

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-02/11-01/11
Date: 18 October 2012

THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Response to the Observations of the Republic of Côte d'Ivoire (ICC-02/11-01/11-258 OA2) and the Office of Public Counsel for Victims (ICC-02/11-01/11-259 OA2)

Source: The 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 Appeals Chamber granted the Office of the Prosecutor (“Prosecution”) until 19 October 2012 to file a single response to the observations of both the Republic of the Côte d’Ivoire (“CIV”) and the Office of Public Counsel for Victims regarding Mr. Gbagbo’s document in support of his appeal.¹ The Prosecution submits its response to those observations as follows.

BACKGROUND

2. On 25 May 2012, the Defence for Mr. Gbagbo (“Appellant”) submitted a “Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12(3), 19(2), 21(3), 55 and 59 du Statut de Rome présentée par la défense du Président Gbagbo” (“Defence Challenge”).²
3. On 18 June 2012, the CIV requested leave to submit observations on the Defence Challenge (“CIV’s Request”)³ and submitted those observations the same day.⁴ On 25 June 2012 the Appellant objected to the CIV’s Request and asked that the CIV’s observations be disregarded by Pre-Trial Chamber I (“Chamber”).⁵
4. On 27 June 2012 the Prosecution submitted its response to the Defence Challenge.⁶
5. On 15 August 2012, the Chamber issued its “Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the

¹ ICC-02/11-01/11-236 OA2, p.3; ICC-02/11-01/11-254 OA2, p.4.

² ICC-02/11-01/11-129. Corrigendum filed on 30 May 2012 (ICC-02/11-01/11-129-Corr).

³ ICC-02/11-01/11-154.

⁴ ICC-02/11-01/11-156.

⁵ ICC-02/11-01/11-163.

⁶ See ICC-02/11-01/11-01/167-Conf-Corr, as filed on 28 June 2012.

Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)''' ("Decision").⁷

6. On 21 August 2012, the Appellant appealed the Decision⁸ and subsequently submitted its document in support of the appeal on 6 September 2012 ("Appellant's Application").⁹
7. On 31 August 2012, the Appeals Chamber issued its "Directions on the submissions of observations",¹⁰ granting the right to:
 - (i) victims who were allowed to file observations pursuant to the Chamber's 15 June 2012 decision ("Victims") to submit observations on the Appellant's Application and to the Prosecution's response;¹¹
 - (ii) the CIV, pursuant to Rule 103(1) of the Rules of Procedure and Evidence ("Rules"), to submit observations on the Appellant's Application; and
 - (iii) the Prosecutor and Appellant to file their respective single response to the observations made by the CIV and Victims, by 12 October 2012.
8. On 28 September 2012, the Prosecution¹² and the CIV submitted observations on the Appellant's Application.¹³
9. On 1 October 2012, the Prosecution was notified¹⁴ of additional observations submitted on behalf of the CIV.¹⁵ On the same day, the Appeals Chamber disregarded both prior observations made on behalf of the CIV and directed the CIV to submit observations by 8 October 2012 in

⁷ ICC-02/11-01/11-212.

⁸ ICC-02/11-01/11-225.

⁹ ICC-02/11-01/11-240 OA2.

¹⁰ ICC-02/11-01/11-236 OA2.

¹¹ ICC-02/11-01/11-153.

¹² ICC-02/11-01/11-251 OA2.

¹³ ICC-02/11-01/11-250 OA2.

¹⁴ ICC-02/11-01/11-253 OA2.

¹⁵ ICC-02/11-01/11-253-Anx1 OA2.

compliance with Regulations 37(1) and 23(3) of the Regulations of the Court (“Regulations”), and to clarify by whom they were represented.¹⁶ The Appeals Chamber extended to 19 October 2012 the deadline for the Prosecutor and Appellant to file their respective single responses to the observations made by the CIV and Victims.¹⁷

10. On 5 October 2012, the Office of Public Counsel for Victims (“OPCV”), submitted its initial observations on the Appellant’s Application and Prosecution’s response.¹⁸ The same day the Appeals Chamber decided to disregard them and invited the OPCV to re-submit observations, in compliance with Regulation 37(1).¹⁹

11. On 8 October 2012, the CIV²⁰ and OPCV²¹ re-submitted their respective observations, in accordance with the Appeals Chamber’s directions.

SUBMISSIONS

12. The Prosecution agrees with the observations made by the OPCV on behalf of the Victims and the CIV on the Appellant’s Application (“Observations”) with the additional clarifications or explanations contained herein. In some cases, their Observations replicate points made by the Prosecution in its filing and at other times amplify or supplement the Prosecution’s arguments. Below, the Prosecution addresses only those instances where it wishes to supplement a point made by either the CIV or the OPCV.

13. As a general preliminary comment, the Prosecution concurs with the OPCV and CIV that many of the arguments raised in the Appellant’s

¹⁶ ICC-02/11-01/11-254 OA2.

¹⁷ ICC-02/11-01/11-254 OA2, para.3.

¹⁸ ICC-02/11-01/11-255 OA2.

¹⁹ ICC-02/11-01/11-256 OA2.

²⁰ ICC-02/11-01/11-258 OA2.

²¹ ICC-02/11-01/11-259 OA2.

Application repeat arguments made before the Chamber that amount to mere disagreements with the Chamber and should therefore be dismissed on this basis *in limine*.²²

Grounds 1 to 2 of the Appellant's appeal:

14. *Whether the Chamber erred in law in allowing the CIV to make observations on the Defence Challenge and by not addressing the CIV's submissions in a separate decision*

(I) Grounds 1 to 2 are not relevant to the Court's "jurisdiction"

15. The Prosecution agrees with the CIV that the Appellant's first two grounds of appeal, related to the Chamber's decision to allow the CIV to make observations on the Defence's Challenge, are not relevant to the jurisdiction of the International Criminal Court ("Court"), pursuant to Article 19 of the Rome Statute ("Statute").²³

16. The Prosecution submits that under Article 19(1) of the Statute, the Court is required to satisfy itself that it has jurisdiction in any case brought before it. As the Appeals Chamber has confirmed, the Statute clearly delineates the parameters of the Court's jurisdiction in terms of: (i) subject-matter (crimes under Article 5, sequentially defined in Articles 6, 7 and 8); (ii) temporal scope (Article 11); (iii) persons (Articles 12 and 26); and (iv) territory (Articles 12 and 13).²⁴ The Statute stipulates the specific conditions for the exercise of the Court's jurisdiction (Articles 12 and 13). The Appellant's first two grounds of appeal essentially amount to an

²² ICC-02/11-01/11-259 OA2, paras.17-24 ; ICC-02/11-01/11-258 OA2, paras.1-2.

²³ ICC-02/11-01/11-258 OA2, para.4.

²⁴ ICC-01/04-01/06-772 OA4, paras.21-22. Jurisdiction over persons is also dealt with under Articles 25, 27 and 28 of the Statute.

alleged procedural error (rather than an error of law)²⁵ that (1) is not relevant to any issues regarding the establishment, or exercise, of the Court's jurisdiction pursuant to the Statute and (2) did not materially affect the Decision.²⁶

17. On the merits and with particular respect to the Appellant's Ground 1, the CIV urges that it had *de jure* status as a participant in the proceedings pursuant to Regulation 24.²⁷ In the Prosecution's view, it is unnecessary for the Court to resolve the issue of the CIV's status, because the Chamber did not base its decision to entertain observations from the CIV on Regulation 24 or decide the CIV was a 'participant' in the proceedings. Instead, the Chamber accepted the CIV's observations in the exercise of its broad discretion under Rule 58(2).²⁸ It did not commit legal error in noting and exercising its discretion. In any event, the Prosecution agrees that the alleged error, even if established, would be inconsequential and did not materially affect the correctness of the Chamber's overall findings.²⁹

Grounds 3 to 5 of the Appellant's appeal:

18. *Whether the Chamber erred in law by: considering the 18 April 2003 declaration in light of the concrete "situation" (Ground 3); failing to interpret that declaration as a unilateral act of the Ivorian State (Ground 4); and drawing conclusions based on the 2010 and 2011 Letters of Mr. Ouattara without assessing their legal nature (Ground 5)*

²⁵ See ICC-02/11-01/11-259 OA2, para.27. As the OPCV points out, the error was more of a procedural error rather than an error of law. Jurisdiction over persons is also dealt with under Articles 25, 27 and 28 of the Statute.

²⁶ ICC-02/11-01/11-259 OA2, paras.28-31; ICC-02/11-01/11-258 OA2, paras.4-5.

²⁷ ICC-02/11-01/11-258 OA2, para.7.

²⁸ ICC-02/11-01/11-212, paras.22-23.

²⁹ ICC-02/11-01/11-259 OA2, para.33.

(I) Ground 4: Need to interpret unilateral declarations by their plain meaning

19. The Appellant seeks to rely upon the International Law Commission's *Guiding Principles* regarding unilateral declarations of States ("Guiding Principles") to argue that a State's intent must be interpreted only with regard to the circumstances existing at the time the declaration was made.³⁰ OPCV and the CIV differ on the applicability of the Guiding Principles. The Prosecution concurs with the OPCV that the Guiding Principles do not apply to the CIV's Article 12(3) declaration.³¹ Whilst the Prosecution thus does not agree with the CIV that the Guiding Principles apply, it observes, as the CIV points out,³² that the seventh Guiding Principle, which the Appellant cites,³³ clearly states that "[i]n interpreting the content of such obligations, weight shall be given *first and foremost* to the text of the declaration".³⁴

20. Even assuming – as does the Appellant and the CIV -- that the Guiding Principles apply, under the seventh Guiding Principle the text of the 18 April 2003 declaration is entitled to great weight. That text in fact makes clear that the CIV granted the Court jurisdiction for an indeterminate period of time from 19 September 2002 onwards. The Appellant is seeking to impose an artificial limited temporal scope or supplementary condition to the Article 12(3) declaration in contradiction to the plain meaning and intent of the language used therein, and also in contradiction to the Guiding Principles upon which the Appellant relies.

³⁰ ICC-02/11-01/11-240 OA2, para.103. *See also* ICC-02/11-01/11-129-Corr-tENG, para.71.

³¹ ICC-02/11-01/11-01/11-251 OA2, para.51.

³² ICC-02/11-01/11-258 OA2, para.15.

³³ ICC-02/11-01/11-240 OA2, para.103.

³⁴ ICC-02/11-01/11-156-tENG, para.31. Citing International Law Commission, General Assembly, Official Records, 61st session, Supplement No.10 (N61/10), p.386. *Italics added.*

Grounds 6 to 10 of the Appellant's appeal:

21. Whether the Chamber erred in law in relation to the Appellant's allegations concerning serious violations of his rights, as follows, in: its interpretation of the scope of application of Article 55(1) of the Statute (Ground 6); its interpretation of the scope of control of the Court pursuant to Article 59(2) (Ground 7); re-qualifying the request based on serious violations of the Appellant's rights as an abuse of process (Ground 9); the necessary conditions for finding an exception to jurisdiction (Ground 10); and whether the Chamber made an error of fact in not finding a violation of Article 59(2) during the procedure of transfer to the Court (Ground 8)

22. The Prosecution does not consider that it is necessary to adopt the CIV's approach to analysing the Chamber's interpretation or application of Articles 55 and 59 of the Statute by relying on the terms *ratione materiae*, *ratione personae* and *ratione temporis*. These concepts are more commonly used in the context of analysing a court's jurisdiction;³⁵ whilst, as the CIV itself argues, alleged violations of Articles 55 and 59 of the Statute do not amount to grounds for challenging the Court's jurisdiction under Article 19.

23. The Prosecution also concurs with the CIV's views regarding Articles 55 and 59 as follows:

- (i) The alleged violations of Articles 55 and 59 of the Statute do not amount to grounds for challenging jurisdiction or admissibility of a case under Articles 17 and 19, but instead can only be considered relevant to an application to stay proceedings where, because "the

³⁵ See ICC-01/04-01/06-772 OA4, para.21, as the Appeals Chamber has stated: "The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim *jurisdiction ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim *jurisdiction ratione personae*, territorial jurisdiction - *jurisdiction ratione loci* - and lastly *jurisdiction ratione temporis*."

breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place...”.³⁶

- (ii) Articles 55 and 59 should be construed in accordance with their clear and unambiguous meaning,³⁷ and not be interpreted broadly and incorrectly in the manner asserted by the Appellant.³⁸
- (iii) Accordingly, the Chamber took the correct approach in interpreting Articles 55 and 59 and rejecting the Appellant’s arguments that violations of these provisions should cause the Chamber to refuse to exercise its jurisdiction and/or impose a permanent stay of proceedings.³⁹ In particular, it was manifestly reasonable for the Chamber to conclude in this case that:⁴⁰

- a. it should focus on ensuring that the suspect’s “basic safeguards” under Article 59 were protected;
- b. under Article 55 only those acts attributable to organs of the Court or performed at their behest were relevant; and
- c. as regards the relevant temporal scope of Articles 55 to 59: (1) the relevant ‘arrest’ under Article 59 occurred after the CIV received the request for arrest and transfer to the Court; and (2) Article 55 rights are not triggered automatically the moment the Prosecution’s investigation commences, but come into play when actions are taken against the person at the behest of the Prosecutor.

³⁶ See ICC-02/11-01/11-156-tENG, para.20, citing ICC-01/04-01/06-772 OA, para.34. See also ICC-02/11-01/11-258 OA2, paras.17-20.

³⁷ ICC-02/11-01/11-251 OA2, paras. 55-62, 67-72; ICC-02/11-01/11-258 OA2, paras.18-19, 27-38.

³⁸ ICC-02/11-01/11-251 OA2, paras.55-62, 66-69.

³⁹ ICC-02/11-01/11-129-Corr-tENG, paras. 109-304, p.74; ICC-02/11-01/11-240, p.45. See also ICC-02/11-01/11-258 OA2, paras.18-19.

⁴⁰ ICC-02/11-01/11-258 OA2, paras.27-33.

CONCLUSION

24. The Prosecution concurs with the Victims and the CIV that the Appellant's Application should be rejected by the Appeals Chamber.



Fatou Bensouda, Prosecutor

Dated this 18 October 2012

At The Hague, The Netherlands