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

Date: 28 August 2014

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert

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

Public

**Decision on further submissions on issues related to the admissibility of the
case against Simone Gbagbo**

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

Sylvia Geraghty

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

Herman von Hebel

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 present decision on further submissions on issues related to the admissibility of the case against Simone Gbagbo.

1. Upon request of the Prosecutor,¹ Pre-Trial Chamber III issued, on 29 February 2012, the “Warrant of Arrest for Simone Gbagbo” (the “Warrant of Arrest”),² followed, on 2 March 2012, by the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo” (the “Article 58 Decision”).³

2. On 30 September 2013, Côte d’Ivoire filed the “*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 du Rome*”, challenging the admissibility of the case against Simone Gbagbo before the Court (the “Admissibility Challenge”).⁴

3. On 15 November 2013, the Chamber issued the “Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, whereby the Chamber, *inter alia*, invited the Prosecutor, the Defence of Simone Gbagbo and the Office of Public Counsel for victims on behalf of the victims who have communicated with the Court in relation to the case, to submit observations on the Admissibility Challenge.⁵

¹ ICC-02/11-35-US-Exp.

² ICC-02/11-01/12-1.

³ ICC-02/11-01/12-2-Red.

⁴ ICC-02/11-01/12-11-Conf and annexes. A public redacted version of the filing is also available (ICC-02/11-01/12-11-Red).

⁵ ICC-02/11-01/12-15.

4. On 25 February 2014, Côte d'Ivoire, as authorised by the Chamber,⁶ provided further documentation in support of its Admissibility Challenge.⁷

5. The response by the Defence was filed on 8 April 2014,⁸ while the responses by the Prosecutor⁹ and the legal representative of victims¹⁰ were both filed on 9 April 2014.

6. Having reviewed the documentation provided by Côte d'Ivoire, as well as the observations by the parties and participants, the Chamber considers that, prior to the disposal of the Admissibility Challenge and in order to perform a meaningful assessment as to whether the case against Simone Gbagbo allegedly subject to national proceedings sufficiently mirrors the case before the Court, it would be beneficial that further submissions and documentation be received from Côte d'Ivoire in particular as to the contours and the current status of the alleged domestic proceedings against Simone Gbagbo, also taking into account that the relevant circumstances might have changed since the last submissions by Côte d'Ivoire. In this regard, the Chamber recalls that rule 58(2) of the Rules of Procedure and Evidence provides the Chamber with the power to take the appropriate measures for the proper conduct of the admissibility proceedings. With a view to ensuring that any additional submission is effective and useful to the final determination of the Admissibility Challenge, the Chamber considers it necessary to recall in the present decision certain aspects of the applicable law

⁶ "Decision on Côte d'Ivoire's request to provide additional documents in support of its challenge to the admissibility of the case against Simone Gbagbo", 20 February 2014, ICC-02/11-01/12-35, p. 7.

⁷ ICC-02/11-01/12-37-Conf and annexes. A public redacted version of the filing is also available (ICC-02/11-01/12-37-Red).

⁸ ICC-02/11-01/12-39.

⁹ ICC-02/11-01/12-41-Conf and annex. A public redacted version of the response is also available (ICC-02/11-01/12-41-Red).

¹⁰ ICC-02/11-01/12-40-Conf and annexes. A public redacted version of the filing is also available (ICC-02/11-01/12-40-Red).

and indicate the related information and clarifications requested from Côte d'Ivoire on issues of relevance to the admissibility of the case against Simone Gbagbo before the Court.¹¹

7. The Chamber notes article 17 of the Rome Statute (the "Statute") as well as the relevant jurisprudence of the Court on the test to be applied in considering an admissibility challenge and the related burden of proof, according to which: (i) in considering an admissibility challenge based on article 17(1)(a) of the Statute, the first determination to be made is on whether there is an ongoing investigation or prosecution at the national level of the same case that is before the Court;¹² (ii) the expression "the case is being investigated" in article 17(1)(a) of the Statute must be understood as requiring the taking of "concrete and progressive investigative steps" to ascertain whether the person is responsible for the conduct alleged against him or her before the Court;¹³ (iii) a State challenging the admissibility of a case "bears

¹¹ A similar approach was taken by the Chamber in relation to the challenge filed by Libya to the admissibility of the case against Saif Al-Islam Gaddafi before the Court (see "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239). The Appeals Chamber subsequently stated that "[i]n providing such detailed guidance, the Pre-Trial Chamber provided effective and useful guidance as to what Libya was required to produce to substantiate its admissibility challenge" (Appeals Chamber, "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 21 May 2014, ICC-01/11-01/11-547-Red, para. 205).

¹² See 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, paras 1, 75-79.

¹³ Appeals Chamber, "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 21 May 2014, ICC-01/11-01/11-547-Red, paras 54, 55 and 73. See also Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, para. 11. In this regard, the Appeals Chamber clarified that these investigative steps may include "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses" (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, paras 1 and 40).

the burden of proof to show that the case is inadmissible” and, to discharge this burden, “the State must provide the Court with evidence with a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case [as] [i]t is not sufficient to merely assert that investigations are ongoing”;¹⁴ (iv) the evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the same case that is before the Court is not only “evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes”, but extends to all material capable of proving that an investigation or prosecution is ongoing;¹⁵ (v) “[i]n assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating” and, in order to carry out this assessment, it is necessary for a Chamber to know the contours or parameters of both the case before the Court and the case subject to the alleged domestic proceedings;¹⁶ (vi) a case before the Court is defined by the suspect against whom the proceedings before the Court are being conducted and the conduct giving rise

¹⁴ 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, paras 2 and 61. In this sense, as previously stated by this Chamber, “a mere assurance that the national ongoing investigation covers the same as the case before the Court cannot be deemed sufficient to discharge [the] burden of proof in this regard” (Pre-Trial Chamber I, “Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”, 7 December 2012, ICC-01/11-01/11-239, para. 28).

¹⁵ *Ibid.*, paras 10 and 11; see also “Decision on the admissibility of the case against Abdullah Al-Senussi”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 66(viii). The Chamber clarified that this evidence includes, for example, “directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic] investigation of the case, to the extent that they demonstrate that [the national] authorities are taking concrete and progressive steps to ascertain whether [the person] is responsible for the conduct [alleged in the proceedings before] the Court”.

¹⁶ Appeals Chamber, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 21 May 2014, ICC-01/11-01/11-547-Red, para. 2.

to criminal liability under the Statute that is alleged in the proceedings;¹⁷ and (vii) “the parameters of the ‘conduct’ alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question”.¹⁸

8. At the present stage of the proceedings, the conduct alleged in the case against Simone Gbagbo before the Court is set out in the Warrant of Arrest, read with the Article 58 Decision and, by way of incorporation into the latter, the relevant parts of the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”.¹⁹ The Chamber, more specifically, recalls that the present case concerns the individual criminal responsibility of Simone Gbagbo for the commission, jointly with Laurent Gbagbo and his inner circle and through the Ivorian Defence and Security Forces, who were reinforced by youth militias and mercenaries, of the crimes of murder, rape and other forms of sexual violence, inhumane acts and persecution committed: (i) in the context of the march on the *Radiodiffusion Télévision Ivoirienne* (RTI) station on 16 December 2010; (ii) in the context of the women’s march on 3 March 2011 in Abobo; (iii) in the context of the Abobo market shelling on 17 March 2011; and (iv) in relation to the Yopougon massacre on 12 April 2011.

9. The Chamber considers that this constitutes the relevant conduct alleged in the proceedings before the Court that defines the scope of the criminal case against Simone Gbagbo, and that must therefore be compared to

¹⁷ See e.g. Appeals Chamber, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 21 May 2014, ICC-01/11-01/11-547-Red, para. 1.

¹⁸ Decision on the admissibility of the case against Abdullah Al-Senussi”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 66(iii).

¹⁹ Pre-Trial Chamber I, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”, 30 November 2011, ICC-02/11-01/11-9-Red.

the conduct that is allegedly subject to the domestic proceedings in Côte d'Ivoire. In order to make this assessment, "the contours of the case being investigated domestically [...] must be clear", given that, "[i]f a State is unable to present such parameters to the Court, no assessment of whether the same case is being investigated can be meaningfully made".²⁰ As stated above, upon review of the documentation so far provided by Côte d'Ivoire, the Chamber considers that it would benefit from further submissions and further documentation from Côte d'Ivoire indicating with more precision the contours of the alleged proceedings held against Simone Gbagbo in Côte d'Ivoire. In particular, the Chamber would benefit from information, properly substantiated by concrete, tangible and pertinent evidence, with regard to: (i) Simone Gbagbo's conduct allegedly being investigated/prosecuted by the domestic authorities; (ii) the parameters of the anticipated case at the national level; and (iii) whether, and to what extent, the anticipated case covers fully or in part Simone Gbagbo's criminal responsibility for acts of murder, rape and other forms of sexual violence, inhumane acts and persecution committed within the context of the march on the RTI station on 16 December 2010, the women's march on 3 March 2011 in Abobo, the Abobo market shelling on 17 March 2011, and the Yopougon massacre on 12 April 2011.

10. This Chamber also previously found that a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance,²¹ and that for a State to discharge its burden of proof that currently there is not a situation of "inaction" at the national level, it needs to substantiate that an investigation or prosecution is in progress at this

²⁰ Appeals Chamber, "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 21 May 2014, ICC-01/11-01/11-547-Red, paras 83 and 84.

²¹ Pre-Trial Chamber I, "Decision on the OPCD requests in relation to the hearing on the admissibility of the case", ICC-01/11-01/11-212, para. 9.

moment.²² As observed above, circumstances relevant to the admissibility of the case against Simon Gbagbo might have changed since the latest submissions filed by Côte d'Ivoire in the record of the case. Accordingly, the Chamber considers that the provision of updated information by Côte d'Ivoire in relation to the current status of the alleged domestic proceedings against Simone Gbagbo would be of assistance to the disposal of the Admissibility Challenge. Additional and updated information – and evidence in support thereof – of particular relevance relates to: (i) investigative and/or procedural steps, if any, that have been taken after the filing of Côte d'Ivoire's latest submissions; (ii) what type of evidence, if any, has been collected as a result of any such investigative steps; (iii) at which phase of the proceedings the alleged national case against Simone Gbagbo is at the moment; and (iv) the timeline of the national proceedings conducted thus far, and the envisaged timeline of the anticipated continuation of such proceedings.

11. Finally, Côte d'Ivoire's submissions, with the appropriate evidence in their support, on the matters identified above, if any, shall be provided by 10 October 2014. Within the same time limit, Côte d'Ivoire may also provide submissions and evidence on any other matters relevant to the admissibility of the case and on which it intends to rely for the purposes of the Admissibility Challenge. The Chamber will determine the appropriateness of any response to such submissions upon request of the parties and participants, if any, after the filing by Côte d'Ivoire.

²² Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11-239, para. 14.

FOR THESE REASONS, THE CHAMBER

DECIDES that further submissions, if any, by Côte d'Ivoire relevant to its challenge to the admissibility of the case against Simone Gbagbo before the Court and any evidence in support thereof shall be filed by 10 October 2014.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Ekaterina Trendafilova



Judge Christine Van den Wyngaert

Dated this 28 August 2014

At The Hague, The Netherlands