Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-02/11-01/11**
Date: **28 March 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

Confidential
with Annexes A, C, D, E and G – Confidential, *ex parte*, only available to the Office of the Prosecutor
with Annexes B and F – Confidential
with Annexes A, C, D, E and G – Confidential redacted version

Prosecution's response to Defence's request challenging the admissibility of the case pursuant to Article 17 and 19 of the Rome Statute

Source: **Office of the Prosecutor**

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

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1. On 15 February 2013, the Defence filed a challenge to the admissibility of the case pursuant to Articles 17 and 19 of the Rome Statute, alleging that the case against Mr. Gbagbo should be declared inadmissible since he claims that there are national proceedings against him in the Republic of Côte d'Ivoire ("Côte d'Ivoire") and that the existence of such proceedings entails a presumption that the State is willing and able to carry out these proceedings genuinely ("Request").[1]

2. On 19 February 2013, the Chamber ordered the Prosecution and the Legal Representative to file their responses by 28 March 2013, and on 14 March 2013 it authorized Côte d'Ivoire also to submit observations on the Request by the same date.[2]

3. The Prosecution submits that the Defence's Request should be rejected. Simply put, there are no national proceedings in Côte d'Ivoire against Mr. Gbagbo for the conduct which forms the basis of the charges in the Amended Document Containing the Charges ("DCC").[3] Alternatively, if the Chamber considers that there existed relevant national proceedings in the past, the Prosecution submits that, as a sovereign State, Côte d'Ivoire suspended such proceedings when it willingly "relinquished its jurisdiction in favour of the Court"[4] upon its transfer of Mr. Gbagbo to The Hague.

Confidentiality

4. The Prosecution submits its Response and Annexes as confidential – only available to the Parties and Participants, since they refer to matters that are not public. The Prosecution has applied *proprio motu* redactions to some of the annexes pursuant to Rule 81(2) and (4) since the information refers to personal

[1] ICC-02/11-01/11-404-Red.
[2] ICC-02/11-01/11-T-14-ENG, p.7, lines 1-3 and ICC-02/11-01/11-418.
[3] ICC-02/11-01/11-357-Conf-Anx1.
[4] ICC-01/04-01/07-1497, para. 85.

details of Prosecution sources.[5] An unredacted version of all annexes is filed as confidential, *ex parte*, only available to the Office of the Prosecutor. The Prosecution will also file a public redacted version of this submission.

Submission

Admissibility determination - a two-step inquiry

5. The Appeals Chamber has ruled that an admissibility determination follows a two-step inquiry: (1) whether there exists a national investigation and/or prosecution in relation to the case at hand, and (2) where such proceedings exist, whether they are vitiated by an unwillingness or inability of the State to carry them out genuinely. The unwillingness or inability of a State having jurisdiction over the case becomes relevant – and will be considered – only where, due to ongoing or past investigations or prosecutions in that State, the first prong of the test has been satisfied.[6]

Facts as they exist at the time of the challenge

6. The Defence argues at length that the Court should have previously found the case inadmissible, including at the time of the issuance of the arrest warrant, due to the existence at the time of relevant national proceedings. Irrespective of the merits of the Defence arguments, which the Prosecution disputes below, the Appeals Chamber has stated that admissibility must be determined on the basis of the facts as they exist at the time of the admissibility challenge: the critical issue being "whether or not the case *is* inadmissible, and not whether it *was* inadmissible."[7]

[5] ICC-02/11-01/11-30, para. 51.
[6] ICC-01/04-01/07-1497, paras 75, 78-79 and ICC-01/04-01/06-8-Corr, para. 29.
[7] ICC-01/04-01/07-1497, para. 56 (emphasis in the original).

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Burden of proof

7. The Defence advances two different burdens of proof for assessing this two-step inquiry. The Defence agrees that it has to prove the existence of national proceedings, but considers that once proven, there is a presumption of ability and willingness of the State to carry them out. It argues that the party claiming the inability and/or unwillingness of the State should then bear the burden of proof.

8. The Prosecution agrees that the Defence, as the challenging party, has the burden to prove the existence of relevant domestic proceedings, but disagrees that there exists a "presumption" that shifts the burden to the Prosecution to disprove the State's willingness or ability. As Rule 58 makes clear, the party making an admissibility challenge bears the burden of proof. Moreover, the Appeals Chamber has held, in the context of a challenge brought by a State, that "a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible".[8] The Prosecution submits that the same burden applies to any party bringing an admissibility challenge.

9. The Prosecution further submits that although the complementarity regime is premised on a "preference" for national proceedings, it disagrees that this preference translates into a "presumption" that shifts the burden to the opponent to disprove the State's willingness or ability. As noted above, it is the Defence that has brought the admissibility challenge, and therefore it bears the burden of proof with respect to both prongs of the two-step admissibility inquiry. This burden must be met, moreover, to the standard of proof of a "balance of probabilities".[9]

[8] ICC-01/09-01/11-307, para. 62.
[9] ICC-01/05-01/08-802, para. 203; ICC-01/09-02/11-274 OA, para. 61.

The same person / same conduct test

10. For a case to be declared inadmissible, at least one State with jurisdiction over the case must be "investigating, prosecuting or trying that case".[10] As emphasised by the Appeals Chamber, when deliberating on the admissibility of a case under Article 17(1)(a), "the question is not merely of 'investigation' in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction".[11] In the Democratic Republic of the Congo situation, the concept of a case was defined as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects".[12]

11. Based on this definition, Pre-Trial Chamber II in the Kenya cases held that for a case to be inadmissible national proceedings must encompass both "the person and the conduct which is the subject of the case before the Court".[13] This same person/same conduct test was then upheld by the Appeals Chamber.[14] Elsewhere in its decision in the Kenya cases, the Appeals Chamber also stated that "when the Court has issued a warrant of arrest or a summons to appear, for a case to be inadmissible under article 17(1)(a) of the Statute, national investigations must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court".[15] The Prosecution submits that on either formulation of the test, the Defence has failed to prove that Mr. Gbagbo was the subject of relevant national proceedings.

12. The Defence erroneously suggests that the test as developed before this Court also includes a broader category, referring to the concept of "potential cases" at the preliminary examination and article 15 stages, which can include a broader

[10] ICC-01/04-01/06-8-Corr, para. 30.
[11] ICC-01/09-02/11-274, para. 36.
[12] ICC-01/04-101-tEN-Corr, para. 65.
[13] ICC-01/09-01/11-101, para. 55 ; ICC-01/04-01/06-8-Corr, para. 31.
[14] ICC-01/09-01/11-307OA, para. 47.
[15] ICC-01/09-02/11-274, paras 1 and 39.

range or persons and conduct.[16] Pre-Trial Chamber II held that the concept of "potential cases" is limited to the early stages before concrete cases have yet to be identified before the Court.[17] Therefore, the notion of "potential cases" is completely inapplicable here.

13. Before the Pre-Trial Chamber in the *Saif al-Islam* case, the Prosecution argued that the "substantially the same conduct" test cannot be applied in a manner that is so flexible that its purpose is undermined.[18] For example, under a loose interpretation whereby the underlying incidents and facts could vary, a domestic authority could choose to genuinely investigate the same suspect for the same type of conduct (e.g. killings), but for incidents that are not investigated by the ICC, with the knowledge that the evidence in those other non-ICC incidents is weak and that the investigation will therefore not progress to a genuine trial that poses the same likelihood of conviction. Under the loose interpretation that allows the State to choose incidents, a "genuine" investigation into weak incidents would suffice to support a successful admissibility challenge and, potentially, block further ICC proceedings. To ensure that impunity does not prevail, the Court must guard against the possibility that a State could orchestrate "genuine proceedings" based on weak incidents deliberately pursued in order to block any ICC cases based on substantially the same conduct.[19] In other words, it is essential to the very purpose of the admissibility test that the same conduct test not be interpreted too loosely.

[16] Defence Application, para. 47.
[17] ICC-01/09-01/11-101, para. 54: "… the reference to the groups of persons [i.e. potential cases] is mainly to broaden the test, because at the preliminary stage of an investigation into the situation it is unlikely to have an identified suspect. The test is more specific when it comes to an admissibility determination at the "case" stage, which starts with an application by the Prosecutor under article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified. At this stage, the case(s) before the Court are already shaped. Thus, during the "case" stage, the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings."
[18] ICC-01/11-01/11-276-Red2, para. 28.
[19] Moreover, the Prosecution will be unable to exercise scrutiny over incidents chosen by a State that it itself has not investigated, and will be unable also to do so once the challenge has been brought as a consequence of the operation of Article 19(7).

14. At the same time, the inclusion of "substantially" in the test adopted by the Appeals Chamber recognizes that the purposes of the test could be met even if a national investigation or prosecution does not necessarily match *exactly* all of the precise features of the ICC's investigation or prosecution, notwithstanding the references to 'same conduct' in Article 20(3) and Article 90(1) in the context of admissibility.

15. To balance these competing concerns, therefore, the Prosecution submits that in applying the "substantially the same conduct" test of the Appeals Chamber, the Chamber should satisfy itself 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. In examining to what extent the national investigation or prosecution matches the Prosecution's investigation or prosecution, the Chamber should consider whether the conduct that forms the basis of the ICC crimes – for which the Court seeks the person's surrender - is reflected in the crimes for which the suspect stands accused at the national level.

16. By contrast, and contrary to both the holding of the Appeals Chamber and the underlying purpose of the admissibility test, the Defence argues that a flexible definition of the term "conduct" should be adopted. The Defence claims that the term "conduct" should refer to the general behaviour related to the *context* in which the crimes were committed, rather than to the *behaviour* associated with the direct commission of the crimes.[20] According to the Defence, the "economic crimes" of the national proceedings and the "blood crimes" of DCC amount to "substantially the same conduct". Both arise from the same *context*, namely the post-electoral crisis and the alleged desire of Mr. Gbagbo to implement a policy to

[20] ICC-02/11-01/11-404-Conf, para. 43.

remain in power.[21] Following this line of reasoning, the Defence says that since national proceedings were initiated against Mr. Gbagbo in Côte d'Ivoire in August 2011 for "economic crimes" including *« vol aggravé, détournement de deniers publics, concussion, pillage et atteinte à l'économie nationale*",[22] the case at the ICC is inadmissible.

17. The Defence's argument is flawed. The economic crimes in the domestic proceedings do not amount to "substantially the same conduct" as that which underlies the ICC case. There are no common denominators between the *actus reus* of the crime of embezzlement and the crime of killing civilians for instance. The embezzlement or theft of public funds, which is the subject of the national proceedings, is conduct that is aimed at *obtaining* funds. It is different from Mr. Gbagbo's subsequent conduct of *using* these funds to contribute to the commission of crimes against humanity of murder, sexual violence, other inhumane acts or persecution that are the subject of the proceedings before this Court. The Defence's argument would convert the "substantially the same conduct" test to one of "any conduct", including even conduct not proscribed under the Rome Statute.

18. In essence, the Defence's argument converts the test of "substantially the same conduct" into a test that includes the investigation and prosecution of any crime committed in the same *context* as the crimes charged by the ICC. Such a test would not insure that those allegedly responsible for the Rome Statute crimes would be investigated and prosecuted for those crimes. Further, such a test would have dangerous implications, allowing national jurisdictions to shield persons suspected of Rome Statute crimes. Under the broad approach of the Defence, a domestic authority could choose to carry out an investigation or prosecution against a person for any crime allegedly committed in the same *context* (i.e. post-election violence) in order thereby to prevent the person from

[21] ICC-02/11-01/11-404-Conf, paras 43 and 52.
[22] ICC-02/11-01/11-404-Conf, para. 36.

being prosecuted for the commission of the "most serious crimes of concern to the international community"[23].

19. The Prosecution submits in Annex A to G documents that confirm that the domestic proceedings against Mr. Gbagbo are limited to economic crimes.[24] Moreover, in relation to the Defence arguments that the case should have been deemed inadmissible at the time of the issuance of the arrest warrant against the suspect, an argument that is itself flawed,[25] the Prosecution recalls that when it submitted its application for the issuance of an arrest warrant against Mr. Gbagbo, it disclosed the existence of the national investigation into economic crimes, a fact which was reaffirmed again on 18 February 2013 by the Ivorian authorities.[26] Specifically, the Prosecution stated that Mr. Gbagbo is charged in Côte d'Ivoire with "*vol en réunion, à main armée, avec violences et par effraction, détournement de deniers publics, concussion, atteinte à l'économie publique, pillage et complicité desdites infractions*".[27] Formal charges for these crimes were filed against the accused on 18 August 2011, pursuant to Articles 27, 29, 30, 110, 111, 225, 226, 227, 229, 313, 325, 327, 392, 395, 396 and 397 of the Penal Code.[28] On 26 March 2013, the *Ministère de la Justice, des Droits de l'Homme et des Libertés Publiques* of Côte d'Ivoire confirmed that these are the only charges Mr. Gbagbo is accused of domestically.[29]

Inactivity by national authorities

20. Additionally, the Prosecution can confirm that, although the domestic proceedings against Mr. Gbagbo have not been officially closed, they are

[23] Preamble of the Rome Statute.
[24] CIV-OTP-0041-0512, CIV-OTP-0041-0514, CIV-OTP-0041-0515, CIV-OTP-0041-0517, CIV-OTP-0041-0523, CIV-OTP-0041-0526 and CIV-OTP-0041-0531.
[25] ICC-01/04-01/07-1497, para. 56.
[26] ICC-02/11-01/11-87-Conf-Exp-Red2, paras 132-141. See also Annex G containing document CIV-OTP-0041-0531.
[27] Annex A containing document CIV-OTP-0041-0512.
[28] ICC-02/11-01/11-129-Conf-Anx38; ICC-02/11-01/11-404-Conf, para. 7; ICC-02/11-01/11-212, para. 97; See also Annexes A-G, as received from the Ivorian authorities, containing documentation related to the charges against Mr Gbagbo in Côte d'Ivoire.
[29] Annex A containing document CIV-OTP-0041-0512.

currently suspended due to Mr. Gbagbo's transfer to The Hague.[30] Furthermore, the Ivorian authorities indicate that since November 2011 "*aucun acte d'instruction*" has been performed in the domestic case.[31]

21. Therefore, even if the domestic charges for economic crimes related to substantially the same conduct as the charges before this Court, which the Prosecution disputes, the national authorities are currently inactive, as no investigation within the meaning of Article 17(1)(a) has been or is being carried out and no prosecution is taking place. The Prosecution recalls that admissibility must be determined on the basis of the facts as they exist at the time of the admissibility proceedings.[32] The Prosecution further recalls that the Appeals Chamber found that "[i]n determining whether a State is indeed investigating or prosecuting a case, the Chamber will need to be made aware of and be provided with documentation on the national criminal justice system of the State in question"[33] and that "the words 'is being investigated', in this context, signify the taking of steps directed at ascertaining whether *those suspects* [for whom arrest warrants have been issued] are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."[34] The Defence has failed to provide the Chamber with any evidence to that effect.

[30] Annex G containing document CIV-OTP-0041-0531.
[31] Annex G containing document CIV-OTP-0041-0531 and, since the prescription of three years applies to this type of charges according to Ivorian law, the deadline to prosecute Mr. Gbagbo for these economic crimes will expire in the next 20 months.
[32] ICC-01/04-01/07-1497, para. 56 (emphasis in the original)
[33] ICC-01/09-01/11-336 OA, 20 September 2011, para. 27.
[34] ICC-01/09-01/11-307 OA, para. 41, emphasis in original; ICC-01/09-02/11-274 OA, 30 August 2011, para. 40, emphasis in original. See also ICC-01/09-01/11-307 OA, para. 43 and ICC-01/09-02/11-274 OA, para. 42: "[W]hat is relevant for the admissibility of a concrete case under articles 17 (1) (a) and 19 of the Statute is not whether the same evidence in the Prosecutor's possession is available to a State, but whether the State is carrying out steps directed at ascertaining whether these suspects are responsible for substantially the same conduct as is the subject of the proceedings before the Court."

Unwillingness

22. The Prosecution further submits that if the Chamber were to find that Mr. Gbagbo was previously being prosecuted in Côte d'Ivoire within the meaning of article 17(1)(a), the Ivorian authorities have now relinquished jurisdiction in favour of the Court.

23. The Defence alleges that Côte d'Ivoire has clearly demonstrated its will to prosecute perpetrators of crimes committed during the post-electoral crisis and that none of the requirements of Article 17(2) are satisfied in the present case.[35]

24. The Prosecution recalls that the Ivorian authorities called upon the Court to investigate and prosecute those responsible of the gravest crimes committed since 28 November 2010 on the whole of the Ivorian territory.[36] They also insisted that the economic charges against Mr. Gbagbo in Côte d'Ivoire were separate from other charges that may be brought against him by the ICC.[37] Finally, they surrendered him to the The Hague on 30 November 2011. The Prosecution submits that this reflects the valid decision of a sovereign State to relinquish its jurisdiction in favour of the Court[38] in order for Mr. Gbagbo to be prosecuted for "blood crimes".

25. In addition, in a communication dated 18 February 2013,[39] the Ivorian authorities made it clear that they had no intention to prosecute Mr. Gbagbo:

> *« […] Monsieur Laurent Gbagbo était poursuivi pour des infractions économiques. Depuis sa remise à la Cour Pénale Internationale, la procédure est compromise. Depuis le mois de novembre 2011, aucun acte d'instruction n'a été accompli dans son dossier. La prescription étant de trois (03) ans pour les délits en Côte d'Ivoire, elle sera acquise dans vingt (20) mois. Or, rien ne nous dit que Monsieur Gbagbo sera de retour en Côte d'Ivoire avant cette date.* ***Les infractions économiques dont il a été inculpé en Côte d'Ivoire et***

[35] ICC-02/11-01/11-404-Conf, paras 72-73 and Annex A containing document CIV-OTP-0041-0512.
[36] ICC-02/11-01/11-87-US-Exp-Anx6.112.
[37] ICC-02/11-01/11-87-US-Exp-Anx5.45.
[38] ICC-01/04-01/07-1497, para. 85.
[39] Annex G containing document CIV-OTP-0041-0531

> ***pour la poursuite desquelles le Procureur de la République avait formulé une requête sont donc sans intérêt pour la Justice ivoirienne.*** *Au surplus les poursuites invoquées par la défense de Monsieur Gbagbo sont sans objet […] »*[40]

26. Therefore, and contrary to the Defence's allegation, the unwillingness of the Ivorian authorities to prosecute Mr. Gbagbo falls within the category of "*A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case*."[41] Trial Chamber II in the *Katanga* case indicated that a State can expressly convey its intent or it can be inferred from unambiguous facts, such as, amongst other: (i) the referral of the situation from the State to the Court, (ii) the fact that the State did not object to the surrender of the accused and, (iii) made no challenge to admissibility.[42]

27. The Appeals Chambers in the same case stated that "the purpose of article 17 (1) (b) of the Statute is to ensure that the Court respects genuine decisions of a State not to prosecute a given case, thereby protecting the State's sovereignty. However, the provision must also be applied and interpreted in light of the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, namely "to put an end to impunity".[43] As such, the Appeals Chamber held that a decision to relinquish jurisdiction cannot be equated with a decision not to prosecute within the meaning of article 17(1)(b).[44]

28. In relation to similar arguments as those now raised by the Defence in this case, the Appeals Chamber further added:

> "The Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they

[40] In bold by the Prosecution.
[41] ICC-01/04-01/07-1213-tENG, para. 80.
[42] ICC-01/04-01/07-1213-tENG, para. 90.
[43] ICC-01/04-01/07-1497, para. 83.
[44] ICC-01/04-01/07-1497, para. 82-83.

were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court. The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes. The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in. Moreover, 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 sixth paragraph of the Preamble." [45]

29. The Prosecution therefore submits that, as stated above, Côte d'Ivoire made explicit statements and took specific actions to refer the situation of Côte d'Ivoire to the Court, surrendered Mr. Gbagbo to the ICC and is not challenging the admissibility of the case. Côte d'Ivoire should, as a result, be considered as having relinquished its jurisdiction over Mr. Gbagbo to the Court.

30. The fact that another person also subject to ICC proceedings has yet to be surrendered to the Court, moreover, has no bearing on the admissibility of the current case. The issue of arrest and surrender, or indeed the possibility of admissibility proceedings, in relation to this other person is, moreover, still pending a determination by this Court – the outcome of which remains hypothetical at this stage.

[45] ICC-01/04-01/07-1497, para. 85. The Prosecution notes, moreover, that none of the exceptions that the Appeals Chamber goes on to note in the same paragraph as a basis under which the Court may decide not to act upon a relinquishment of jurisdiction, namely article 17 (1) (c) and (d), article 19(1), and article 53 of the Statute, apply in this case.

Conclusion

31. The Prosecution requests the Chamber to reject the Request of the Defence by declaring that the case against Mr. Gbagbo is admissible.

Fatou Bensouda, Prosecutor

Dated this 28th day of March 2013

At The Hague, The Netherlands