

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 10 July 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public Document

Prosecution response to Defence request for authorisation to reply to the observations of the Prosecution and OPCV regarding the Defence challenge to jurisdiction of the International Criminal Court

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. On 6 July 2012 the Defence filed a « *Demande d'autorisation aux fins de répliquer aux observations du Procureur et du Représentant légal commun des victimes relatives à la requête de la Défense contestant la compétence de la Cour Pénale Internationale* »¹ (Defence's Request).
2. The Prosecution submits that Pre-Trial Chamber I ("Chamber") should reject the Defence's Request since it does not raise new issues of facts or law.² The Defence's Request simply highlights anticipatable differences in the arguments of the Defence and the Prosecution and Legal Representative on issues raised by the Defence.³ Given that there is no automatic right to reply, any party that affirmatively seeks relief is obligated to reasonably anticipate and address possible counter-arguments in its initial application.⁴ The Defence here is seeking another opportunity to expand on their arguments, which they have already had ample opportunity to present in their 79-page initial application contesting the Court's jurisdiction.⁵ But all the points raised by the Defence either could have been foreseen in their initial application challenging the Court's jurisdiction or do not require a response.⁶
3. The Prosecution thus respectfully submits that the already-submitted briefs on the multiple jurisdictional challenges are adequate to fully address the Defence's claims. That said, ultimately, it is up to the Chamber to determine if it is "sufficiently informed to reach a decision"⁷ without unnecessary delay and without the proposed reply brief.⁸

¹ ICC-02/11-01/11-174.

² ICC-01/04-01/10-61, p. 3; ICC-02/05-03/09-147, paras. 4-5.

³ ICC-02/11-01/11-174, paras. 28-36.

⁴ ICC-01/04-01/07-3279, para. 11.

⁵ ICC-02/11-01/11-129.

⁶ ICC-02/11-01/11-129.

⁷ ICC-01/04-01/07-2792, para. 6; ICC-01/04-01/07-3279, para. 11.

⁸ ICC-02/11-01/11-164-Conf, para. 21.

Submissions

(1) Impact of the prior decision pursuant to Article 15 of Pre-Trial Chamber III

4. The Defence asserts that the reference to the procedural history by the Prosecution and OPCV, in particular the decision concerning the validity of the 18 April 2003 declaration, raises the question of the effect of prior decisions taken by Chambers on the proceedings in the absence of a contradictory debate.⁹
5. However, when referring to the procedural history in which Pre-Trial Chamber III found that there was a valid declaration made by the State of Côte d'Ivoire,¹⁰ the Prosecution never asserted that the Chamber is *bound* by that decision but was submitting that the Chamber could adopt this same approach.¹¹

(2) Competence of the Court to assess the authority of the person making a declaration on behalf of a State

6. The Defence asserts that the Prosecution has raised a “new” question which the Defence did not develop as to the capacity of the Chamber, when determining the legality of a declaration made under Article 12(3), to evaluate whether Mr Ouattara was entitled to represent Côte d'Ivoire.¹²
7. However, the Prosecution submits it was simply responding to the Defence arguments that Mr Ouattara did not have the authority to sign the letter of 14 December 2010 (or the letter of 3 May 2011) as President of Côte d'Ivoire and that those letters did not constitute valid “declarations” under Article 12(3).¹³ By raising that issue, the Defence clearly asserted, even without articulating it expressly, that the Court could adjudicate its claim. Assuming that the Court's

⁹ ICC-02/11-01/11-174, paras. 28-29.

¹⁰ ICC-02/11-01/11-167-Conf-Corr, para. 15.

¹¹ ICC-02/11-01/11-167-Conf-Corr, para. 14.

¹² ICC-02/11-01/11-174, para. 30.

¹³ ICC-02/11-01/11-129, paras. 90-100.

capacity to determine whether Mr Ouattara was the lawfully elected head of state is independent of the merits of the argument, *i.e.* that Mr Ouattara could not speak for the CIV government, the Defence's failure to address this obvious and fundamental threshold question does not make it a "new issue" for these purposes.

(3) Rules of interpretation of the 18 April 2003 declaration and letters of the State

8. The Defence asserts that the OPCV has raised issues regarding rules of interpretation of the declaration of 18 April 2003¹⁴ that give rise to complex questions that it must have a chance to respond to.¹⁵ However, the Prosecution observes that the Defence made extensive submissions relating to the interpretation of the declaration of 18 April 2003¹⁶ (and letters of 2010 and 2011)¹⁷ in their initial application and the OPCV was simply responding to those submissions.¹⁸

(4) Article 55

9. The Defence seeks to respond to the Prosecution and OPCV submissions as to the scope of the application of Article 55 of the Rome Statute. In particular the Defence asserts that if, as the Prosecution argues, the Prosecution cannot ask a State to take into custody a person before an arrest warrant is issued, then this raises the question as to which entity Article 55 would refer to when there is an issue of arbitrary detention, inhumane and degrading treatment and torture.¹⁹

¹⁴ ICC-02/11-01/11-165, paras. 15-35.

¹⁵ ICC-02/11-01/11-174, para. 31.

¹⁶ ICC-02/11-01/11-129, paras. 56-89.

¹⁷ ICC-02/11-01/11-129, paras. 90-108.

¹⁸ ICC-02/11-01/11-165, paras. 15-35.

¹⁹ ICC-02/11-01/11-174, para. 32.

10. However, the Prosecution submits it and OPCV were responding to: (a) the Defence's assertions in their initial application that if the CIV authorities had not detained Mr Gbagbo then the Prosecution would have sought to do so;²⁰ and (b) the Defence's arguments that Article 55 also applied to violations of Mr Gbagbo's rights during his prior period of detention with the CIV authorities before his transfer to the Court.²¹ Having invoked Article 55, the Defence cannot now argue that the response, that Article 55 is inapplicable in these circumstances, raises a new issue. Put another way, its failure to deal with the specific statutory language of Article 55 when raising an Article 55 claim does not now entitle it to a reply.²²

(5) Burden of proof in determining the nature of the contacts between the Prosecution and authorities of Côte d'Ivoire

11. The Defence asserts that the response of the Prosecution on the issue of the nature of the cooperation between the Prosecution and the CIV authorities on the detention of the Suspect prior to his arrest on this Court's charges, raises questions as to the burden of proof, bearing in mind the Defence has no access to the exchanges between the Prosecution and the CIV authorities.²³

12. The Prosecution reminds the Chamber that CIV authorities took Mr Gbagbo into detention, for completely unrelated financial crimes, months before the OTP case was initiated. There is thus not even a colorable claim that the CIV authorities detained him at the behest of the OTP sufficient to impute to the OTP any responsibility for the alleged mistreatment that he claims to have suffered at their hands. But even if the Defence is correct – a point the Prosecution does not concede – that the Prosecution bears the burden of disproving the unsupported

²⁰ ICC-02/11-01/11-129, paras. 258-261.

²¹ ICC-02/11-01/11-129, paras. 255-261.

²² ICC-02/11-01/11-167-Conf-Corr, para. 34. Article 55(1) and (2) must be read together.

²³ ICC-02/11-01/11-174, paras. 33-34.

allegation of collusion, the Prosecution did so. It stated in its response that it was not involved in Mr Gbagbo's prior detention and there was no concerted action between the Prosecutor and the CIV authorities to detain him to ensure he would be available for future surrender to the Court. Moreover, the Prosecution recalls that in its arrest warrant application, it did disclose to the Chamber the information in its possession concerning the basis for Mr Gbagbo's detention.²⁴ The Prosecution submits that even if it would have any burden of proof, it would be very difficult, in the circumstances, to prove a negative. As Officers of the Court, the Prosecution is on record stating that Mr Gbagbo was not detained by the national authorities at the Prosecution's behest and was not in the Court's constructive custody.²⁵

(6) Lubanga jurisprudence

13. The Defence asserts that the Prosecution has wrongly interpreted the test posed by the *Lubanga* jurisprudence as to the criteria for a stay of proceedings; in particular, contrary to what the Prosecution asserts for matters of torture and inhumane and degrading treatment, the test does not require direct collaboration with an organ of the Court.²⁶
14. The Prosecution observes that this is a matter of interpretation of a judicial decision, which this Court is fully able to do without additional submissions from the Defence.²⁷

²⁴ ICC-02/11-01/11-87-Conf-Exp-Red2, para. 132.

²⁵ ICC-02/11-01/11-167-Conf-Corr, para. 27.

²⁶ ICC-02/11-01/11-174, para. 35.

²⁷ See, e.g., ICC-02/05-03/09-294-Red, para. 7 (Defence denied leave to reply to address whether Prosecution misrepresented holdings of the ECHR).

(7) Scope of Article 59

15. Finally, the Defence asserts that it should have the right to reply to the Prosecution's analysis of the scope of Article 59 of the Statute.²⁸
16. The Prosecution observes that it did not argue that violations of national law in connection with the transfer of Mr Gbagbo are irrelevant. Rather, it observed in its response that Pre-Trial Chamber I in *Lubanga* correctly limited itself in its assessment to whether the national authorities committed material breaches of Article 59(2) during the execution of the Court's cooperation request.²⁹ Thus, the Prosecution's position was that Article 59(2) is irrelevant to the particular Defence allegation, that CIV authorities violated Mr Gbagbo's rights during the period prior to this Court's issuance of the arrest warrant. Again, by invoking Article 59(2) to challenge pre-ICC-arrest events in the custodial State, the Defence should have anticipated the responsive argument that Article 59 does not apply. The wholly predictable Prosecution response to that effect is neither objectively a surprise nor a new issue meriting an opportunity to reply.³⁰

²⁸ ICC-02/11-01/11-174, para. 36.

²⁹ ICC-02/11-01/11-167-Conf-Corr, para. 58.

³⁰ ICC-02/11-01/11-167-Conf-Corr, paras. 42-43.

Conclusion

17. For all the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Defence's Request in its entirety.



Fatou Bensouda, Prosecutor

Dated this 10th day of July 2012

At The Hague, The Netherlands