- argument holds water.

7 And then as we go to the possible impact that the decision might have on the trial, on the
8 proceedings, we think that this matter has not been correctly presented by the Defence.

9 We don't really see what their arguments are. We find that they're not adequately
10 founded.

11 My last point concerns the suspensive effect. Article 88 is perfectly clear. A request
12 for appeal does not have suspensive effect. That is perfectly clear. We go to appeal
13 and the Defence might ask the Appeals Chamber for a suspensive effect and so clearly
14 that is something that would have to be rejected as well. Thank you.

15 PRESIDING JUDGE TARFUSSER: Office of the Prosecutor?

16 MR MACDONALD: The Defence will be happy that for once the Procureur bis is not
17 siding with the Prosecution, but we are siding also with the Defence on this issue, your
18 Honour. But it is our intention to file our own ALA or, sorry, application for leave to
19 appeal in writing.

20 And now since the Defence have done theirs orally, we will file by tomorrow close of
21 business a response in writing to their oral submissions.

22 And like I said yesterday, this is a fundamental issue, fundamental issue to this case, but
23 this institution as a whole and the internal constant practice. And on this point, your
24 Honour, obviously we disagree with the majority. There has been before this
25 institution a constant practice.

1 Therefore, our position is that we should be able to continue with the witness. We
2 request that the Chamber not rule on the issue until you also have received our
3 application for leave to appeal in writing, which we will attempt to file as soon as
4 possible, but the current deadlines would run until Tuesday, your decision having been
5 issued yesterday.

6 But I think in the meantime we can continue with the examination of the witness and if
7 ever in the future there was a need to come back because the issue would be resolved,
8 then we can do that because I'm confident that at the moment we can proceed and finish
9 with the witness's testimony.

10 Now, I understand the Defence is asking that we postpone this whole process, but I also
11 understand that the Chamber is very much concerned about a witness being on standby
12 and others waiting to come and testify also. So I do believe that we can continue
13 forward and if ever there's an issue to come back, we can recall these witnesses maybe at
14 a later stage and we could do that by videoconferencing. So that's our position.

15 Now, tomorrow I just want to make clear it's a response, not the application, the
16 response in writing that we would submit to the oral submissions that were just made at
17 this moment, your Honour.

18 PRESIDING JUDGE TARFUSSER: Let me adjourn 10 minutes just to talk with the
19 colleagues, or 10, 12 -- 10, 15 minutes and then we come back.

20 MR KNOOPS: Mr President.

21 PRESIDING JUDGE TARFUSSER: Yes.

22 MR KNOOPS: Would you allow me to make one brief remark, Mr President? Just one
23 remark.

24 As to the last suggestion of my learned friend Mr MacDonald, I fully understand the
25 position the Chamber might be in, but if the Court would be willing to consider this

1 issue and if the Court would still ask the Defence to start with its examination, with the
2 caveat that the witness can be called back, I think it's clear that for the Defence this
3 cannot work.

4 PRESIDING JUDGE TARFUSSER: Mr Knoops, I know what we have to do now and
5 from a personal point of view I -- may I say something and then we go back?

6 From a personal point of view, I find it a bit strong the argument that this Chamber
7 wants to or I personally want to undermine the rights of the Defence, which is absolutely
8 not the case. No. This is just to put this clear.

9 Ten minutes.

10 THE COURT USHER: All rise.

11 (Recess taken at 11.50 a.m.)

12 (Upon resuming in open session at 12.14 p.m.)

13 THE COURT USHER: All rise.

14 Please be seated.

15 PRESIDING JUDGE TARFUSSER: So let's resume.

16 After consultation with the colleagues, we decided as follows: The Prosecution has
17 until today close of business to file observations to the request made by the Defence,
18 both Defence teams, and the hearing is adjourned to tomorrow at 11 and with a ruling,
19 where we start with a ruling by the Chamber.

20 I see first the Legal Representative of Victims was the first.

21 MS MASSIDDA: Thank you, Mr President. Considering your ruling, we will then be
22 willing also to file a response by close of business today. Thank you.

23 PRESIDING JUDGE TARFUSSER: You're welcome.

24 MR MACDONALD: Can I ask the indulgence of the Court on the close of business
25 today to be 6 p.m. exceptionally?

- 1 PRESIDING JUDGE TARFUSSER: Exceptionally.
- 2 MR MACDONALD: Thank you very much.
- 3 PRESIDING JUDGE TARFUSSER: The hearing is adjourned. Tomorrow 11.
- 4 THE COURT USHER: All rise.
- 5 (The hearing ends in open session at 12.15 p.m.)