Cour Pénale Internationale

International Criminal Court

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No.: **ICC-02/11-01/11**
Date: **11 June 2013**

PRE-TRIAL CHAMBER I

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR V. LAURENT GBAGBO

Public Redacted

Decision on the *"Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut"*

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives
Jean-Pierre Mignard
Jean-Paul Benoit

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Herman von Hebel, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Pre-Trial Chamber I (the "Chamber") of the International Criminal Court (the "Court") issues the following decision on the "*Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut*".[1]

I. Procedural History

1. On 15 February 2013, the Defence filed a challenge to the admissibility of the case against Laurent Gbagbo ("Mr Gbagbo") before the Court under articles 19 and 17 of the Rome Statute (the "Admissibility Challenge"), supported by documents contained in 13 public annexes and 2 confidential annexes.

2. On 18 February 2013, the Chamber granted the Office of Public Council for victims (the "OPCV") access to the confidential version of the Admissibility Challenge as well as the confidential annexes thereto.[2]

3. On 19 February 2013, during the confirmation of charges hearing, the Defence, the Prosecutor and the OPCV made oral submissions regarding the Admissibility Challenge and the Chamber ordered the Prosecutor and the OPCV to submit their written responses by 28 March 2013.[3]

4. On 14 March 2013, the Chamber granted the request of Côte d'Ivoire for authorisation to submit observations on the Admissibility Challenge.[4]

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[1] Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut, 15 February 2013, ICC-02/11-01/11-404-Conf, and public redacted version ICC-02/11-01/11-404-Red.

[2] Pre-Trial Chamber I, Decision on the OPCV's "Request to access documents related to the 'Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut" filed by the Defence on 15 February 2013", 18 February 2013, ICC-02/11-01/11-406.

[3] Pre-Trial Camber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, pp. 6-14, pp. 26-27, pp. 34-38.

[4] Pre-Trial Chamber I, Decision on the "Demande d'autorisation de la République de Côte d'Ivoire aux fins de déposer des observations sur la requête relative à la recevabilité de l'affaire en vertu des articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo", 14 March 2013, ICC-02/11-01/11-418.

5. On 28 March 2013, the Prosecutor, the OPCV and Côte d'Ivoire filed their observations on the Admissibility Challenge.[5]

II. Submissions

A. Defence's Admissibility Challenge

6. The Defence Admissibility Challenge is founded on the existence of ongoing proceedings against Mr Gbagbo for economic crimes allegedly committed during the post-electoral crisis. According to the Defence, on 18 August 2011, Mr Gbagbo was charged with economic crimes in Côte d'Ivoire, namely "*vol aggravé, détournement de deniers publics, concussion, pillage et atteinte à l'économie nationale*", which proceedings must be presumed to be ongoing in the absence of any indication that they have been terminated.[6]

7. In support of this contention, the Defence submits (i) two press articles, dated 18 August 2011 and 19 August 2011 respectively, indicating that Mr Gbagbo had been charged with economic crimes by the Ivorian authorities,[7] and (ii) REDACTED.[8]

8. The Defence further submits that the national proceedings for economic crimes constitute the same case as that under prosecution before the Court

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[5] Prosecution's response to Defence's request challenging the admissibility of the case pursuant to Article 17 and 19 of the Rome Statute, 28 March 2013, ICC-02/11-01/11-428 (the "Prosecutor's Response"); Observations du Représentant légal commun des victimes à la Requête de la Défense déposée le 15 février 2013 aux fins de contestation de la recevabilité de l'affaire, 28 March 2013, ICC-02/11-01/11-426-Conf, public redacted version, ICC-02/11-01/11-426-Red (the "the OPCV's Observations"); Observations de la République de Côte d'Ivoire sur la requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo, 28 March 2013, ICC-02/11-01/11-427-Conf-Exp, public redacted version, ICC-02/11-01/11-427-Red ("Côte d'Ivoire's Observations").

[6] Admissibility Challenge, para. 36.

[7] Admissibility Challenge, Annexes 2 and 3.

[8] Admissibility Challenge, para. 53; Annex 4.

because both relate to the same context, namely the post-electoral crisis and the alleged will of Mr Gbagbo to implement a policy to remain in power.[9]

9. The Defence emphasises that the meaning of "substantially the same conduct" has not been definitively addressed in the jurisprudence of the Court,[10] and invites the Chamber to interpret "conduct" in a flexible manner, focusing on the general conduct of the suspect in relation to the context in which the crimes were committed rather than the conduct related to the direct commission of the crimes.[11] According to the interpretation of conduct forwarded by the Defence, the existence of national proceedings covering different crimes or factual allegations to those encompassed by the case before the Court, but involving the same general conduct on the part of the suspect would render a case inadmissible before the Court.[12]

10. The Defence further submits that, once the existence of national proceedings in relation to the same person and the same conduct is established, it should be presumed that the State is able and willing to carry out such investigation or prosecution, and that the burden of proof in relation to the second limb of the admissibility test shifts to the party disputing this presumption.[13]

11. Nonetheless, the Defence provides information to the Chamber which, in its submission, establishes the willingness and ability of Côte d'Ivoire to investigate and prosecute the case. In particular, the Defence argues that the existence of numerous national proceedings related to the post-electoral crisis

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[9] Admissibility Challenge, para. 52; Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, p. 9, line 22 – p. 10, line 12.
[10] Admissibility Challenge, para. 39.
[11] Admissibility Challenge, para. 43.
[12] Admissibility Challenge, para. 43.
[13] Admissibility Challenge, paras 57-58; Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, p. 10, line 23 – p. 11, line 5.

show both the ability and willingness of Côte d'Ivoire to carry out proceedings.[14]

12. In this regard, the Defence disputes the applicability and appropriateness of the form of "unwillingness" elaborated by Trial Chamber II in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, alleging that a State that is able to investigate or prosecute cannot relinquish its jurisdiction to the Court on the basis of mere convenience without jeopardising the complementarity principle.[15] The Defence argues that the form of "unwillingness" accepted by Trial Chamber II is not consistent with the text of the Statute or with the obligation of States under international law to prosecute serious crimes.[16] The Defence underscores that the short-sighted view of complementarity adopted by Trial Chamber II fails to take account of the wider goals of international criminal justice, in particular the need for national jurisdictions to build capacity to try such crimes domestically in order to involve the affected communities as part of the overall process of reconciliation and peace building.[17]

B. Prosecution's Response

13. The Prosecutor submits that the Admissibility Challenge should be rejected on the basis that national proceedings are not ongoing in relation to the same case.[18] It is emphasised that, although domestic proceedings against Mr Gbagbo for economic crimes have not been officially terminated, activity in relation to this case has been suspended since Mr Gbagbo's transfer to the

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[14] Admissibility Challenge, paras 64-68, 72; Anxs 5-13; Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, p. 11, line 9 – p. 12, line 17.
[15] Admissibility Challenge, paras 74-83; Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, p. 12, line 18 – p. 14, line 15.
[16] Admissibility Challenge, paras 79-80.
[17] Admissibility Challenge, para. 82.
[18] Prosecutor's Response, paras 20-21.

Court in November 2011.[19] Therefore, the Prosecutor submits that, even if the domestic prosecution for economic crimes were considered to encompass "substantially the same conduct" as that underlying the charges before the Court, these domestic proceedings are currently inactive.[20]

14. Regarding the definition of the same case, the Prosecutor disagrees with the Defence's interpretation of the same person/same conduct test. In particular, the Prosecutor contends that the "substantially the same conduct" test should not be interpreted in a manner that is so flexible that its purpose is undermined.[21] The Prosecutor argues that the threshold should be that "at a minimum, the national authorities are focused on the same course of conduct and series of events as the ICC, meaning that they are examining the person's criminal responsibility in the context of substantially the same incidents and underlying facts and allegations of criminal responsibility."[22] Applying this test, the Prosecutor submits that the economic crimes referred to in the domestic proceedings relate to conduct aimed at *obtaining* funds, which is different from Mr Gbagbo's subsequent *use* of those funds to contribute to the crimes against humanity that form the basis of the charges before the Court.[23]

15. Finally, the Prosecutor disputes the Defence's allegations regarding the unwillingness test. The Prosecutor argues that Côte d'Ivoire has clearly demonstrated its will to prosecute perpetrators of crimes committed during the post-electoral crisis, but has validly relinquished its jurisdiction in favour of the Court in order for Mr Gbagbo to be prosecuted for crimes against humanity.[24]

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[19] Prosecutor's Response, paras 20-21.
[20] Prosecutor's Response, para. 21.
[21] Prosecutor's Response, paras 13 and 18.
[22] Prosecutor's Response, para. 15.
[23] Prosecutor's Response, para. 17.
[24] Prosecutor's Response, paras 22-29.

C. OPCV's Observations

16. The OPCV contends that the only evidence provided by the Defence in support of its Admissibility Challenge is REDACTED.[25] It is submitted that this document alone does not provide the slightest evidence that investigations or prosecutions against Mr Gbagbo for crimes within the jurisdiction of the Court were REDACTED undertaken.[26]

17. The OPCV contends that the domestic proceedings initiated against Mr Gbagbo relate to economic crimes only and do not encompass the same conduct as that which forms the basis of the charges before the Court. The OPCV disagrees with the Defence's broad understanding of the "same conduct" test and argues that, to the contrary, the test should be interpreted in a strict manner requiring identical incidents to be investigated at the national level for the case to be inadmissible before the Court.[27]

18. In addition, the OPCV submits that, even if the Defence had proven the existence of national proceedings in relation to the same case, the second limb of the admissibility test would not be fulfilled because Côte d'Ivoire does not have the ability to genuinely carry out these proceedings.[28]

D. Côte d'Ivoire's Observations

19. Côte d'Ivoire submits that the case against Mr Gbagbo is admissible because there are no relevant proceedings against him at the domestic level. Disagreeing with the Defence's contextual interpretation of the "substantially the same conduct" test, Côte d'Ivoire contends that it is only if the national

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[25] OPCV's Observations, paras 24-25.
[26] OPCV's Observations, para. 37.
[27] OPCV's Observations, para. 40 ; Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, p. 36, line 4 – p. 37, line 6.
[28] OPCV's Observations, paras 52-56 ; 22; Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG, p. 37, line 11 – p. 38, line 8.

proceedings target *"fondamentalement les mêmes faits"* as the proceedings before the Court that the case would be inadmissible.[29]

20. Côte d'Ivoire clarifies that the REDACTED, submitted by the Defence as proof of the existence of proceedings against Mr Gbagbo, REDACTED as it was anticipated that a case against Mr Gbagbo would be brought before the Court.[30] It is further submitted that the information contained in this document shows that REDACTED that no proceedings had been opened against Mr Gbagbo for the commission of violent crimes.[31]

21. Côte d'Ivoire indicates that, in view of the initiation of proceedings before the Court against Mr Gbagbo, national authorities chose to refrain from opening an investigation into, or proceedings against Mr Gbagbo for violent crimes.[32]

III. Analysis by the Chamber

22. The Chamber notes articles 17, 19 and 21 of the Rome Statute (the "Statute") and rules 58 and 59 of the Rules of Procedure and Evidence.

23. In the view of the Chamber, the admissibility of a case must be determined on the basis of the factual situation in existence at the time of the admissibility proceedings. Pursuant to article 17(1)(a) of the Statute, the Court is required to determine that a case is inadmissible where "the case *is being* investigated or prosecuted". Thus, the investigation or prosecution must be ongoing at the time of the admissibility proceedings. Indeed, this has been the interpretation of the Appeals Chamber, which has provided guidance on the issue, as follows:

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[29] Côte d'Ivoire's Observations, para. 13.
[30] Côte d'Ivoire's Observations, para. 22.
[31] Côte d'Ivoire's Observations, paras 23-26.
[32] Côte d'Ivoire's Observations, para. 27.

> "Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time."[33]

24. Therefore, in considering whether the case is admissible under article 17(1)(a) of the Statute, the crucial question for the Chamber is whether active steps are being taken in relation to the alleged prosecution of Mr Gbagbo in Côte d'Ivoire at the time of the admissibility proceedings. To this end, tangible proof must have been presented which supports the assertion that a national investigation or prosecution is ongoing.[34]

25. The Defence contends that the case against Mr Gbagbo before the Court is rendered inadmissible by proceedings that are alleged to be ongoing in Côte d'Ivoire against Mr Gbagbo in relation to economic crimes.[35] As set out above, in support of this contention, the Defence submits two press articles, dated 18 August 2011 and 19 August 2011 respectively,[36] and REDACTED.[37] The Defence does not provide any tangible proof showing that active steps have been taken in the alleged prosecution of Mr Gbagbo since August 2011, relying instead on the absence of any indication that the proceedings have been terminated as supporting the conclusion that they remain ongoing.[38] The Chamber cannot accept such an inference in light of the following.

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[33] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 56.

[34] *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-02/11-274 (OA), paras 2, 61 and 62.

[35] Admissibility Challenge, para. 36.

[36] Admissibility Challenge, Annexes 2 and 3.

[37] Admissibility Challenge, para. 53, Annex 4.

[38] Admissibility Challenge, para. 36.

26. The Chamber notes that the Prosecutor has submitted documentary evidence confirming that Mr Gbagbo was formally charged with economic crimes in Côte d'Ivoire on 18 August 2011, a fact which was also disclosed in the Prosecutor's application for a warrant of arrest for Mr Gbagbo.[39] A number of other documents submitted by the Prosecutor shed light on the progress of these proceedings since Mr Gbagbo's surrender to the Court.

27. In particular, the Chamber notes that the Ivorian *Ministre de la Justice, des Droits de l'Homme et des Libertés Publiques* confirmed REDACTED that, to date, the proceedings in relation to economic crimes REDACTED are the only proceedings that have been initiated in Côte d'Ivoire against Mr Gbagbo.[40] REDACTED[41] Furthermore, REDACTED the prosecution of Mr Gbagbo for economic crimes in Côte d'Ivoire has been impaired since his surrender to the Court and confirms that no action has been taken in relation to this file since November 2011.[42]

28. In the view of the Chamber, the information and documents detailed above show that, although a prosecution for economic crimes may have been initiated against Mr Gbagbo REDACTED and that some initial procedural steps may have been undertaken prior to Mr Gbagbo's surrender to the Court in November 2011, there has been no activity in relation to the suspect since that date. In the circumstances, it has not been demonstrated that Mr Gbagbo "is being prosecuted" in Côte d'Ivoire, within the meaning of article 17(1)(a) of the Statute.[43] As a result, it is unnecessary for the Chamber to examine the

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[39] Prosecutor's Response, para. 19; Prosecutor's Response, Annexes A, D, E, and F.
[40] Prosecutor's Response, Annex A. REDACTED
[41] Prosecutor's Response, Annex A; REDACTED
[42] Prosecutor's Response, para. 20; Prosecutor's Response, Annex G; REDACTED.
[43] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307 (OA), para. 41: "The Appeals Chamber found that the

arguments of the parties and participants as to whether the alleged prosecution relates to the "same case". Similarly, it is unnecessary for the Chamber to consider the submissions on whether Côte d'Ivoire is unwilling or unable genuinely to carry out the prosecution.

29. In this connection, and taking into account the Defence's submissions with respect to the possibility of a State remaining inactive or relinquishing jurisdiction, the Chamber is guided by the findings of the Appeals Chamber in its judgment confirming the decision of Trial Chamber II in the *Katanga* case. The Appeals Chamber found that "in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court".[44] Furthermore, the Chamber shares the view of the Appeals Chamber that "there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the 'duty to exercise [its] criminal jurisdiction' as envisaged in the [...] Preamble".[45]

Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307 (OA), para. 41: "The Appeals Chamber found that the words 'is being investigated' signify "the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses [...] [U]nless investigative steps are actually taken in relation to the suspects who are the subject of the proceedings before the Court, it cannot be said that the same case is (currently) under investigation by the Court and by a national jurisdiction".

[44] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), paras 2, 75-78.

[45] *Idem*, para. 85.

FOR THESE REASONS, THE CHAMBER

REJECTS the Admissibility Challenge.

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

Judge Silvia Fernández de Gurmendi

Presiding Judge

Judge Hans-Peter Kaul

Judge Christine Van den Wyngaert

Dated this 11 June 2013

At The Hague, The Netherlands