



Original: **French**

No.: **ICC-02/11-01/11**

Date: **6 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 CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Application for leave to reply to the observations of the Prosecutor and the common legal representative of victims on the Defence challenge to the jurisdiction of the International Criminal Court

Source: Defence team for President Gbagbo

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

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I. INTRODUCTION

1. Pursuant to regulation 24(5) of the Regulations of the Court, the Defence hereby applies to Pre-Trial Chamber I for leave to reply to the Prosecution response¹ and the observations of the common legal representative of victims² regarding the jurisdiction of the Court.

2. The Defence reply is necessary because the Prosecutor and the Legal Representative of Victims base their arguments on a misinterpretation of certain Defence arguments and raise new questions of law; accordingly, granting the Defence leave to reply would enable it to address the most important of the new issues, that is, those which could have a definite impact on further proceedings.

II. PROCEDURAL BACKGROUND

3. On 24 May 2012, the Defence filed a challenge to the Court's jurisdiction on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute.³

4. On 15 June 2012, Pre-Trial Chamber I issued the *Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute*,⁴ in which it ruled that, for the proceedings relating to the jurisdiction of the Court, the Office of Public Counsel for Victims ("the OPCV") could represent those victims who had submitted applications to participate in the proceedings and whose applications had not yet been assessed by the Chamber.⁵ Furthermore, the Pre-Trial Chamber confined the intervention of the parties and participants to providing written observations⁶ and ordered the Prosecutor and the OPCV to file their observations on the Defence challenge no later than 27 June 2012.⁷

5. That same day, the Republic of Côte d'Ivoire filed an application for leave to submit observations on the challenge to the jurisdiction of the International Criminal Court.⁸

¹ ICC-02/11-01/11-167.

² ICC-02/11-01/11-165.

³ ICC-02/11-01/11-129. Corrigendum filed on 29 May 2012 (ICC-02/11-01/11-129-Corr-tENG).

⁴ ICC-02/11-01/11-153.

⁵ ICC-02/11-01/11-153, p. 5.

⁶ ICC-02/11-01/11-153, para. 9.

⁷ ICC-02/11-01/11-153, p. 5.

⁸ ICC-02/11-01/11-154.

6. On 18 June 2012, the OPCV filed a “Request to access documents in relation to the Defence Challenge to the Jurisdiction of the Court”⁹ seeking access to all the confidential documents annexed to the Defence challenge to the Court’s jurisdiction. The Defence responded on 21 June 2012, opposing the request.¹⁰

7. That same day, without having received authorisation, the Republic of Côte d’Ivoire filed “*Observations de la République de Côte d’Ivoire sur la requête en incompétence de la Cour pénale internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut de Rome*”.¹¹

8. On 25 June 2012, the Defence prayed the Chamber to dismiss the requests of counsel for the Republic of Côte d’Ivoire to file observations on the jurisdiction of the International Criminal Court.¹²

9. On 27 June 2012, the Prosecutor filed a response to the Defence challenge to the jurisdiction of the International Criminal Court,¹³ and the OPCV filed observations on the Defence challenge on behalf of the victims.¹⁴

III. APPLICABLE LAW

10. Regulation 24(5) of the Regulations of the Court states:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

11. Under regulation 34(c) of the Regulations of the Court, a reply shall be filed within ten days of notification in accordance with regulation 31 of the Regulations.

12. Under regulation 33(1)(b) of the Regulations of the Court, the day of notification of a document, decision or order shall not be counted as part of the time limit. Regulation 33(1)(d) provides that documents shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of the time limit.

⁹ ICC-02/11-01/11-155.

¹⁰ ICC-02/11-01/11-160.

¹¹ ICC-02/11-01/11-156.

¹² ICC-02/11-01/11-163.

¹³ ICC-02/11-01/11-167-Conf.

¹⁴ ICC-02/11-01/11-165.

13. Under rule 58(2) of the Rules of Procedure and Evidence, the Chamber “shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings” for the purposes of an application pursuant to article 19 of the Statute.

14. A previous decision of the Court stipulated that leave may be granted to reply for a variety of reasons, where good cause to grant such leave has been shown.¹⁵

IV. DISCUSSION

1. The grounds for reply

15. These grounds pertain to the nature of the issues raised and to their importance.

1.1 The nature of the issues raised

16. The Defence notes that the observations of the Prosecution and the Legal Representative of Victims raise new questions of law requiring detailed analysis and response.¹⁶ The issues are the following: the effect of decisions of the Chamber not taken in accordance with the adversarial principle on the subsequent proceedings; *Kompetenz-Kompetenz* [Court jurisdiction to determine its own jurisdiction]; the rules for interpreting letters and declarations from States; the scope of article 55 of the Statute; the scope of article 59 of the Statute; the manner of determining the burden of proof regarding the content of correspondence between the Prosecutor and national authorities and the scope of article 59 of the Statute.

17. The Prosecutor’s approach to these points, based on a misinterpretation of the Defence arguments, raises new questions which must be addressed by the Defence; otherwise, the Prosecutor’s statements would be assessed in a non-adversarial manner.

18. Moreover, the new questions raised by the Prosecutor as a consequence of his interpretation – or misinterpretation – of the Defence arguments complicate the matter by harking back to complex issues,¹⁷ notably general international law, which warrant further discussion.

¹⁵ ICC-01/05-01/08-294, para. 3.

¹⁶ ICC-01/04-01/07-3279, para. 11; ICC-02/05-03/09-261, para. 5.

¹⁷ ICC-01/04-01/06-173-tEN, p. 4.

1.2 The importance of the issues raised

1.2.1 Significant impact on the continuation of the trial

19. As the Prosecutor has addressed a number of points in a novel and complex manner, the issues raised need to be discussed because resolving them will be decisive for the continuation of the trial.¹⁸

20. In this respect, the Defence emphasises the vital importance of the issue of jurisdiction, which is far more than a mere procedural step. Indeed, the Chamber may find that it lacks jurisdiction in the case of President Gbagbo. In light of the potential consequences of the issue brought before the Pre-Trial Chamber on the continuation of the proceedings and on whether a trial will be held, the Defence submits that it is vital that it be allowed to reply to the enumerated issues raised. It is in the interests of justice¹⁹ that the Defence should be able to reply to these particular points, which have the greatest bearing on the resolution of the issue of the Court's jurisdiction.

21. A past decision in *Lubanga* was taken "considering the potential impact of the issue dealt with and the prosecution response on the ongoing process [...]".²⁰

22. It is worth noting that the Defence wishes to reply only to the most important questions, those which must necessarily be addressed in order to resolve the issue raised, and not to all the questions raised in the responses of the Prosecutor and the Legal Representative of Victims, even though these responses exhibit a certain lack of understanding of the Defence arguments and/or a refusal to address the facts.

1.2.2 Protecting the rights of the Defence

23. It is also important from the perspective of the rights of the Defence that the Defence be allowed to reply. As the Accused may raise objections based on lack of jurisdiction only once, as stipulated in article 19(4) of the Statute, it is vital that the Defence be allowed to present in full its arguments regarding the issues raised by the Prosecutor and the Legal Representative of Victims. In the event that the Chamber declined to allow the trial to continue, the Prosecutor would have the right and the opportunity to request the Chamber to

¹⁸ ICC-01/04-01/06-236, p. 2; ICC-01/04-01/10-61, p. 4.

¹⁹ ICC-02/05-03/09-147, para. 5

²⁰ ICC-01/04-01/06-236.

review its decision in light of new facts.²¹ It is, therefore, essential that the Pre-Trial Chamber allow the Defence to bring all relevant issues to its attention before ruling on the challenge to jurisdiction, in accordance with respect for the rights of the Defence, in particular its right to have the last word.²²

1.2.3 Beyond the instant case

24. Furthermore, the Chamber's decision, in particular regarding the law applicable to declarations made pursuant to article 12(3) of the Statute, will reverberate far beyond the instant case. The Chamber will, in fact, be the first to rule on this issue. In light of the vital importance of the matter to be addressed,²³ the proceedings should be as exhaustive as possible and the Defence should be able to express itself fully and precisely. The issue raised is decisive, not only for the Defence, but also for the institution as a whole.

1.2.4. The raisons d'être for a reply

25. Lastly, the Court's own philosophy itself also serves as a ground for granting leave to reply. The clarifications which the Defence intends to present to the Court are consonant with the philosophy of judicial proceedings which, in addition to upholding the adversarial principle, are dedicated to the ascertainment of the truth, with the parties being servants to the truth above and beyond their own individual interests. The dialectical tradition underpinning modern reasoning, which is interwoven with and actuated by adversarial debate, with the judges as its guarantors in the case of court proceedings, should lead the Chamber to grant the Defence leave to reply in recognition of the fact that the reply would enlighten the Chamber²⁴ and assist it to arrive at a better resolution of the issue, by virtue of the more thorough discussions which it would engender.²⁵

2. The issues to be raised in the reply

26. The Defence wishes to raise several issues in its reply. These issues will satisfy the requirements relating to their nature, importance, impact on the proceedings, etc.

²¹ Article 19(10) of the Statute.

²² ICC-01/04-01/06-T-29-FR, pp. 23-24; ICC-01/05-01/08-T-13-FRA, pp. 7-8. See also rules 140 and 141 of the Rules.

²³ ICC-01/04-01/07-1004-tENG, para. 3; ICC-01/04-01/10-61, p. 4.

²⁴ ICC-02/11-01/11-164-Conf, para. 21.

²⁵ ICC-01/04-01/07-T-104-Red-ENG WT 18-02-2010, pp. 6-7.

27. The Defence wishes to draw the Chamber's attention to the fact that, in light of the misinterpretation of the Defence arguments by the Prosecutor and the Legal Representative of Victims and their propensity to shift the debate so as to evade responding directly to the Defence arguments, it could raise further issues but will raise only the most important in order to contribute to the expeditiousness and effectiveness of the proceedings. In seeking to enlighten the bench to the greatest possible degree, the Defence has confined itself to those questions of law which it considers essential to determining the final outcome of the proceedings.

2.1 Procedural history

28. The reference to the procedural history by the Office of the Prosecutor and the victims raises a new question of law: the effect on the proceedings of decisions taken by the Chamber in the absence of any adversarial debate.

29. For example, contrary to the submission of the Prosecutor and the victims, the issue of the validity of the 18 April 2003 declaration cannot already have been determined²⁶ because there has been no adversarial debate on the matter.

2.2 *Kompetenz-Kompetenz*

30. The Prosecutor raises a new question of law, which was not discussed in the initial request, concerning the precise powers of the Chamber in determining the legality of an article 12(3) declaration, in particular as regards assessing the capacity to act of the declaration's author. This article raises complex issues with regard to the relationship between the Court and general international law, and the purview of the rule, recognised in international law, that a court has *Kompetenz-Kompetenz*, that is, the capacity to determine its own jurisdiction and, hence, the attendant powers. In the instant case, this means the Chamber is indeed able, contrary to the Prosecutor's assertion, to assess whether Mr Ouattara's status vested him with the capacity to represent Côte d'Ivoire on 14 December 2010, especially in light of the provisions of international law on the recognition of States and, in the alternative, whether he was empowered to make commitments on behalf of his country before the International Criminal Court. The novelty of the issue, the fundamental nature of the debate to which it gives rise and its complexity justify, therefore, that the Defence be granted leave to reply on this point.

²⁶ ICC-02/11-01/11-165, para. 14; ICC-02/11-01/11-167-Conf, para. 15.

2.3 The rules for the interpretation of letters and declarations from States

31. Similarly, the victims' arguments on the applicable rules for interpreting the 18 April 2003 declaration²⁷ raise a complex question of law concerning the relationship between the ICC and general international law. As this question is being raised before the Court for the first time under article 12(3), the Chamber's decision will certainly have an impact on other cases. Moreover, the question of which law is applicable to article 12(3) declarations will be essential to determining the issue of jurisdiction in the instant case. For these reasons, this legal issue warrants detailed discussion in order for the Chamber to make an enlightened decision.

2.4 The scope of article 55 of the Statute

32. The observations of the Office of the Prosecutor and the Legal Representative of Victims on the scope of article 55 of the Statute and the guarantees it provides for the protection of persons being investigated raise a fundamental question of principle warranting a reply by the Defence. If, as the Prosecutor maintains, he can never seek a person's arrest as part of a preliminary investigation,²⁸ the question arises as to which institution is targeted by the article in its prohibition of arbitrary detention, inhuman and degrading treatment and torture.

2.5 The party to whom the burden of proof falls in determining the content of correspondence between the Prosecutor and national authorities

33. The Prosecutor's response in regard to the issue of his cooperation with the authorities of Côte d'Ivoire raises a new question of law pertaining to the burden of proof. The manner in which a professional investigation is conducted and the provisions of the Rome Statute²⁹ necessarily mean that the Prosecutor would have sought information specifically about the situation of President Gbagbo. To enlighten the Chamber in this debate prompted by the Prosecutor, the Defence must argue this issue, which was not addressed in its initial application, of the obligation incumbent upon the Prosecutor to prove – in accordance with the letter and the spirit of the Statute – by providing all appropriate evidence, that his correspondence with the Ivorian authorities never mentioned this matter.

²⁷ ICC-02/11-01/11-165, paras. 15-35.

²⁸ ICC-02/11-01/11-167-Conf, para. 32.

²⁹ Article 53(1)(b) of the Statute.

34. Any other interpretation of the burden of proof would place a disproportionate obligation on the Defence, since the Defence does not have access to the correspondence between the Prosecutor and the authorities of Côte d'Ivoire and the Prosecutor has consistently refused to provide access to it.³⁰

2.6 Criteria for terminating proceedings on the grounds of torture and ill-treatment

35. The Prosecutor's misinterpretation of the test provided by the jurisprudence in *Lubanga* on the criteria for terminating proceedings warrants a Defence reply. Contrary to the Prosecutor's assertion,³¹ in cases of torture and inhuman and degrading treatment, the test does not require direct collaboration with an organ of the Court. By denying the substance of the *Lubanga* test, the Prosecutor is seeking to avoid responsibility for his inaction in the face of the extremely serious violations of the rights of the Accused which were committed before his very eyes.

2.7 Scope of article 59 of the Statute

36. The Prosecutor's analysis of the scope of article 59 of the Statute raises a fundamental question regarding the article's ambit which warrants reply by the Defence. The Prosecutor is denying the obligation incumbent upon national authorities pursuant to article 59(2) of the State to respect national law in carrying out the transfer process any importance or effect and, thereby, any scope. By merely verifying the conditions governing the application of article 59, whilst dismissing arguments based on breaches of national law, the Prosecutor renders meaningless this provision of the Rome Statute, clear as it is. If the Chamber were to follow his lead, the repercussions on the effectiveness of the Court's power of scrutiny would be significant and the purpose of article 59's very presence in the Statute would be called into question. To what end might the Statute's authors have included this article if they did not intend the Chamber to have a genuine power of scrutiny and for there to be an effective remedy in the event the provisions of the article were violated? If the Prosecutor's reasoning is followed, article 59 would be merely ornamental. This risk warrants a discussion of the Prosecutor's position by the Defence so that the Chamber may be fully enlightened.

³⁰ E-mail correspondence between the Defence for President Gbagbo and the Prosecutor, 21 May and 25 June 2012.

³¹ ICC-02/11-01/11-167-Conf, para. 38.

3. Time limits

37. According to the *chapeau* of regulation 34(c) of the Regulations of the Court, the Chamber may set a time limit other than that provided for in regulation 34.³²

38. Given the importance of the ongoing debate on jurisdiction and the potential impact of the new questions raised by the Prosecutor and the Legal Representative of Victims, the Defence prays the Chamber to grant it fifteen days to file its reply and to order that the time limit shall begin on the date of the decision granting leave to reply.³³

39. Consequently, the Chamber is respectfully requested to grant President Gbagbo's defence team leave to reply to the "Prosecution Response to Defence motion for a declaration on lack of jurisdiction of the Court based on Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute"³⁴ and the "Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court"³⁵ no later than fifteen days from the decision granting it leave to reply.

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

- **Grant** the Defence the right to reply to the "Prosecution Response to Defence motion for a declaration on lack of jurisdiction of the Court based on Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute" and the "Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court";
- **Allow** the Defence to file its reply no later than fifteen days from the decision granting it leave to reply;
- **Order** that the reply shall be no longer than forty pages

[signed]

Emmanuel Altit

Lead Counsel for Mr Laurent Gbagbo

Dated this 6 July 2012 at The Hague, The Netherlands

³² See, e.g., ICC-01/04-01/06-236, p. 4; ICC-01/04-01/10-61, para. 4.

³³ See, e.g., ICC-01/04-01/06-173, p. 4; ICC-01/04-01/06-359, p. 4.

³⁴ ICC-02/11-01/11-167-Conf.

³⁵ ICC-02/11-01/11-165.