

First Day of the ICC Confirmation of Charges Hearing in the Case against Laurent Gbagbo

19 FEBRUARY 2013

Strategies of the defense and the prosecution, and the preliminary decisions of Pre-Trial Chamber I.

Introduction of the Hearing

The confirmation of charges hearing in the case *The Prosecutor v. Laurent Gbagbo* began on the afternoon February 19, 2013 at the International Criminal Court (ICC). The person charged, Laurent Gbagbo, appeared and was represented by Emmanuel Altit and Professor Dov Jacobs. Appearing healthier than he had at the initial hearing on December 5, 2011, Laurent Gbagbo had a serene and determined posture as he faced the charges that the prosecution was preparing to submit to Pre-Trial Chamber I (PTC). The ICC had scheduled the hearings to accommodate Laurent Gbagbo, holding sessions only in the afternoons, in sequences of one hour interspersed with breaks, and allowing for Gbagbo to periodically follow the hearings through webcast outside the courtroom. Gbagbo took advantage of this option a few times to quietly leave the courtroom, but he would return almost immediately.

There was a remarkably strong presence in the public galleries of Ivorian citizens who came to follow the confirmation hearing. From time to time, Gbagbo hailed his supporters through the window. Officials from the Ivorian Patriotic Front (FPI) were present in the public gallery, while a crowd of indeterminate size protested outside the courthouse. This pro-Gbagbo show of support began in Abidjan on Saturday, February 16, with a demonstration that was dispersed by Ivorian authorities.

The hearing on confirmation of charges was presided over by the Honorable Judge Silvia Fernández de Gurmendi. It began with a reading of the charges as presented by the prosecutor in the amended Document Containing the Charges (DCC), dated January 25, 2013. The court clerk read out eight counts of crimes against humanity against Laurent Gbagbo, as indirect co-perpetrator of (1) murder, (2) rape, (3) inhumane acts or attempted murder, (4) persecution for political, national, ethnic, or religious motives; and as a contributor to (5) murder, (6) rape, (7) inhumane acts or attempted murder, and (8) persecution for political, national, ethnic, and religious motives.

Justice Fernández de Gurmendi granted the defense leave to comment on two points: procedures for admissibility of the case before the ICC and due process. The bench announced that on Friday, February 15, 2013 the defense submitted a new application challenging the admissibility of the case before the ICC and that under Rule 58 of the Rules of Procedure and Evidence, the PTC is required to consider the request. The presiding judge indicated that the PTC would issue its ruling on admissibility on February 28, 2013.

Defense Arguments

Emmanuel Altit announced that Professor Dov Jacobs would elaborate on the above-mentioned points. He first laid out the context of the proceedings, which form part of a story that is still taking shape, involving numerous parties including the Office of the Prosecutor (OTP), the United Nations, the Ivorian government, the French government, the representatives of victims, judges, and former President Laurent Gbagbo. Professor Jacobs compared metaphorically the Ivorian drama, or at least the developing ICC proceedings, to the drama of Luigi Pirandello, with a storyline involving many actors but only one of them, Laurent Gbagbo, was singled out.

Subsequently, Professor Jacobs addressed the admissibility of the case, putting into perspectives the proceedings before the ICC and those taking place domestically in Côte d'Ivoire. He asserted that the Ivorian courts should be the primary actors, noting that "complementarity is not an option recognized to national courts but rather an obligation." He then analyzed the complementarity principle in connection with the duty to prosecute international crimes which raises the issue pertaining to the unwillingness or inability test of national courts to carry their duties; in ascertaining the unwillingness or inability of national courts to prosecute, he wondered if the scope of the test would apply on the conduct/crimes or the context under examination.

The defense argued that the proceedings against Laurent Gbagbo in Côte d'Ivoire focus on the same crimes for which he is being prosecuted by the ICC. He says that in the DCC, the prosecutor does not emphasize the crimes but instead describes the context in which the crimes were committed. He also dismissed the allegations that the criminal proceedings against Gbagbo in Côte d'Ivoire are limited to economic crimes, given that Gbagbo's co-defendants, including Simone Gbagbo and Blé Goudé, are being prosecuted for broader acts. Therefore, the defense asked the PTC to declare the case inadmissible under Article 17 of the Rome Statute, asserting that Côte d'Ivoire has demonstrated the willingness to prosecute Gbagbo and does not lack the ability to investigate and organize the trial of Gbagbo.

The defense contended that Côte d'Ivoire has proclaimed its ability to prosecute post-election violence through the ongoing criminal proceedings against members of the Laurent Gbagbo regime, including former political and military authorities. The defense also considers that Côte d'Ivoire has the willingness to prosecute post-election violence crimes and this can be evidenced by the resolve to carry domestic prosecution against members of the Gbagbo regime. The defense further believes that Gbagbo is not likely to be treated mercifully by Ivorian courts. The defense considers the readiness of Ivorian courts to handle Gbagbo case as an important criterion for the test of willingness. In a previous hearing before the

ICC, notably in case of *The Prosecutor v. Germain Katanga*, the test of unwillingness was evidenced by the total inaction on the part of the Congolese authorities. This does not seem to be the case in Côte d'Ivoire.

The defense warned the PTC to avoid leniency while conducting the unwillingness or inability test. This could send a wrong message to States that would pick and choose cases to refer to the ICC and those they would prefer to prosecute domestically. A weak response of the ICC towards this attitude could portray the court as having a complacent standard of admissibility. The ICC would then become a convenient court, subjected to the will of States. The defense alleged that in the present situation, Ivorian authorities are manipulating the ICC by announcing that domestic charges against Gbagbo are limited to economic crimes and calling upon the ICC to prosecute other crimes committed by Gbagbo, while the same authorities organize domestic prosecutions beyond economic crimes, notably against Simone Gbagbo. The same Ivorian authorities, who were ready to refer and transfer Gbagbo to the ICC, are unwilling to execute the ICC warrant of arrest against Simone Gbagbo and transfer her to The Hague. Touching on due process, the defense raised four preliminary issues: cooperation, the charges, the role of the victims' legal representatives, and the connection between the case before the ICC and ongoing proceedings in Côte d'Ivoire.

Regarding cooperation, the defense contends that the Gbagbo case is so complex that international actors are involved, namely France and the United Nations, who were present before, during, and after the electoral crisis of 2010. The United Nations Operation in Côte d'Ivoire (UNOCI) had military observers and troops there to maintain order, participated in the elections (including in the certification of results) and mediation initiatives, and is still active in the reconstruction of the country. France, the colonial power in Côte d'Ivoire, has been continually active in the country's military, administrative, economic, and financial activities since independence.

The defense argues that UNOCI and France possess information relevant to the charges pending before the ICC but that the prosecutor made no mention of this in the DCC. The defense reported that it unsuccessfully attempted to obtain cooperation from UNOCI and France, arguing that - in view of the modest evidence presented by the prosecutor in the DCC - information that France and UNOCI possess on the conflict is crucial. Having failed to obtain the cooperation of UNOCI and France, the defense requested that the confirmation of charges hearing be postponed.

Regarding the charges, the defense was appalled by the fact that the prosecutor's DCC contained legal and factual inconsistencies that are inconsistent with the fact that the prosecutor ample time and full cooperation of the Ivorian authorities to carry out investigations in Côte d'Ivoire. First of all, the defense believes that in

the DCC, the prosecutor did not thoroughly present the facts and circumstances and confused the essential elements of the offenses with subsidiary or accessory facts, providing nothing more than general remarks on the criminal intent. Secondly, the defense argued that the prosecution introduced a new mode of responsibility that was not included in the documents originally exchanged, notably provisions of article 25(3)(d), relating to the contribution of the commission of crimes, in addition to the primary mode of liability (indirect co-perpetrator). The defense also objected that this new mode of liability was disclosed only during a pre-trial conference, with no other form of notification.

The defense also addressed the behavior of the legal representatives of the victims (LRV), criticizing them for trying to be recognized as parties to the proceedings even though the Rome Statute only recognizes their role as through the prism of participation. The defense objected that the PTC did nothing to remind the LRV of their role and also protested that the PTC responded to a request from the LRV on the eve of the hearing without consulting the defense.

Finally, the defense reasserted that there is only one unique case related to case on post-election violence and that very same case is subject to domestic proceedings in Cote d'Ivoire and international indictment before the ICC. In consideration to the principle of complementarity, the ICC should: (1) relinquish jurisdiction in favor of national courts and allow Gbagbo to defend himself in Côte d'Ivoire; or (2) adjourn deliberations on the case until the completion of current cases in Côte d'Ivoire, as Laurent Gbagbo cannot be tried without knowledge of what Simone Gbagbo and Blé Goudé did.

Prosecutor's Response

ICC Prosecutor Fatou Bensouda told the President of the PTC that Eric MacDonald, Senior Trial Lawyer for the OTP, would respond to the points raised by the defense. The prosecution did not wish to comment further on the issue of admissibility, opting to await the February 28 ruling of the PTC. The prosecution wished however to criticize the last minute application of the defense on admissibility, calling it a delaying tactic. MacDonald also stated that the prosecution would demonstrate the admissibility of the case and accused the defense of straining acceptable behavior and abusing the notion of what the ICC identified as "substantially the same conduct" in *The Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al-Senussi*.

The prosecution also contends that Laurent Gbagbo cannot be exonerated because there are ongoing proceedings against him in Côte d'Ivoire, given the serious nature of crimes the prosecutor is seeking to indict him for. The prosecution pledged to demonstrate that the application of inadmissibility was nothing but a

smokescreen.

MacDonald responded to the argument of lack of cooperation by France and the UN by asking the defense to provide written evidence of its request for cooperation. He also called this another delaying strategy for a hearing that was originally scheduled to take place in June 2012 and blasted the defense for not mentioning this difficulty throughout the preceding eight months.

As for the defense's claim that it had not been adequately informed on the new mode of liability leveled against Gbagbo, charging him as a contributor under Article 25(3)(d) of the Rome Statute, MacDonald stated that this exception should be dismissed because Rule 121 (of the Rules of Procedure and Evidence) calls for a notification to the defense and to the defendant 30 days before the confirmation of charges hearing. Furthermore, the prosecution stated that the OTP communicated to the defense a detailed list of charges and the methods by which they would be presented at the hearing. Finally, it was also stipulated in the arrest warrant that the modes of liability could be revised during the confirmation of charges, and MacDonald asserted that this hearing was the time and place to do it.

The defense took the floor to protest that the procedure for the prosecution to change the modes of liability was not correctly followed, as notification was given only at the request of the defense. They added that nowhere in the DCC were the modes liability clearly presented and stated that the OTP confuses the elements of crimes against humanity with the modes of liability. The defense concluded its comment by asserting that reading the DCC should not be a "treasure hunt."

Preliminary Decisions of the Chamber

After a brief interruption of the hearing, the PTC decided to respond to the four questions raised by the defense. First, the PTC believes that the confirmation of charges hearing does not depend on any external cooperation by which the defense would have benefited or not. Second, the PTC requested that the issues raised by the defense on the DCC be attached to the review of charges under Rule 122.6, stating that they would be considered throughout the hearing. Thirdly, the PTC took into consideration the comments of the defense on the behavior of the LRV, but fails to identify the action sought by the defense. Finally, the PTC ruled that there is no legal ground under the Rome Statute for the adjournment of its proceedings because of the existence of similar proceedings before national courts.

Opening Statements from the Prosecution

Fatou Bensouda, proceeded finally to her opening statement in which she claimed that Laurent Gbagbo should be tried before the ICC after the confirmation of charges against him because of his choice to conduct criminal acts in deciding to contest Alassane Ouattara's victory in the runoff of presidential elections in Côte d'Ivoire on November 28, 2010. She also stated that Laurent Gbagbo should be tried for conceiving a plan to remain in power through terror and violence. The prosecutor justified the choice of four events in which Gbagbo's individual responsibility - separate from that of all Ivoirians, political parties or ethnic groups - should be established.

Eric MacDonald continued the remarks by declaring that Gbagbo committed these crimes to maintain his political power and carried out a plan by appointing his supporters to key positions in government and in the security services, recruiting youth militia and mercenaries, and financially supporting the training and staffing of these groups. By refusing to recognize Alassane Ouattara as president-elect, who had been recognized by the international community as such, Gbagbo acted as a de facto Head of State and commander of the armed forces without a legitimate mandate.

The prosecution argued, in addition, that Gbagbo was determined to stop the unarmed pro-Ouattara demonstrations by the use of lethal force and that he coordinated a concerted plan, chaired command meetings, and took decisions that led to criminal activities against residential neighborhoods of religious and ethnic groups supporting President Ouattara. MacDonald reviewed the crimes as well as the loss of life and physical damage that resulted, confirming that the prosecution had evidence and witnesses implicating the responsibility of Gbagbo. As evidence, he declared that the prosecution was in possession of audiovisual recordings, reports from the United Nations and non-governmental organizations, as well as documentary evidence and information, including those found in the residence of Laurent Gbagbo.

Conclusion of the Hearing

The presiding judge closed the hearing of February 19 by asking the prosecution to clarify its strategy related to the modes of liability of Gbagbo and to decide whether it wished to introduce Laurent Gbagbo as indirect co-perpetrator, as a contributor, or whether it intended to use cumulative and alternating modes of liability. The prosecution, through Eric MacDonald, stated that it intended to use the alternative and cumulative route.

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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