

Days five, six, and seven of the ICC Confirmation of Charges Hearing in the Case against Laurent Gbagbo

25-27 FEBRUARY 2013

Olivier Kambala wa Kambala, an international law expert who is following events at The Hague in this case, reports on the defense rebuttal of the prosecution's allegations.

If there was a Plan, it was to Conspire against Gbagbo

The defense denied the existence of a plan by Laurent Gbagbo to stay in power and strongly criticized the prosecution's partial and biased reading of the history of Côte d'Ivoire. Among other failings in the indictment, it pointed out silence on the existence of the real plan, which was to force Gbagbo from power. It took issue with the prosecution for its silence on four years of Côte d'Ivoire history, covering the period from 2002 to 2007. The defense noted that at the start of the proceedings on the situation in the Côte d'Ivoire, when the prosecutor asked to be authorized to conduct an investigation pursuant to Article 15 of the Rome Statute of the International Criminal Court (ICC), the prosecution had been asked by Pre-Trial Chamber III in October 2011 to add to the information available to the court on crimes supposed to have been committed between 2002 and 2010.

The defense considered that the prosecution had distorted the history of Côte d'Ivoire by leaving out the items requested by the pre-trial chamber. If the prosecution had not omitted them, the defense maintains, the crimes committed by the rebels would have been revealed together with the fact that these crimes were part of their goal of destroying the Gbagbo regime in order to set themselves up in its place.

The defense maintained that Gbagbo's actions in no way demonstrated an intent to hold onto power, and even less to use violence for that purpose, given that: (1) Gbagbo wanted elections to be held and had entrusted the task of organizing the elections and disarming the combatants to his Prime Minister, Guillaume Soro; (2) Gbagbo had agreed that the Independent Electoral Commission (CEI) should consist of a majority from opposition political parties and rebel institutions hostile to him; (3) Gbagbo had hired a foreign company (Sagem Security) to manage voter registration; (4) he had authorized a free and democratic election campaign; (5) he had allowed Alassane Ouattara and Henri Konan Bédié to run as candidates in the presidential elections by making use of Article 48 of the Constitution of Cote d'Ivoire to set aside Ouattara's constitutional invalidation and Bédié's senility; and (6) many of Gbagbo's supporters are from the North.

The defense held that these facts give no indication of his intent to stay in power, while noting that experts' opinion was against running the elections because of the prevailing instability, owing among other things to the rebels' refusal to disarm. The defense showed a video of the former President of South Africa, Thabo Mbeki, who maintained that the international community was aware that the conditions for holding democratic elections had not been met.

Structure of the Common Plan

The defense endeavored to rebut the prosecution's charges that Gbagbo had set up a structure of military leaders loyal to him to carry out the plan to hold onto power at all costs. It argued that no military appointments had been made before the elections and that all military appointments were made via nomination by a committee headed by the Defense Minister (who was himself Baoulé and so did not belong to Gbagbo's ethnic group Bété) and that all Gbagbo did was approve them. The defense also claimed that some of the military officers allegedly belonging to the Gbagbo common plan are currently members of the Ouattara administration. In addition to which, the defense rejected the prosecutor's allegation that the majority of the violence was directed against inhabitants of the North, because the unit heads in the chain of command during the Gbagbo period came from all parts of the country and some of them were from the North. The defense added further to this by noting that during the transition, many officers in the Ivorian *Forces de Défense et de Sécurité ivoiriennes* [Defense and Security Forces] (FDS) during the transition had been appointed by Guillaume Soro, who was the Prime Minister. The defense stressed the fact that Gbagbo had thereby allowed the integration of rebel generals into the national army. As to the loyalty to Gbagbo of FDS officers after the elections, the defense maintained that this was proper since the Constitutional Council had declared him president. They further pointed out that the same loyalty procedure had been applied to Ouattara.

The defense also disputed the prosecution's theory that the officers of the FDS were Gbagbo followers, considering that today a fair number of them have been appointed to ambassadorships by Alassane Ouattara, and others are still in service. As for the Chief of the Defense Staff, the defense points out that this officer, who was appointed as an ambassador by Ouattara, had taken refuge in the South African embassy during the crisis.

The defense added that the so-called plan set up by Gbagbo had been presented in a highly inconsistent manner by the prosecution because the plan they described was imaginary.

Coordination of the Implementation of the Common Plan

The defense argued that Gbagbo did indeed have conversations with Simone Gbagbo, who is his wife, and that it is not certain that these conversations covered the common plan. The defense also maintained that Laurent Gbagbo spoke with Blé Goudé, Minister for Youth, just as he also had conversations with other ministers.

The prosecution identified a meeting held on December 3, 2010 which was supposedly intended to launch the mobilization of the common plan. The defense wondered what the criminal intent of this meeting might be and also wondered who participated in that meeting because the prosecution had provided no details. The defense claimed that in fact this meeting had been about preparations for humanitarian action to benefit all Ivoirian populations in difficulty. The defense rejected the idea that Gbagbo took part in meetings of the FDS Defense Staff, and said even Gbagbo's own personal Chief of Defense Staff did not take part in them. The defense noted that he took part in three meetings of the Central Command of Security Operations (CeCOS), which the Defense Staff were also invited to attend. However, the defense rejected the idea that these meetings had anything to do with the common plan since three meetings in three months hardly seemed enough to devise a plan.

The defense was alarmed by the fact that the prosecution wanted to incriminate Gbagbo for the actions of Simone Gbagbo, who has her own political career as the Member of Parliament representing Abobo. As for the crisis meetings Mrs. Gbagbo is supposed to have organized, the prosecution witnesses are either evasive or they say that Gbagbo did not take part in them.

The defense questioned the source of a datebook that the prosecution attributes to Mrs. Gbagbo, in which she is supposed to have written the words "fight and win," "consult the Ivoirians, consult the PR," and "a reply with real weapons" and on the same page mention was also made of the "pacification campaigns in the region so as to avoid confrontations." The defense disputed the authenticity of the datebook, given that it seemed to have come from Gbagbo's residence that had been ransacked and destroyed, and the arrangements for guarding it after Gbagbo's departure are uncertain. In general, the defense found no evidence to determine that the participants at meetings of the *Congrès national de la résistance pour la démocratie* [National Resistance Congress for Democracy] (CNRD) were opposed to putting an end to the violence, since the existing evidence tended rather to point out initiatives taken by the CNRD to find solutions to the crisis.

As to the existence of a supposed "crisis command post," the defense contended that this was meant rather to give thought to how to prevent rebel advances, to hold conversations about media coverage and to ask for a report on the women's march in Abobo.

The defense requested a closed session after which it would proceed to establish that Gbagbo lacked information on what was taking place and was therefore in no position to control anything at all. The defense stated that the military prosecutor had been charged with the authority to investigate the events of December 16, 2010, the women's march, and what happened in Abobo.

Preparations: Mercenaries and Armaments

The defense rejected the evidence presented by the prosecution on the recruitment of mercenaries, including in particular an email from Anselme Seka and a handwritten note about a meeting that was supposed to have taken place at the home of Minister Anaki. Regarding the email, the defense doubted that this email was addressed to Gbagbo and also doubted that it had ever reached him. As for the handwritten note from a meeting held at the home of Minister Anaki, the defense claimed that a meeting held by Anaki, a member of the RHDP, could not have been on behalf of Gbagbo, but rather of Alassane Ouattara; as for the subject of the note, i.e. the recruitment of 40 Liberian mercenaries to destabilize a march by the RHDP, the defense alleged that the prosecution was trying to ascribe to Gbagbo the mercenaries recruited by Ouattara and the RHDP.

The defense noted that the Amended Document Containing the Charges (ADCC) spoke of "a cache of arms in the basement of the presidential palace" which it was claimed had been seized after Gbagbo was arrested and that the proof of the existence of this cache was a letter from the President of the Security Council of the United Nations. The ADCC also stated that the United Nations Operation in Côte d'Ivoire (UNOCI) had handed these arms over to the Republican Forces of Côte d'Ivoire (FRCI), which means that there would no longer be any trace of such arms. First, the defense was curious about this action taken by the UNOCI of transferring the seized arms to the FRCI while Côte d'Ivoire was still under an arms embargo. Next, the defense pointed out that it was hard to understand the storage of weapons in Gbagbo's basement when the FDS were short of arms.

As for arms trafficking prior to the elections, the defense conceded that this might possibly have happened but that it was not linked to Gbagbo. The United Nations team of experts had not provided any evidence of it. Some of the generals, Bredou and Kassaraté in particular, may have been involved in arms trafficking, but had never been questioned about it, and both of them had been rewarded by Ouattara, proving that their loyalty to Gbagbo was doubtful. As for the defense, it felt that there was nothing to show that Gbagbo was aware of what these generals were doing.

As for a request for arms to the President of the Democratic Republic of Congo (DRC), supposedly sent by Gbagbo, the defense noted that no credence should be given to an anonymous letter, and the defense noted furthermore that there was no trace whatsoever of any steps to verify the facts with the Congolese authorities. The defense maintained that throughout the entire crisis, the FDS had not received any arms; it also made a point of mentioning the misunderstanding

with the United Nations stemming from allegations that Belarus had delivered helicopters to the FDS.

The Presidential Elections in November 2010

The defense considered that the statements made by the prosecution, according to which the elections ran smoothly, are seriously flawed, because, the defense maintains, the elections were fraudulent, as some of the prosecution's own witnesses have testified. The defense then requested a closed hearing to comment on a confidential exhibit.

The defense also maintained that these election frauds, especially in the North of Côte d'Ivoire, were perpetrated by means of serious human rights violations against supporters of Gbagbo, facts that were confirmed by external observers, including experts from the African Union (AU) and the European Union. In a video shown by the defense, the former Prime Minister of Togo, Kokou Koffigoh, who was in charge of the AU's observers, was seen stating that violent abuses were committed during the elections in the North.

The defense was determined to show that the prosecution's theory – according to which the elections went smoothly and that Gbagbo's refusal to accept the results was part of a common plan – did not make sense, and for good reason: (1) in the Document Containing the Charges (DCC) the prosecution states that the president of the CEI declared Ouattara the winner of the elections, which does not seem to be his proper role given that under the constitution that role falls to the Constitutional Council; (2) the prosecution declares that the president of the Constitutional Council is an ally of Gbagbo, which seems to the defense to be irrelevant, given that the results were announced by a group of members of the Constitutional Council; (3) the prosecution states that Gbagbo and Ouattara were sworn in at the same time, which seems to be wrong given that Ouattara was sworn in, in the same room, after the proclamation of the results by the CEI; and (4) the prosecution fails to mention that Gbagbo, proclaimed the winner by the Constitutional Council, never stopped calling for a recount of votes that was rejected by Ouattara and by the international community.

Orders by Gbagbo to Attack Civilian Supporters of Alassane Ouattara

The defense denied that Gbagbo had ever given any such order. It submits that on the contrary the FDS responded to the attacks of rebels who had earlier taken

control of Abobo and that at the same time, UNOCI, France, and the FRCI were launching a military operation.

The defense submits that there was already a warlike situation in Abidjan, after the operations of the Invisible Commando in Abobo and also due to the presence of 850 soldiers quartered at the Golf Hotel with Ouattara.

The Invisible Commando had infiltrated Abobo and had been holding caches of arms since before the elections. When they launched their military offensive on December 16, 2010, the Invisible Commando and Soro's group committed atrocities against Gbagbo's civilian supporters, as described in the book *Le Commandant invisible raconte la bataille d'Abidjan* [*The Invisible Commander's Account of the Battle of Abidjan*]. Following assaults by the pro-rebel forces, the FDS had left Abobo in January 2011 and the civilian population had also evacuated the area.

The defense maintained that there were conflicting statements in the orders allegedly given by Gbagbo: on the one hand the prosecution affirmed that Gbagbo had supposedly been asking to use the army since December 2010, and on the other hand, another piece of evidence from the prosecution affirmed that the army only became involved starting on February 21, 2011. The defense feels that these contradictions could prove either that Gbagbo had not given the army any orders, or perhaps that the army was not obedient to Gbagbo. Ultimately, the defense maintained that it was hard to believe that an order had been given, since apparently the army had assessed the situation and decided not to intervene. Moreover, the defense claimed, Gbagbo was incapable of giving an irresponsible order and that his orders were directed, rather, towards maintaining order and protecting the villages and the population.

As for the order supposedly given to blockade and besiege the Golf Hotel immediately after the election results were published, the defense pointed out the contradictions and confusion among the prosecution witnesses, especially witness P44 who speculated that the order was given in January or February, who did not know who gave the supposed order, and who sometimes referred to the Golf Hotel as a military camp. The defense also noted that the prosecution had failed to mention that Ouattara and Soro were able to come and go from the Golf Hotel as they pleased.

Lastly, the defense claimed that the FDS had never been given explicit instructions to attack civilians. If there had ever been any attacks, there would have to have been investigations and criminal convictions.

The defense also pointed out some cases where the testimony of prosecution witnesses had been manipulated with the goal of establishing that such orders had been given.

Rebel Atrocities

The defense deplores the fact that in Paragraph 14 of the DCC, the prosecution states that the Republican Forces of Cote d'Ivoire (formerly the *Forces Nouvelles* [New Forces]) advanced from the North to the South and reached Abidjan on March 31, 2011 and were supported by the Dozos and a group of militia from Burkina Faso, without ever explaining who the *Forces Nouvelles* were, let alone the Dozos. The prosecution failed to mention that the FRCI consisted of former leaders from the North who were denounced by human rights organizations for the atrocities they committed in the territories under their control. The prosecution had also failed to mention the presence of the mercenaries from Burkina Faso and Mali. As for the Dozos, the defense alerted the court to the fact that the prosecution had failed to state that the Dozos are an offshoot of the Kamajor hunters of Sierra Leone, who are alleged to have committed acts of violence, including cannibalism, under the banner of their partners from Sierra Leone. The accounts of the actions of the Invisible Commando say that the Dozos committed ritual crimes and organ removals.

The defense also maintained that this was the group that advanced from North to South and that a French newspaper, the *Canard Enchaîné*, stated that the group was getting tactical advice from France. The defense attested lastly that this was a group that had committed atrocities in the south and west of Côte d'Ivoire and in particular in Bloléquin, Toulepleu, Dioboke, Duékoué, and Abobo, among other places.

The defense said that the rebels, in addition to their characteristic acts of cruelty, had been in the habit of humiliating their victims, especially Gbagbo supporters, when they were not using them as human shields.

Characterization of the Côte d'Ivoire Conflict as Not International in Nature

The defense considered as defective the characterization by the prosecution of the conflict in Côte d'Ivoire as non-international after February 25, 2011. The intervention of the UN Security Council since February 2003 was used by the defense to illustrate this, and to strongly criticize that limitative characterization, which was intended to avoid investigating and determining the responsibility of the various parties involved in the conflict. Furthermore, the defense said if the qualification offered by the prosecution were to be accepted, the prosecution had

failed to investigate the crimes committed by all the combatants that were on the scene.

The Quality of the Evidence in the DCC

Attorney Natacha Fauveau Ivanovic, associate counsel on the defense team, strove to focus on the quality of the evidence provided by the prosecution, concluding that the prosecution had failed to produce evidence that was concrete and tangible. She argued that the allegations made by the prosecution were vague, inexact, murky, political, and not reliant on any sort of reality.

Based on a combined reading of Article 67 of the Rome Statute and Rules 52 and 121 of the Rules of Procedure and Evidence of the ICC, the defense submitted that the items of evidence presented by the prosecutor did not pass the test of acceptable proof, and that in its *modus operandi* for sharing information, the prosecution had tended to not play by the rules.

The defense noted that in the presentation of the charges: (1) there were inconsistencies and contradictions, particularly with respect to the time of the design of the common plan by Gbagbo; on that score the defense blasted the fact that in the DCC, the prosecutor refers to a period prior to November 2010, without giving further details and starts his account in 2002 whereas the facts that led up to the crisis in Côte d'Ivoire started to manifest themselves in 1999; (2) the fact of focusing solely on Gbagbo was a ploy to protect those who were really responsible for the troubles; and (3) the victims have not been identified by the prosecution and the authors of the crimes even less so.

The defense submitted that the threshold of trustworthy and credible evidence, in the meaning given to it in ICC case law, is non-existent and that the items produced by the prosecution do not allow the establishment of substantial grounds for believing that crimes were committed and are attributable to Gbagbo.

In support of this the defense focused on the following points:

- (1) *The prosecutor's sources* are mostly newspaper articles and reports from Non-Governmental Organizations (NGOs). As for the NGO reports, the defense cited ICC case law, in particular the ruling against confirmation of the charges in the Mbarushinama case and in the Lubanga decision in which the judges held, respectively, that less probative value must be ascribed to indirect evidence, and that an expert had confirmed that the NGOs are "poor investigators." The proof of this, said the defense, was a video produced by the prosecution as an exhibit in its case against Gbagbo, but which in the end turned out to be a video about electoral

violence took place in Kenya. The prosecution had later switched this video over to exhibits for the defense. The defense also used the example of the video on the women's march in Abobo on March 3, 2011 in which a woman presumed to be seriously wounded was seen to stand up only to be asked to lie down again until the end of the "shoot." The defense also alleged that the prosecution had included these videos in the case file without getting an independent expert opinion;

(2) *Lack of credibility of the witnesses for the prosecution:* The defense pointed out that after the inconsistencies and contradictions in the depositions, the prosecution witnesses cannot be considered credible. In particular, the defense mentioned witness P106 who provided the Kenya video, as well as witnesses P48, 107, and 184; the defense also pointed out some unidentified witnesses, in particular P49 and P239. At this juncture, the defense requested a closed session;

(3) *Authenticity of the evidence:* The defense laid great emphasis on the videos and documents seized at the Gbagbo residence – which had been demolished and ransacked - the integrity of which cannot be affirmed given that it is hard to know whether or not the residence was under guard.

The defense once again invoked ICC case law, in particular the appeal ruling of May 30, 2012 in the Mbarushimana affair that highlighted the profile of cases that can go to trial and of those that cannot, depending on the credibility of evidence characterized by a lack of ambiguity, inconsistencies, and contradictions.

This all indicated to the defense that there was insufficient evidence and no factual basis for believing that the crimes had been committed in the way the prosecution presents them, much less that they could be attributed to Gbagbo.

Unclear Modes of Liability

The defense also maintained that the modes of liability adopted by the prosecution in the charges against Gbagbo are unclear and contradictory.

At first the prosecution presents Gbagbo as an indirect co-perpetrator, without mentioning the other modes of liability, in particular who the perpetrators are. Also, the defense said, without giving much evidence of the indirect co-perpetrator mode, the prosecution moves right on to the contributor mode, which had not been referred to at all earlier in the DCC. Next, the defense acknowledged that cumulative and alternative modes of liability are possible but maintains that

this would mean that an unfair trial awaits Gbagbo if the prosecution does not specify which options have been adopted.

The defense also showed that the modes of liability adopted by the prosecution, particularly the ones in Article 25(3)(a) and 25(3)(d) are part of a certain hierarchy and that both modes cannot be confirmed simultaneously because an individual cannot be both a co-perpetrator and an accomplice at the same time. The defense invoked case law from the confirmation of charges stage in the Katanga affair that states that with respect to the chief author, the issue of complicity became moot. The defense also raised case law stemming from the Ruto/Kosgey/Sang case in which Pre-Trial Chamber II had raised doubts on the validity of the approach consisting of drawing concomitant conclusions from forms of liability presented as subsidiary to one another. To that end, the defense petitioned the pre-trial chamber to deny a cumulative application by the prosecution.

Furthermore the defense held that the conditions required under Article 25 (3) (d) have not been met in this case because there was not enough evidence to establish substantial grounds for believing that crimes had been committed. The defense believed that the prosecution was proceeding dismissively by not clearly identifying the groups acting in concert. The use of such expressions as "organization," "leaders of the patriotic galaxy in the Gbagbo organization," and "Gbagbo and the members of his immediate entourage" illustrate this haphazard approach, and no further details are provided.

With respect to the answer given by the prosecutor's office to the question from Judge Kaul about consideration of the mode of liability under Article 28, i.e. command responsibility, the defense claimed that the prosecution's answer consisted merely of comments, to which it would be hard for the defense to develop an appropriate response. Consequently, the defense petitioned the pre-trial chamber to suspend the hearing to enable the prosecution to give more details and to allow the defense to respond to them.

Lack of Investigation

The defense claimed that the prosecutor had failed in his duty by making investigations only to support the charges and not to defend against them, as is required pursuant to Article 54 of the Rome Statute.

The defense also maintained that the investigation by the prosecution was defective in the sense that: (1) there is no evidence contained in official documents, no proof of orders issued by the FDS, information on troop movements, the type of armaments used, or any trace of the reports made to Gbagbo; and (2) there are no items in the case file available to France and the

United Nations that give an understanding of the case. The defense claimed that: (a) France and UNOCI had documents essential to an understanding of the case; (b) the UN and French observers had material on the four events that are the focus of the prosecution's charges against Gbagbo; (c) French intelligence services had information on the activities of the rebels, both before and after Abidjan was captured, and on the links between Alassane Ouattara and the rebels; and (d) the UNOCI experts have information on the clashes that took place and have been preparing reports on events in Côte d'Ivoire since 2003.

Late Delivery of Documents to the Defense

The defense said that the prosecution had not made items available to it in a proper manner so as to ensure equality of means. It also stated that the prosecution ought at the very least to have handed over to it exculpatory exhibits that disprove the prosecution's theory of Gbagbo's guilt.

The defense went on to say that the prosecution had been late in delivering more than 1,000 exhibits and the last items were delivered on January 15, January 17, February 6, February 13, 2013, and even on February 18, in other words the day before the start of the hearings on confirmation of the charges.

The prosecution protested that what the defense had done could be called "prosecution bashing" and it had dragged its feet on the well-known facts.

Items Constituting Crimes against Humanity

The defense maintains that in order to establish the existence of grounds of crimes against humanity for political, national, ethnic, and religious reasons, it is sufficient to prove only one, but the incriminating facts must be clear. It added that there was no conclusive evidence fulfilling the conditions of the elements that constitute crime against humanity, given that the prosecution was aligning its argument with the fact that the members of the targeted groups were targets because of their allegiance to Alassane Ouattara, which is, rather, political discrimination; the defense submitted that the prosecution had casually added national and ethnic grounds, something that indicates a lack of rigorosity in the presentation of evidence.

The defense claimed that it was contrary to the full exercise of the rights of the defense that the accused (or the individual concerned) should offer an explanation on only some of the facts and actions in a context where many crimes had been committed. In order to establish the systematic nature of the attacks, a more complex review of the situation in Côte d'Ivoire would have to be conducted. As for the evidence produced by the prosecution, the defense was of the opinion that

the systematic nature of crimes against humanity had not been proven, since the attacks had been committed by several groups and the prosecution had focused on only one single group.

The defense submitted that there was neither adequate evidence nor conclusive proof to establish substantial grounds for believing that the objective and subjective elements constituting crimes against humanity had existed and because of this fact, any accusation was not worth considering.

Conclusions of the Defense

As to confirmation of the charges, the defense concluded that the prosecution had presented nothing but abusive and unfounded accusations. Consequently, the defense petitioned the pre-trial chamber not to follow the political approach taken by the prosecution and to rule against confirming the charges against Gbagbo.

Coverage of the confirmation of charges hearing of former Côte d'Ivoire President Laurent Gbagbo is part of the Open Society Justice Initiative's [war crimes trial monitoring project](#). In partnership with the [International Senior Lawyers Project](#) (ISLP), the Open Society Justice Initiative is monitoring the proceedings of the first former head of state to be brought to the International Criminal Court (ICC). Our monitor, Olivier Kambala wa Kambla, is an international lawyer with 15 years' experience and is an expert in international criminal law, transitional justice, human rights, peace processes, and capacity building of civil society. He will be monitoring the hearing from the ICC in The Hague, the Netherlands.

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