

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/12 OA

Date: 23 March 2015

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Marc Perrin de Brichambaut
Judge Piotr Hofmański
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

PUBLIC

**RESPONSE to <<'Prosecution's Request to Dismiss *In Limine* and Strike Portions
of the Responses of the Government of the Republic of Côte d'Ivoire and the
Defence for Simone Gbagbo'>>**

Source: DEFENCE

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

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1. INTRODUCTION

1. On 11 December 2014, Pre-Trial Chamber I rendered its Decision on Côte d'Ivoire's challenge to the Admissibility of the case against Ms. Simone Gbagbo.¹

2. On 17 December 2014, Côte d'Ivoire filed an Appeal pursuant to Article 82, paragraph 1, (a) of the Statute of Rome against the aforesaid Decision.²

3. On 22 December 2014, the Defence for Simone Gbagbo ('the Defence') filed a Response in support of the requests of Côte d'Ivoire.³

4. On 9 January 2015, Côte d'Ivoire filed a confidential Document in support of Appeal⁴ of the Decision of Pre-Trial Chamber I.⁵

5. On 6 February 2015, the Defence filed a Response to the Appeal of Côte d'Ivoire pursuant to Regulation 64(4) of the Regulations of the Court.⁶ Subject to the reservations therein expressed,⁷ the Defence fully supported the Appeal of Côte d'Ivoire.

6. On 19 February 2015, Principal Counsel for victims filed, confidentially, 'Observations des victimes sur l'appel de la République de Côte d'Ivoire contre la < Décision relative à l'exception d'irrecevabilité soulevée par la Côte d'Ivoire s'agissant de l'affaire concernant Simone Gbagbo >'.⁸

7. On 5 March 2015, the Defence filed its Response⁹ to the victims' Observations pursuant to Decision dated 28 January 2015.¹⁰

¹ ICC -02/11-01/12-47.

² Ibidem /12-48.

³ ICC-02/11-01/12 OA. 22-12-2014.

⁴ Ibid.,-54-Conf, 09-01-2015.

⁵ Ibid.,-47-Red, 11-12-2014.

⁶ ICC-02/11-01/12-62, 06-02-2015 OA.

⁷ Ibid., at paras 6, 19, 58.

⁸ ICC-02/11-01/12-63 OA. (self-translated by Defence Counsel)

⁹ ICC-02/11-01/12-65. 05-03-2015. 1/17. RH PT OA

¹⁰ ICC-02/11-01/12 'Decision on Ms. Simone Gbagbo's request for extension of time for the filing of a response to the document in support of the appeal', p 3, para 2.

8. On 9 March 2015, the Prosecution filed a ‘Request to Dismiss *In Limine* and Strike Portions of the Responses of the Government of the Republic of Côte d’Ivoire and the Defence for Simone Gbagbo’.

9. The Defence for Simone Gbagbo hereby files this Response to the Prosecutor’s request pursuant to Regulation 24.1 of the Court.

2. PROCEDURAL HISTORY¹¹

10. On 29 February 2012, Pre-Trial Chamber III issued a Warrant of Arrest¹² under seal against Simone Gbagbo, for her alleged criminal responsibility within the meaning of Article 25(3)(a) of the Statute for the crimes against humanity of (1) murder under Article 7(1)(a); (2) rape and other forms of sexual violence under Article 7(1)(g); (3) other inhumane acts under Article 7(1)(k); and (4) persecution under Article 7(1)(h) of the Statute committed in the territory of Côte d’Ivoire during the period between 16 December 2010 and 12 April 2011.

11. On 2 March 2012, Pre-Trial Chamber III rendered its written ‘Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of arrest against Simone Gbagbo’.¹³

12. On 19 March 2012, the Prosecutor filed a ‘Demande d’arrestation et de remise de Simone Gbagbo’.¹⁴

13. Dated 30 September 2013, Côte d’Ivoire filed an Admissibility Challenge pursuant to Articles 19, 17 and 95 of the Rome Statute¹⁵ with confidential annexes.

¹¹ For ease of reference, only the aspects of the procedural history pertinent to the issue on hand are here set out.

¹² Pre-Trial Chamber III, Under Seal, Warrant of Arrest for Simone Gbagbo, 29 February 2012, ICC-02/11-01/12, p 8.

¹³ Public redacted version, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, p 5, para 6.

¹⁴ La Chambre Préliminaire I, (Original: français) ICC-02/11-01/12, 19 March 2012.

¹⁵ ‘Requête de la République de Côte d’Ivoire sur la Recevabilité de l’affaire Le Procureur c. Simone Gbagbo et demande de sursis à exécution en vertu des Articles 17, 19 et 95 du Statut de Rome’, 30 Septembre 2013, No. ICC-02/11-01/12; Conf. 17 Annex.

14. On 15 November 2013, Pre-Trial Chamber I rendered its ‘Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo,’ inviting observations from, *inter alia*, the Defence.¹⁶

15. On 25 February 2014, Côte d’Ivoire filed additional documentation¹⁷ to which all-party observations were filed.¹⁸

16. On 10 October 2014, Côte d’Ivoire filed a ‘Second dépôt de documents complémentaires à l’appui de la Requête de la République de Côte d’Ivoire sur la Recevabilité de l’affaire Le Procureur c. Simone Gbagbo et, Demande de sursis à Exécution en vertu des Articles 17, 19, et 95 du Statut de Rome.’¹⁹

3. RESPONSE TO PROSECUTION REQUEST

17. The Prosecution requests the Appeals Chamber to, *inter alia*, dismiss (a) ‘portions of paragraphs 43-56 of the Defence Response to the GoCIV Appeal’ and (b) ‘portions of paragraph 43 and 50 of the Defence Response to the LRV Observations (to the extent that they refer to post-Decision developments) *in limine* and to strike them from the record.’²⁰

18. The Defence is fully cognisant of the jurisprudence of the Court outlining the corrective nature of intervention by the Appeals Chamber. It accepts it is limited to a consideration of the evidence which was available to the Chamber at the date of its Decision.

19. The Defence submits that, at the date of its Decision, the Chamber clearly demonstrated²¹ that, from its perusal of Annex 10 and RI-01/2011, it had before it, evidence of, and was fully aware of the trial before the *Cour d’Assises* in Abidjan. It noted as follows, ‘*proceedings have also been opened for alleged crimes against the State, in particular, in case R1-01/2011 instituted before the juge d’instruction du 10ème Cabinet d’Instruction. The proceedings in*

¹⁶ Pre-Trial Chamber I, ‘Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’, 15 November 2013, ICC-02/11-01/12.

¹⁷ ICC-02/11-01/12-37-Conf, 21 Annex.

¹⁸ ICC-02/11-01/12-39. Defence.

¹⁹ ICC-02/11-01/12 -45-Conf. 4 Annex.

²⁰ ICC-02/11-01/12-66 OA.09-03-2015. pp 4-5, para 6 .

²¹ ICC -02/11-01/12-47. Decision, 11-12-2014; p 22, para 48.

this case have reached the Chambre d'Accusation which, on 10 July 2013, confirmed certain charges against Simone Gbagboand referred the case for trial to the Cour d'Assises d'Abidjan'.

20. The Defence submits that the request of the Prosecution is misguided in that, as shown above, the Defence has not sought to introduce any matter during the appellate proceedings which had not already been considered by the Chamber.

21. The Defence referenced the domestic trial (already considered by the Chamber) for the sole purpose of demonstrating the concurrence of the domestic proceedings as set out in disclosed Annex 10 and RI-01/2011 with those before the Court. In paragraphs 43 to 56 the Defence sought to address, not whether the trial was going ahead (which would not advance the argument being made) but rather, whether the charges brought at the domestic level, as set out in Annex 10 and RI-01/2011 are the *same or substantially the same* as the charges before the Court.

22. Having so referenced the domestic trial; solely for the purpose of complying with the jurisprudence of the court that 'any factual allegations raised by any party or participant must be sufficiently substantiated in order to be properly raised,' Defence Counsel confirmed she had briefly attended the trial.²²

23. It is submitted that, it was not the intention of the Defence at any point, to seek to prejudice the position of any of the Parties and /or participants who, contrary to the submission of the Prosecution, did have adequate opportunity to raise this issue after the Defence filing on 6th February.

24. The Prosecution failed to do so until 9th March — over one month later.²³ Had the matter been promptly raised, the alleged offensive '*hints at certain developments in the ongoing national proceedings in December 2014*'²⁴ could have been considered in the preparation of

²² Judgment on Appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber 1 of 11 October 2013: ICC-01/11-01/11-565: 24-07-2014; p 59, para 160.

²³ ICC-02/11-01/12-66: 9-03-2015. Prosecution's Request to dismiss *in limine* and strike portions of the Responses of the Government of the Republic of Côte d'Ivoire and the Defence for Simone Gbagbo, pp 4-5, para 6.

²⁴ Ibid., p 3, para 2.

the Defence Response to Observations of Victims, filed on 5 March 2015, portions of which the Prosecution now also requests to have dismissed and removed from the record.

25. Further, the Prosecution has failed to demonstrate how the alleged offensive ‘*hints*’ are now prejudicial to its own position, when it had adequate opportunity to promptly raise the matter heretofore. The making of a generalised, sweeping allegation does not render it so.²⁵

26. Principal Counsel for Victims has not raised the issue at all.

27. It is respectfully submitted, it is not for the Prosecution to seek a dismissal and strike out of portions of the Defence Responses on behalf of other parties and participants, who have not, of themselves, so sought.²⁶

28. Neither is it for the Prosecution to allege prejudice on behalf of other parties and participants, who have not themselves, so alleged.²⁷

29. Should the Appeals Chamber nonetheless, be minded to consider acceding to all or any of the Prosecution’s request, the Defence submit that any dismissal and strike out should be limited to the following (a) ‘portions of paras 43, 49 and 56 of the Defence Response to the GoCIV Appeal’ filed 6th February 2015 and (b) ‘portions of paragraph 43 and 50 of the Defence Response to the LRV Observations’ filed 5th March 2015, as follows;

Re: (a):

30. At para 43, -the deletion of ‘*Mme. Gbagbo made her first appearance before the President of the Cour d’Assises on 9th December 2014*’ and ‘*later;*’ -so that it would read

43. The charges which were publicly proffered against her by the *Cour d’Assises* are for; crimes *contre l’Etat*, in which it is alleged she, with others ‘*ont recruté des individus dans leur région d’origine pour les constituer en bandes armées et diriger les dites bandes et que par leur participation au mouvement insurrectionnel, ces*

²⁵ Ibid., p 4, para 4.

²⁶ Ibid.

²⁷ Ibid.

derniers ont commis des actes d'une atrocité sans précédent notamment des tueries massive, des vols, des pillage, des incendies et des destructions volontaires de biens troublant ainsi gravement l'ordre public' in Abidjan and its environs.

31. At para 49, -the deletion of '*with the imminence of Trial well heralded in the international press in the latter part of 2014*' -so that it would read

49. The Defence therefore submits, in dismissing the *crimes contre l'Etat* and although having specifically referenced document RI-01/2011 and noted that charges were confirmed against Mme. Gbagbo by the *Chambre d'Accusation* on 10 July 2012 and that the case was referred for Trial to the *Cour d'Assises d'Abidjan*,²⁸ the Chamber failed to take into consideration that, albeit more extensive in scope, inherent in the State's generic charge of *crimes contre l'Etat* were crimes against the civil population (*des tueries massive*) committed by *bandes armées* in and around Abidjan, including Abobo and Yopougon in the post electoral period.

That is to say, *substantially the same conduct/case* arising out of the *same or broadly similar* incidents as these before the Court.

32. At para 56, -the deletion of

'The Defence briefly attended the trial of Mme. Gbagbo in Abidjan for inter alia, crimes against the civil population as contained in the generic charge crimes contre l'Etat. Reasons are as set out above.' -so that this paragraph would be deleted in its entirety.

33. The Defence submits that, all the rest and residue of paragraphs 43-55 inclusive, should remain intact as above set out, as the arguments contained therein bear no reference to, nor are they buttressed by the '*hints at certain developments in the ongoing national proceedings in December 2014*' belatedly complained of by the Prosecution.

²⁸ ICC-02/11-01/12-47-Red, p 22, para 48.

Re: (b):

‘portions of paragraphs 43 and 50 of the Defence Response to the LRV Observations’ filed 5th March 2015.

34. At para 43, -the deletion of this paragraph in its entirety.

35. At para 50, -the deletion of *(now underway)*’ –so that this paragraph would read

50. In dismissing the ‘*crimes contre l’État*’ and although having specifically referenced document RI-01/2011 and noted that charges were confirmed against Mme. Gbagbo by the *Chambre d’Accusation* on 10 July 2012 and that the case was referred for Trial to the *Cour d’Assises d’Abidjan*²⁹ the Chamber failed to take into account the very relevant facts contained therein, which demonstrated that, albeit more extensive in scope, inherent in the State’s generic charge of ‘*crimes contre l’État*’ were crimes against the civil population (*des tueries massive*) and that, they broadly mirrored those before the Court.

36. The Defence submits that, the residue of paragraph 50 should remain intact as above set out, as again, it is submitted, the arguments contained therein bear no reference to, nor are they buttressed by any ‘*hints*’ as complained of by the Prosecution.

²⁹ ICC-02/11-01/12-47-Red, p 22, para 48.

4. RELIEF REQUESTED

Given all of the circumstances as set out above, the Defence requests the Honourable Appeals Chamber to

-Reject the Request of the Prosecution in its entirety

Or in the alternative,

-Limit any striking out / dismissal to the portions of the paragraphs as above submitted by the Defence.


Sylvia Geraghty, S.J.

Lead Counsel to Mme. Simone GBAGBO

Dated this 23th day of March 2015.

Word count: 2,382³⁰

Dublin, Ireland.

³⁰ In compliance with Regulation 36 of the Court.