Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-02/11-01/15**
Date: **8 June 2018**

TRIAL CHAMBER I

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public Document

Motion for the Dismissal *In Limine* of the "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion" (ICC-02/11-01/15-1179).

Source: **Defence team for Laurent Gbagbo**

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

Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence of Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for the Defence of Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'Dry

Legal Representatives of Victims
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

Victims Participation and Reparations Section

Other

I. Procedural history

1. On 9 February 2018, Trial Chamber I issued an "Order on the further conduct of the proceedings", inviting the Prosecution to file an "updated trial brief" and stating that:

> Once the Defence teams have received the updated trial brief, they will be in a position to make written observations on the continuation of the trial proceedings. Each Defence team shall indicate whether or not they wish to make any submission of a no case to answer motion or, in any event, whether they intend to present any evidence.[1]

2. On 19 March 2018, the Prosecution filed its Mid-Trial Brief.[2]

3. On 23 April 2018, the Defence for Laurent Gbagbo filed "*Observations de la Défense présentées à la suite de l'ordonnance de la Chambre 'on the further conduct of the proceedings' du 9 février 2018 (ICC-02/11-01/15-1124)*", in which it explained why "[TRANSLATION] given the particular features of this case, a no case to answer procedure' is necessary owing to the *prima facie* weakness of the prosecution evidence".[3]

4. On 4 June 2018, the Chamber issued the "Second order on the further conduct of the proceedings", ordering the Defence for Laurent Gbagbo and the Defence for Charles Blé Goudé to file, by 20 July 2018, submissions "addressing the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction".[4]

5. On 8 June 2018, the Prosecution filed an "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion".[5]

II. Submissions

6. Firstly, the Prosecution states that:

> The Prosecution respectfully requests the Trial Chamber to provide guidance on the applicable standard of a "no case to answer" motion in order to **assist the Parties** in helping

[1] ICC-02/11-01/15-1124, para. 14.
[2] ICC-02/11-01/15-1136-Conf.
[3] ICC-02/11-01/15-1157-Conf, para. 16.
[4] ICC-02/11-01/15-1174, p. 7.
[5] ICC-02/11-01/15-1179, para. 31.

> the Chamber with focused submissions and avoiding unnecessary analyses on matters inappropriate for a half-time submission.[6]

The Defence's position is as follows: the Prosecution should not stand in for the Defence and suggest that the Defence requires "guidance". The Defence clearly stated its position on the "no case to answer" procedure as early as 2015, in particular in paragraphs 44 to 51 of its filing of 21 May 2015[7] (which the Prosecution omitted to mention in its procedural background), a position that it reiterated in its filing of 23 April 2018. In the decision of 4 June 2018, the Chamber responded to any questions that might arise, while deliberately allowing the Parties a degree of flexibility so as to come to a better understanding of their position. In the Defence's view, therefore, no "guidance" is required.

7. Secondly, in the guise of a request for clarification, the Prosecution actually filed a request for reconsideration of the Chamber's order. In its motion, the Prosecution is in fact requesting the Chamber to reconsider the flexibility which it intentionally and knowingly allowed the defence teams so as to come to a better understanding of their position and, more generally, is requesting the Chamber to reconsider the manner in which it saw fit to exercise its discretion to organize the procedure in the light of the particular features of the case, allowing the defence to file submissions setting out "the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction". The Prosecution disputes that the Chamber may build a case-specific framework within which it could consider Defence submissions setting out "the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction", and seeks to impose on the Chamber a framework built under different circumstances, namely in *Ruto*.

8. It is also interesting to note that the Prosecution is attempting here to stand in for the bench as regards the content and length of any Defence submissions, which is not its role. The stance is all the more surprising as, in the Chamber's view, the

[6] ICC-02/11-01/15-1179.
[7] ICC-02/11-01/15-74.

Prosecution was less than diligent when drafting its "Mid-Trial Brief": "The Chamber has observed that the Trial Brief contains several sweeping allegations on the basis of large collections of evidence and that a certain amount of repetitions, cross-references and circularity is still present".[8]

9. The Chamber, on the basis of the position stated by the defence teams, delivered a clear and informed decision guided by pragmatism that allows for the most thorough analysis possible of the Parties' submissions.

10. The Chamber's decision affords the Defence real flexibility, which is the only way of enabling the Defence to state its position without constraints at a vital stage in the proceedings and which will then allow the Prosecution to respond in full and therefore afford the bench full discretion to hold genuine in-depth discussions with the Parties to enable it to take a vital and informed decision. The Prosecution had complete freedom to draft its "Mid-Trial Brief" as it saw fit; the Defence must be afforded the same freedom.

11. Thirdly, moreover, the Prosecution, in the guise of the request for clarification, is responding outside any procedural framework to the submissions filed by the Defence on 23 April 2018, more than six weeks ago. It is quite surprising that the Prosecution should have waited for the Chamber's decision and then responded out of time and out of context.

12. Fourthly, having responded out of time and outside any procedural framework to the Defence's submissions of 23 April 2018 (see above), the Prosecution then did something curious: it imagined what the Defence might say in its future submissions so as to disparage them in advance. For instance, it argues that the Defence will file submissions with "irrelevant arguments" in "sweeping filings stretching over several hundreds of pages". This type of submission, on which it grounds its motion, is by definition inadmissible.

[8] ICC-02/11-01/15-1174, footnote 11.

13. The Prosecution goes even further by stating that:

> In the present case, there is sufficient evidence for the Defence to answer to, as the Prosecution submitted relevant and reliable evidence for each count both at the level of the perpetration of the crime through crime base witnesses and other actors on the ground, as well as linkage evidence demonstrating the conduct, knowledge and/or the intent of the Accused.[9]

Here, the Prosecution considers itself exempt from having to prove anything whatsoever and, therefore, considers that any Defence argument is bound to fail, which illustrates a lack of understanding of the functioning of the judiciary because it assumes the role of sole custodian of the truth, to the exclusion of the Defence and especially the Judges.

14. The Prosecution should not invent what the Defence will say in its submissions. It will be able to respond at leisure to the Defence's submissions on 27 August 2018, as authorized in the order of the Chamber.

15. The Prosecution's motion must therefore be dismissed *in limine*.

In the unlikely event that the Chamber does not dismiss the Prosecution's motion *in limine*, the Defence will respond to it on the merits within the deadline prescribed for responses.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I, to:

- Dismiss *in limine* the Prosecution's motion

[signed]

_____

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 8 June 2018
At The Hague, Netherlands

[9] ICC-02/11-01/15-1179, para. 23.