



Original: English

No. ICC-02/11-01/11 OA 2

Date: 16 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 THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT KOUDOU GBAGBO

Public document

Decision on requests related to page limits and reclassification of documents

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

The Office of Public Counsel for Victims
Ms Paolina Massidda

States Representatives
Mr Jean-Pierre Mignard
Mr Jean-Paul Benoit

REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Gbagbo against the decision of Pre-Trial Chamber I, entitled “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 Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’” of 15 August 2012 (ICC-02/11-01/11-212),

Having before it the “Observations de la République de Côte d’Ivoire sur le document à l’appui de l’appel de la « *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 Rome Statute filed by the Defence for President Gbagbo »” of 8 October 2012 (ICC-02/11-01/11-258), in which a request for an extension of the page limit is made, and the “Observations on behalf of victims on the Defence’s document in support of the appeal against the Pre-Trial Chamber I’s Decision on the Defence Challenge to the Jurisdiction of the Court” of 8 October 2012 (ICC-02/11-01/11-259), in which the Appeals Chamber is requested to reconsider its “Decision on Observations submitted by OPCV on behalf of victims” of 5 October 2012 (ICC-02/11-01/11-256), in which the Appeals Chamber decided to disregard the observations that the Office of Public Counsel for victims had filed on that day (ICC-02/11-01/11-255) because it exceeded the page limit,

Renders unanimously the following

DECISION

- 1) The request by the Republic of Côte d’Ivoire for an extension of the page limit for its observations is rejected.
- 2) The request by the victims represented by the Office of Public Counsel for victims that the Appeals Chamber reconsiders its “Decision on Observations submitted by OPCV on behalf of victims” of 5 October 2012 is rejected.
- 3) The Republic of Côte d’Ivoire shall provide reasons for its request that certain documents be classified as confidential by 22 October 2012, 16h00.

REASONS

I. PROCEDURAL HISTORY

1. On 31 August 2012, the Appeals Chamber issued the “Directions on the submission of observations”¹ (hereinafter: “Directions”), *inter alia* inviting the Republic of Côte d’Ivoire (hereinafter: “Côte d’Ivoire”), pursuant to rule 103 (1) of the Rules of Procedure and Evidence, to make, by 28 September 2012, observations on Mr Laurent Koudou Gbagbo’s (hereinafter: “Mr Gbagbo”) document in support of the appeal against Pre-Trial Chamber I’s “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 Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’” of 15 August 2012.² The Appeals Chamber also invited the victims who were allowed to file observations in the proceedings before the Pre-Trial Chamber to submit observations, under article 19 (3) of the Statute, on Mr Gbagbo’s document in support of the appeal and the Prosecutor’s response thereto.

2. On 28 September 2012, Côte d’Ivoire filed the “Observations de la République de Côte d’Ivoire sur le document à l’appui de l’appel de la « *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 Rome Statute filed by the Defence for President Gbagbo »”³ (hereinafter: “Initial Observations by Côte d’Ivoire”), containing 37 pages.

3. On 1 October 2012, the Appeals Chamber rendered the “Decision on Observations submitted by the Republic of Côte d’Ivoire”⁴ (hereinafter: “Decision on Observations by Côte d’Ivoire”), *inter alia* deciding that the Initial Observations by Côte d’Ivoire should be disregarded and inviting Côte d’Ivoire to submit observations on Mr Gbagbo’s document in support of the appeal by 8 October 2012, stating that such observations must comply with regulations 37 (1) and 23 (3) of the Regulations

¹ ICC-02/11-01/11-236 (OA 2).

² ICC-02/11-01/11-212.

³ ICC-02/11-01/11-250 (OA 2).

⁴ ICC-02/11-01/11-254 (OA 2).

of the Court. The Appeals Chamber indicated that the reasons for this decision would be given in the judgment on this appeal.

4. On 5 October 2012, the Office of Public Counsel for victims (hereinafter: “OPCV”) filed, on behalf of the victims it represented, the “Observations on behalf of victims on the Defence’s document in support of the appeal against Pre-Trial Chamber I’s Decision on the Defence Challenge to the Jurisdiction of the Court”⁵ (hereinafter: “Initial Observations by OPCV”), containing 22 pages. On the same day, the Appeals Chamber rendered the “Decision on Observations submitted by OPCV on behalf of victims”⁶ (hereinafter: “Decision on Observations by OPCV”), deciding to disregard the Initial Observations by OPCV and inviting the victims represented by OPCV to file observations that comply with regulation 37 (1) of the Regulations of the Court by 8 October 2012. The Appeals Chamber indicated that the reasons for this decision would be given in the judgment on this appeal.

5. On 8 October 2012, Côte d’Ivoire submitted the “Observations de la République de Côte d’Ivoire sur le document à l’appui de l’appel de la « *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 Rome Statute filed by the Defence for President Gbagbo »”⁷ (hereinafter: “Second Observations by Côte d’Ivoire”) and the OPCV submitted the “Observations on behalf of victims on the Defence’s document in support of the appeal against Pre-Trial Chamber I’s Decision on the Defence Challenge to the Jurisdiction of the Court”⁸ (hereinafter: “Second Observations by OPCV”).

II. DECISION ON THE REQUESTS FOR RECONSIDERATION

6. The Appeals Chamber notes that both Côte d’Ivoire and the OPCV request that the Appeals Chamber reconsider its previous decisions. These decisions were issued with reasons to follow in the judgment. Considering these requests and the fact that time limits are running for responses to the documents at issue, the Appeals Chamber finds it necessary for reasons of legal certainty to dispose of these requests. This requires also providing in this decision the reasons for its previous decisions, i.e. the

⁵ ICC-02/11-01/11-255 (OA 2).

⁶ ICC-02/11-01/11-256 (OA 2).

⁷ ICC-02/11-01/11-258 (OA 2).

⁸ ICC-02/11-01/11-259 (OA 2).

Decision on Observations by Côte d'Ivoire and for the Decision on Observations by OPCV.

A. Request by Côte d'Ivoire for extension of Page Limit

7. The Appeals Chamber notes that in the Second Observations by Côte d'Ivoire, the State requests the Appeals Chamber to extend the page limit for its observations under regulation 37 (2) of the Regulations of the Court and to authorise it to file all submissions made in the Initial Observations by Côte d'Ivoire.⁹ Côte d'Ivoire recalls that in that document, it had requested an extension of the page limit for its observations. It repeats its arguments made in the Initial Observations by Côte d'Ivoire, arguing that it has to respond to ten grounds of appeal of Mr Gbagbo, which he presented in a document containing 45 pages and which – in respect of ground 1 and 2 – relate to arguments that had not been raised before the Pre-Trial Chamber, as well as to serious allegations against Côte d'Ivoire.¹⁰ In its submissions, this establishes “exceptional circumstances” in terms of regulation 37 (2) of the Regulations of the Court; Côte d'Ivoire argues that it would be paradoxical if Côte d'Ivoire, which had been invited by the Appeals Chamber to make observations, were unable to make full and equitable submissions before the Appeals Chamber.¹¹

8. The Appeals Chamber disregarded the Initial Observations by Côte d'Ivoire for the following reasons. In its Directions, the Appeals Chamber invited Côte d'Ivoire to make observations, under rule 103 of the Rules of Procedure and Evidence, on the document in support of the appeal that Mr Gbagbo would file. To these observations, regulation 37 (1) of the Regulations of the Court, the general page limit of 20 pages, was applicable. The Initial Observations by Côte d'Ivoire, however, contained 37 pages. Côte d'Ivoire had not obtained, prior to the filing of the Initial Observations by Côte d'Ivoire, an extension of the page limit pursuant to regulation 37 (2) of the Regulations of the Court according to which an extension may be granted in “exceptional circumstances” only.

9. The Appeals Chamber previously held that an extension of a page limit cannot be granted retroactively:

⁹ Second Observations by Côte d'Ivoire, para. VII.

¹⁰ Second Observations by Côte d'Ivoire, para. V.

¹¹ Second Observations by Côte d'Ivoire, paras V, VI.

As the Appeals Chamber explained at paragraph 4 of its “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” of 13 July 2006 (ICC-01/04-168), “[a]n application for an extension of the page limit envisaged by the Regulations of the Court and its approval by a Chamber are prerequisites for the submission of an extended document.” Unlike regulation 35 (2), second sentence, of the Regulations of the Court in respect of time limits, the Regulations of the Court do not provide for a retroactive extension of page limits. Therefore, the Document in Support of the Appeal must be considered as being in breach of the Regulations of the Court.¹²

10. Accordingly, the Initial Observations by Côte d’Ivoire did not comply with regulation 37 (1) of the Regulations of the Court, and this non-compliance could not be cured by retro-actively extending the page limit.

11. In light of this non-compliance, the Appeals Chamber, acting under regulation 29 (1) of the Regulations of the Court, deemed it necessary in the interests of justice to order the re-filing of Côte d’Ivoire’s observations, in compliance with the page limit. The Appeals Chamber considered that in the circumstances of the case, an extension of the page limit for the re-filed observations would not be in the interest of justice because Côte d’Ivoire had failed to make a request for an extension of the page limit and simply filed a document that was too long. Had the Appeals Chamber extended the page limit for the re-filed observations, it would have implicitly condoned this non-compliance with the Regulations of the Court. The Appeals Chamber notes that Côte d’Ivoire argues that it should have the right to make submissions that are as long as Mr Gbagbo’s. However, the Appeals Chamber recalls that in the circumstances of this appeal, Côte d’Ivoire is participating by invitation of the Appeals Chamber pursuant to rule 103 of the Rules of Procedure and Evidence, and as such is not entitled under regulation 38 (1) (c) of the Regulations of the Court to exceed the 20 page limit stipulated in regulation 37 (1) of the Regulations of the Court. In addition, although Mr Gbagbo raised several grounds of appeal, they did not refer, in substance, to new facts that would require lengthy observations by Côte d’Ivoire.

12. Turning to the request for an extension of the page limit made in the Second Observations by Côte d’Ivoire, and without determining whether and under which

¹² *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the re-filing of the document in support of the appeal”, 22 July 2008, ICC-01/04-01/06-1445 (OA 13), para. 8.

circumstances the Appeals Chamber would reconsider previous decisions, the Appeals Chamber rejects the request for an extension of the page limit contained in the Second Observations by Côte d'Ivoire.

B. Request by the Victims for reconsideration

13. Turning to the Second Observations by OPCV, the Appeals Chamber notes that the victims represented by the OPCV request the Appeals Chamber to reconsider its decision to reject the Initial Observations by OPCV. The victims submit that the page limit of regulation 37 (1) of the Regulations of the Court does not apply to the victims' observations pursuant to article 19 (3) of the Statute, but rather the 100 page limit of regulation 38 (1) (c) of the Regulations of the Court.¹³

14. The Appeals Chamber's decision to disregard the Initial Observations by OPCV was based on the consideration that the 20-page limit under regulation 37 (1) of the Regulations of the Court applies to all filings before the Court, "unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber". There is no exception to this page limit for victims' observations under article 19 (3) of the Statute in any of those instruments, nor was an exception ordered by the Appeals Chamber. Notably, the limit of 100 pages that applies to challenges to the jurisdiction of the Court and responses thereto (see regulation 38 (1) (c) of the Regulations of the Court) is not applicable to observations by victims under article 19 (3) of the Statute. This is explained by the more limited role of victims in the proceedings than that of, for instance, the Prosecutor, the accused person or person in respect of whom a warrant of arrest or summons to appear was issued, or a State challenging the jurisdiction or the admissibility of a case. The Appeals Chamber notes in this context that regulation 38 (2) (a) of the Regulations of the Court establishes a page limit of 50 pages for "[r]epresentations made by victims to the Pre-Trial Chamber under article 15, paragraph 3, and rule 50, sub-rule 3". Thus, where a longer page limit for observations by victims appeared necessary, the Regulations of the Court specifically provide for it. Accordingly, the Initial Observations by OPCV did not comply with regulation 37 (1) of the Regulations of the Court. Acting under regulation 29 (1) of the Regulations of the Court, the Appeals Chamber deemed it necessary in the interests of justice to order the re-filing of the observations.

¹³ Second Observations by OPCV, paras 12, 13, 15.




15. In the present case, without determining whether and under which circumstances the Appeals Chamber would reconsider previous decisions, the Appeals Chamber rejects the request by the OPCV, which was based on a misinterpretation of regulations 37 (1) and of regulation 38 (1) (c) of the Regulations of the Court.

III. REQUEST BY CÔTE D'IVOIRE FOR RECLASSIFICATION OF DOCUMENTS

16. The Appeals Chamber notes that Côte d'Ivoire requests¹⁴ the Appeals Chamber to reclassify as confidential the Initial Observations by Côte d'Ivoire, as well as the observations transmitted by Ms Karine Wetzel, dated 28 September 2012, which the Registrar transmitted to the Appeals Chamber on 1 October 2012.¹⁵ The Appeals Chamber observes that Côte d'Ivoire does not indicate any specific reason for its request for reclassification, apart from recalling that the Initial Observations by Côte d'Ivoire had been rejected and that Ms Wetzel had filed a document on behalf of Côte d'Ivoire. As is indicated by regulation 23*bis* (1) of the Regulations of the Court, it is important for participants to state the factual and legal basis for the chosen classification of a document, so as to allow the Chamber to assess whether that classification should be maintained. This also applies *mutatis mutandis* to requests to reclassify as confidential documents that were originally filed as public.

17. Accordingly, the Appeals Chamber gives Côte d'Ivoire the opportunity to specify reasons for the re-classification and to indicate precisely the document numbers of the filings it wishes to classify as confidential.

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka
Presiding Judge

Dated this 16th day of October 2012

At The Hague, The Netherlands

¹⁴ Second Observations by Côte d'Ivoire, para. IV.

¹⁵ Annex 1 to "Transmission du Greffe d'un document reçu le 28 septembre 2012 à 15h35 de Mme Karine Wetzel, Conseillère Représentante de l'État de Côte d'Ivoire auprès de la Cour pénale internationale", dated 28 September 2012 and registered on 1 October 2012, ICC-02/11-01/11-253 (OA 2).