

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 6 February 2015

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
 Judge Sang-Hyun Song
 Judge Akua Kuenyehia
 Judge Erkki Kourula
 Judge Anita Ušacka.

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

PUBLIC

**RESPONSE ON BEHALF OF SIMONE GBAGBO TO THE 'APPEL DE LA
 RÉPUBLIQUE DE CÔTE d'IVOIRE SUR LA DÉCISION DE LA CHAMBRE
 PRÉLIMINAIRE « RELATIVE À L'EXCEPTION D'IRRECEVABILITÉ SOULEVÉE
 PAR LA CÔTE d'IVOIRE S'AGISSANT DE L'AFFAIRE CONCERNANT
 SIMONE GBAGBO »**

Source: DEFENCE

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1. INTRODUCTION

1. On 11 December 2014, Pre-Trial Chamber 1 rendered its Decision on Côte d'Ivoire's challenge to the Admissibility of the case against Ms. Simone Gbagbo.¹

2. On 17 December 2014, Côte d'Ivoire filed an Appeal pursuant to Article 82, paragraph 1, (a) of the Statute of Rome against the aforesaid Decision.² Therein, it included a request for suspensive effect pursuant to Article 82, paragraph 3 of the Statute and a request for an extension of time in which to file a document in support of Appeal.³

3. On 22 December 2014, the Defence for Simone Gbagbo ('the Defence') filed a Response in support of the requests of Côte d'Ivoire,⁴ the Appeals Chamber having so permitted.⁵

4. On 9 January 2015, having been granted an extension of time,⁶ Côte d'Ivoire filed a confidential Document in support of Appeal⁷ of the Decision of Pre-Trial Chamber 1.⁸

5. On 20 January 2015, the Appeals Chamber rejected the request of Côte d'Ivoire for suspensive effect of its appeal against the decision on Admissibility.⁹

6. The Defence files this Response pursuant to Regulation 64(4) of the Regulations of the Court. Subject to the reservations herein expressed,¹⁰ the Defence fully supports the Appeal of Côte d'Ivoire and reserves its rights to raise legal challenges envisaged under the Statute, including applications pursuant to Article 19 of the Statute.

¹ ICC -02/11-01/12-47-Red.

² ICC-02/11-01/12-48.

³ *ibidem* p 8 -Conclusion.

⁴ ICC-02/11-01/12 OA. 22-12-2014.

⁵ ICC-02/11-01/12 OA, 18-12-2014, p3.

⁶ ICC-02/11-01/12 OA-53. 23-12-2014.

⁷ *ibid.*, -54-Conf.09-01-2015.

⁸ *ibid.*, -47-Red.11-12-2014.

⁹ ICC-02/11-01/12-56. 20-01-15 EO PT OA.

¹⁰ para 6, 19, 58.

2. PROCEDURAL HISTORY

7. By Decision of 3 October 2011, Pre-Trial Chamber III, pursuant to Article 15 of the Rome Statute, authorised an investigation in the National Jurisdiction¹¹ *“Due to the absence of national proceedings against those appearing to be most responsible for crimes committed during the post election violence and in light of the gravity of the acts committed, the Chamber is satisfied that there are potential cases that would be admissible in the situation in the Republic of Côte d’Ivoire.”*¹²

8. By Application of 8 February 2012, the Prosecutor sought a warrant of arrest against Simone Gbagbo for her individual responsibility for crimes against humanity.¹³

9. On 29 February 2012, Pre-Trial Chamber III issued a Warrant of Arrest¹⁴ under seal against Simone Gbagbo, for her alleged criminal responsibility within the meaning of Article 25(3) (a) of the Statute for the crimes against humanity of (1) murder under Article 7(1) (a); (2) rape and other forms of sexual violence under Article 7(1)(g); (3) other inhumane acts under Article 7(1)(k); and (4) persecution under Article 7(1)(h) of the Statute committed in the territory of Côte d’Ivoire during the period between 16 December 2010 and 12 April 2011.

⁴ Situation in the Republic of Côte d’Ivoire, 3 October 2011, ICC-02/11-14: a corrigendum to the decision was issued on 15th November 2011, ICC-02/11-14-Corr.

¹² Decision on the Prosecutor’s application pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo, ICC-02/11-01/11, 30 November 2011, p. 9, para. 21.

¹³ Prosecutor’s Application pursuant to Article 58 as to Simone Gbagbo, 8 February, ICC-02/11-35-US-Exp. (The Defence has not been provided with a copy of this document, classified as ex parte).

¹⁴ Pre-Trial Chamber III, Under Seal, Warrant of Arrest for Simone Gbagbo, 29 February 2012, ICC-02/11-01/12, p. 8.

10. On 2 March 2012, Pre-Trial Chamber III, rendered its written ‘Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of arrest against Simone Gbagbo’¹⁵ stating “*The Prosecutor contends that there is a considerable degree of overlap between the [Laurent] Gbagbo Application and the present Application and he has incorporated references to the relevant portions of the [Laurent] Gbagbo Application* but stated that he ‘**has not examined further the admissibility of the case against Mrs Gbagbo at this stage.**’¹⁶ (*viz. paras 5-73, 76-92, 94-131, 149-159, and 158 together with the underlying /supporting material*) (emphasis added)

11. On 19 March 2012, the Prosecutor filed a ‘Demande d’arrestation et de remise de Simone Gbagbo.’¹⁷

12. On 22 November 2012, Pre-Trial Chamber III ordered the lifting of the seal on the Warrant of Arrest against Mme. Gbagbo.

13. Dated 30 September 2013, Côte d’Ivoire filed an Admissibility Challenge pursuant to Articles 19, 17 and 95 of the Rome Statute¹⁸ with confidential annexes.

14. On 15 November 2013 Pre- Trial Chamber I rendered its ‘Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo,’ inviting observations from *inter alia*, the Defence.¹⁹

¹⁵ Public redacted version, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, p. 5, para. 6.

¹⁶ ICC-02/11-01/12-2-Red, 2 March 2012, para 12.

¹⁷ La Chambre Préliminaire I, (Original: français) ICC-02/11-01/12, 19 March 2012.

¹⁸ ‘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 de Rome’, 30 Septembre 2013, No. ICC-02/11-01/12; Conf. 17 Annex.

¹⁹ Pre-Trial Chamber I, ‘Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’, 15 November 2013, ICC-02/11-01/12.

15. On 14 February 2014 Côte d'Ivoire requested authorisation to provide additional documents in support of its admissibility challenge,²⁰ which was duly granted.²¹

16. On 25 February 2014 Côte d'Ivoire filed additional documentation²² to which all-party observations were filed.²³

17. On 28 August 2014, Pre-Trial Chamber 1 issue 'Decision on further submissions on issues related to the admissibility of the case against Simone Gbagbo.'²⁴

18. In response, on 10 October 2014, Côte d'Ivoire filed a 'second dépôt de documents complémentaires à l'appui de la requête...'²⁵

3. Preliminary Submission.

19. While acknowledging the right of the Government of Côte d'Ivoire to set forth, as it sees fit, its interpretation of the nature and /or content of all or any of its submitted documentation, the Defence takes issue with all or any prejudicial interpretation and /or commentary expressed thereon and therein²⁶ and fully reserves its rights in this regard and reminds that, the object of admissibility proceedings is to determine the venue for a trial, not to seek to attribute guilt to an accused, who is innocent, unless otherwise proven.

20. Côte d'Ivoire submits Pre-Trial Chamber 1 ('the Chamber') committed errors of law in its interpretation and application of the criteria for admissibility under Article 17 of the Statute of Rome. It further submits the Chamber erred in law and in fact in its appreciation of the domestic investigations and proceedings against Simone Gbagbo, in deciding it had not demonstrated that the case which is before the Court, is currently subject to domestic proceedings within the meaning of Article 17 (1) (a) of the Statute and therefore is

²⁰ ICC-02/11-01/12-30.

²¹ ICC-02/11-01/12-35. Decision, Pre-Trial Chamber 1; 20 /2/14.

²² ICC-02/11-01/12-37-Conf, 21 Annex.

²³ ICC-02/11-01/12-39. Defence.

²⁴ ICC-02/11-01/12-44. Pre-Trial Chamber 1.

²⁵ ICC-02/11-01/12 -45-Conf. 4 Annex.

²⁶ *ibid.*, -54-Conf, in particular para 66,68, 69,70,75,78, 85,92,94,100.

admissible.²⁷ Côte d'Ivoire submits that, taken together as well as separately, those errors materially affect the decision taken by the Chamber on 11 December 2014.²⁸

4. Submissions

Errors of law in its interpretation and application of the criteria for admissibility under Article 17 (1) of the Statute of Rome

21. Generally and

- a) in determining the existence of an investigation and proceedings [paras 29-37]
- b) in its appreciation of same person/same conduct [paras 38-44]
- c) in taking too narrow an interpretation of the four incidents which ground the charges against Mme. Gbagbo [paras 45-51]

Generally

22. Côte d'Ivoire submits, the Chamber applied a particularly strict and demanding interpretation and application of the criteria for admissibility under Article 17 (1) of the Statute when examining the national proceedings *vis a vis* those at international level, to such an extent that inadmissibility becomes the exception rather than the rule, thereby flying in the face of complementarity.²⁹ In support, it contrasts the particularly high threshold imposed by Article 17(3) of the Statute to determine a finding of incapacity of a State (a *total* or *substantial collapse* or *unavailability* of its national judicial system). As confirmed by the Appeals Chamber, there is also a high threshold for a finding that [a State] is *unwilling* genuinely to investigate or prosecute, thus rendering a case admissible.³⁰ It submits that, given the Chambers own assertion that the two strands of criteria for admissibility (the existence of investigation and determination of willingness /capacity) are intimately and inextricably linked, such radically divergent methods of appreciation can not be justified. The excessively rigorous conditions set by the Chamber when examining the proceedings against Simone Gbagbo for alleged crimes parallel to those before the Court, permeate the decision and are

²⁷ ICC-02/11-01/12-54-Conf. p10, para 20.

²⁸ Ibid., p8, para14.

²⁹ Ibid., p11, para 22, 23.

³⁰ ICC-01/11-01/11-565, para 191.

the origin of the Chambers errors of law in its interpretation and application of Article 17 (1), thereby materially tainting its decision.³¹

The Defence wholly supports this submission as follows;

23. Noting Article 21 (a) of the Statute on Applicable law³² and having considered jurisprudence of the Court³³ and fearful of a gradual erosion of ‘*one, if not **the** cornerstone of the Rome Statute which strikes a balance between State sovereignty and an effective and credible ICC,*³⁴ the Defence emphasises para 6 of the preamble to the Statute of Rome wherein it is clearly stated, ‘it is **the duty** of every State to exercise its criminal jurisdiction over those responsible for international crimes and wholly endorses the view that, ‘there is a general preference in the Rome Statute for domestic proceedings.’³⁵

(emphasis added)

³¹ICC-02/11-01/12-54-Conf., p11, 12, para 22,23, 24, 25, 26, 27,28.

³² Article 21. Applicable law. I. The Court shall apply: (a) In the first place, this Statute... (b) In the second place where appropriate, applicable treaties and the principles and rules of international law..... (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions.

³³ ICC-01/11-01/11 -547-Red. OA 4, p36, para 78.

³⁴ S.A Williams, ‘Issues of Admissibility, Article 17’, -O. Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article, (NOMOS, Bade-Baden, 1st edition, 1999, p. 392, para. 20.*

³⁵ Pre-Trial Chamber 1, Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, para 27.

24. J. T. Holmes, a negotiator of the Rome Statute, has observed: ‘throughout the negotiating process, States made clear that, the most effective and viable system to bring perpetrators of serious crimes to justice was one which **must** be based on national procedures complemented by an international court. Such a system would reinforce the primary obligation of States to prevent and prosecute genocide, crimes against humanity and war crimes –obligations which existed for all States under conventional and customary international law.’³⁶ (emphasis added)

25. M. El Zeidy has observed that the plain text of paragraph 10 of the preamble and of Article 1³⁷ compel the conclusion that the ICC is intended to **supplement** the domestic punishment of international violations rather than **supplant** domestic enforcement of international norms.³⁸ (emphasis added)

26. The Defence further submits that, the Court is a court of last resort.³⁹

a) in determining the existence of an investigation and proceedings [paras 29-37]

27. Côte d’Ivoire submits that two well established principles of the Courts jurisprudence govern the Chambers analysis of the case namely, (i) *inaction* on the part of a competent State renders a case admissible before the Court

³⁶ J.T. Holmes, ‘The principle of complementarity’, in The International Criminal Court –The making of the Rome Statute, R. Lee (ed.), Kluwer Law International, 1999,p74.

³⁷ Preamble. **Emphasizing** that the International Criminal Court established under this Statute **shall** be complementary to national jurisdictions; and Article 1, An International Criminal Court is hereby establishedand **shall** be complementary to national criminal jurisdictions. (emphasis added)

³⁸ M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ 23 Mich. J. Int’l L. 869.

³⁹ Article 1.Statute of Rome and see Report of the Bureau on stocktaking: Complementarity, ICC-ASP/8/5, 18 March 2010, para. 3.

(‘inaction’ taken to mean the case is not, nor has it been, the subject neither of an investigation nor proceedings); and (ii) it does not suffice to confirm that investigations are ongoing.

28. In response, Côte d’Ivoire accepts that the burden of proof rests with it to show that the legal proceedings which it is currently conducting against Mme. Gbagbo are ongoing according to an internal plan, on foot of *substantially the same conduct* as that alleged before the Court. It submits that, if the judicial authorities of Côte d’Ivoire are currently seized of procedures in this sense, the case is inadmissible, except where incapacity or unwillingness can be shown. They submit, neither can be so shown. Further, far from just affirming that pertinent proceedings are ongoing, it has furnished to the Chamber, numerous documentary elements, with substantial explanations evidencing the existence of proceedings against Mme. Gbagbo for crimes which gave rise to the Court’s proceedings. In this sense, the Chamber has committed an error of fact which substantially affects the conclusion on receivability.

29. It further submits this error is accompanied by an error of law in the Chamber’s interpretation of the criteria for ‘*inaction*.’ From the outset, this case was stated to be *admissible*. Initially, the Prosecutor reported that, as no national investigations or proceedings were pending in Côte d’Ivoire against those alleged to bear the greatest responsibility for the most serious crimes falling within the jurisdiction of the Court, (which was true at that time) the case was admissible. This was relied upon by Pre-Trial Chamber 111.

30. Later, the Prosecutor reported and Pre-Trial Chamber 111 relied thereon, that proceedings solely for alleged *economic* crimes had issued against Mme. Gbagbo but as such crimes were believed to be irrelevant to the case before the Court, the case was admissible. Hence, the original report that the case was admissible has persisted.

31. Côte d'Ivoire submits that, by virtue of the volume of documentation it has forwarded to the Chamber, it has demonstrated that both its investigations and proceedings against Mme. Gbagbo are ongoing and for the *same or substantially the same* conduct as that which gave rise to the proceedings before the Court. Yet, the Chamber, in persisting to reiterate former reports of admissibility made in different circumstances, has failed for the most part⁴⁰ to take into consideration the real and tangible progress made with judicial investigations and procedures at domestic level. Had it done so, Côte d'Ivoire submits, absent a finding of unwillingness or incapacity to try Mme. Gbagbo, the Chamber could only have found the case to be inadmissible.

The Defence fully supports the view that the Chamber did so err and submits as follows;

32. The genesis of the designation '*admissible*' as applied to this case, is inauspicious.

33. It was formulated on a prosecutor's admitted failure to examine this case on its own merits. The Defence recalls that on 2 March 2012, Pre-Trial Chamber III, rendered a written 'Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of arrest against Simone Gbagbo'⁴¹ based on, *inter alia*, the Prosecutors *contention* that there was *a considerable degree of overlap between the* [Laurent] *Gbagbo* application and the Simone Gbagbo application and he had *incorporated references to the relevant portions of the* [Laurent] *Gbagbo* application into that of Simone Gbagbo⁴² and admitted he had '***not examined further the admissibility of the case against Mrs Gbagbo at this stage.***'⁴³ (emphasis added)

⁴⁰ ICC-02/11-01/12-47-Red.11-12.14. p15, para36; p23,para 50; p26, para56;p27,para60; p33-34, para72-73

⁴¹Public redacted version, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, p 5, para 6

⁴² See para 10 above

⁴³ ICC-02/11-01/12-2-Red, 2 March 2012, para 12

34. In modern day parlance, this might well be described as an injudicious ‘cut and paste’ method of arriving at a designation of ‘admissibility’ so as to bring this case within the jurisdiction of the Court, as part of a collective.

35. This unexamined ‘admissible’ designation was later perpetuated on the grounds of *economic crimes*.⁴⁴ In turn, when the evidence submitted in support of such crimes by Côte d’Ivoire was considered, it was discarded by the Chamber as *irrelevant* for the purpose of the impugned Decision.⁴⁵ Likewise, the evidence submitted in support of crimes *against the State*,⁴⁶ as set out below.

b) in its appreciation of same person/same conduct [paras 38-44]

36. Côte d’Ivoire submits that in the impugned Decision, the Chamber refers to the diverse procedures engaged in by the domestic judicial authorities against Mme. Gbagbo with repeated reference to *economic crimes* and crimes *against the State*.

37. Côte d’Ivoire decries the fact that, in both instances, the Chamber concluded the diverse domestic procedures applicable thereto were irrelevant to the present decision in that they did not cover the *same conduct* as that alleged before the Court.

38. In the overall context of its investigations and proceedings, it further decries the failure of the Chamber to appreciate the significance of the hearing of a ‘*partie civile*’ 23 January 2013,⁴⁷ the site visit 25 May 2012⁴⁸ and the ‘*constitution de partie civile*’ 23 April 2013.⁴⁹ The Chamber mentioned the site visit without drawing any consequences there from and of the latter; it concluded it did not provide any concrete information as to the real objective of the national investigations.

⁴⁴ ICC-02/11-01/12-2-Red, 2 March 2012, para 10

⁴⁵ ICC-02/11-01/12-47-Red,p21, 22, para 47

⁴⁶ *ibid.*, p22,23, para 48,49

⁴⁷ *ibid.*, p27, para60

⁴⁸ ICC-02/11-01/12-37-Conf-Anx 21

⁴⁹ *ibid.*, Conf-Anx 19

39. The Chamber diminished and likewise discarded the proceedings entitled crimes *against the State (crimes contre l'Etat)*. Côte d'Ivoire submits, the Chamber hid behind a factual description of the allegations against Mme. Gbagbo as well as their legal characterisation, to conclude they did not cover the *same conduct* as that alleged before the Court and therefore, did not give rise to a conflict of jurisdiction pursuant to article 17 (1)(a). Côte d'Ivoire submits that given its dismissal of those matters, the Chamber lost an opportunity to better appreciate certain aspects of the case that are highly pertinent to the proceedings before the Court.

The Defence fully supports that the Chamber did err in its appreciation of *same conduct*.

40. The Defence submits that, while the domestic nomenclature may differ from that of the Court, in essence, the *conduct* alleged against Mme. Gbagbo which gave rise to the charges in the context of broadly the same incidents,⁵⁰ is *substantially the same* in both jurisdictions.

41. The Defence recalls that, it is not alleged by the Court that Mme. Gbagbo committed any crimes by her own hand. She is charged as an alleged co-perpetrator for having allegedly, *organised* military ('FDS') and youth militias and mercenaries who allegedly committed crimes against the civil population in locations in and around Abidjan, including Abobo and Yopougon,⁵¹ in the post electoral period.

42. In the domestic proceedings, crimes against the civil population are likewise alleged to have been carried out by '*bandes armées*' allegedly recruited and directed, (*id est*. '*organised*') by Mme. Gbagbo and others, in locations in and around Abidjan, including Abobo and Yopougon, in the post electoral period.

⁵⁰ *Radiodiffusion Télévision Ivoirienne*; demonstrations between 16 and 19 December 2010(ii) the attack on women's march Abobo 3 March 2011 (iii) Abobo market shelling 17 March 2011(iv) Yopougon massacre 12 April 2011

⁵¹ Prosecutors Application pursuant to Article 58 as to Simone Gbagbo, 7/02/2012.

43. Mme. Gbagbo made her first appearance before the President of the *Cour d'Assises* on 9th December 2014. The charges which were later publicly proffered against her by the *Cour d'Assises* are for; crimes *contre l'Etat*, in which it is alleged she, with others '*ont recruté des individus dans leur région d'origine pour les constituer en bandes armées et diriger les dites bandes et que par leur participation au mouvement insurrectionnel, ces derniers ont commis des actes d'une atrocité sans précédent notamment des tueries massive, des vols, des pillage, des incendies et des destructions volontaires de biens troublant ainsi gravement l'ordre public*' in Abidjan and its environs.

44. The question now to be asked is, does the *case/conduct* which Côte d'Ivoire has or is investigating and is prosecuting, *sufficiently mirror* that before the Court?

45. The jurisprudence of the Court requires that *the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters but not that such conduct be invariably composed of one or more 'incidents' of a pre-determined breadth.*⁵²

46. In the case before the Court the charges relate to (i) violent crimes against the civil population including acts causing suffering or serious injury to individuals, murder and assassinations, arising out of four specific (ii) *incidents* in which the crimes were allegedly committed by (iii) the broad equivalent to '*bandes armée*' allegedly (iv) *organised* by (v) Mme. Gbagbo and others. The *incidents* are four historical events, defined in time and place; all are (vi) in the post electoral period, all are in (vii) Abidjan or its environs, including Abobo and Yopougon.

⁵² ICC-01/11-01/11-565. OA. Judgment, Prosecutor v Abdullah Al-Senussi and Saif Al-Islam Gaddafi, 24-07-14, p29, para83

47. The domestic case against Mme. Gbagbo, likewise includes (i) violent crimes against the civil population including murder, assassination and acts causing suffering or serious injury to individuals (*des actes d'une atrocité sans précédent ...des tueries massive*), committed not by her hand but allegedly by (ii) '*bandes armée*,' allegedly (iii) *organised* (iv) by Mme. Gbagbo (and others); defined in time and place, being (v) in the post-electoral period, (vi) in incidents occurring (vii) in Abidjan and environs, including Abobo and Yopougon.

48. The Defence submits that while the *case/substantially same conduct* may not be *verbatim et litteratim across* both jurisdictions, there is a considerable degree of overlap. The incidents currently being prosecuted in Côte d'Ivoire are more extensive and it is submitted, therefore encompass the crux of the case before the Court. In this sense, they can be said to be *substantially the same*. It should here be recalled that '*a considerable degree of overlap*' between the case of Laurent Gbagbo and that of Simone Gbagbo was considered by Pre-Trial Chamber 111 to be sufficient to issue a warrant of arrest on admissibility against Mme. Gbagbo -even in the absence of examination.⁵³ Further, it is the alleged conduct as opposed to its legal characterisation that matters.⁵⁴

49. The Defence therefore submits, in dismissing the *crimes contre l'Etat* and although having specifically referenced document RI-01/2011 and noted that charges were confirmed against Mme. Gbagbo by the *Chambre d'Accusation* on 10 July 2012 and that the case was referred for Trial to the *Cour d'Assises d'Abidjan*,⁵⁵ with the imminence of Trial well heralded in the international press in the latter part of 2014, the Chamber failed to take into consideration that, albeit more extensive in scope, inherent in the State's generic charge of *crimes contre l'Etat* were crimes against the civil population (*des tueries massive*) committed by *bandes armées* in and around Abidjan, including Abobo and Yopougon in the post electoral period. That is to say, *substantially the same conduct/case* arising out of the *same or broadly similar* incidents as these before the Court.

⁵³ ICC-02/11-01/12-2-Red, 2 March 2012, para12

⁵⁴ ICC-01/11-01/11-565. OA. Judgment Prosecutor v Abdullah Al -Senussi and Saif Al-Islam Gaddafi, 24-07-14.p45, para119.

⁵⁵ ICC-02/11-01/12-47-Red, p22, para 48.

50. The Chamber also considered a third set of proceedings instituted against Mme. Gbagbo which, it accepted did concern crimes against individuals⁵⁶ of the *same nature* as those alleged in the case before the Court. It accepted that in these proceedings, submitted to the competent *juges d'instructions* on 6 February 2012, the national authorities did carry out both investigations and proceedings, including four *premières comparutions* by Mme. Gbagbo.

51. It further accepted that the series of four separate questioning (*les interrogatoires*) of Mme. Gbagbo in September and October 2014 were pertinent to the proceedings before the Court. Côte d'Ivoire submits they related to crimes *identical* to those alleged before the Court.⁵⁷

52. The Chamber also accepted that together with these procedural steps, Côte d'Ivoire *also undertook certain investigative activities with a view to collecting information relevant to determine Simone Gbagbo's responsibility for the alleged crimes*,⁵⁸ and it accepted that it could *not exclude that information gathered for the purpose of one case may be taken into consideration and relied on in another case*.⁵⁹

53. Yet, because of the, too rigorous and demanding application of the criteria which has rendered complementarity the exception rather than the intended rule combined with the Chambers failure to fully appreciate and examine *inter alia*, the *crimes contre l'Etat*, it was unable to find that *substantially the same conduct/case* as that alleged before the Court was being investigated or proceeded with at domestic level. These errors have materially affected the impugned decision.

54. Accordingly, the Defence fully supports submissions of Côte d'Ivoire⁶⁰

⁵⁶ ICC-02/11-01/12-47-Red, p23 et seq. para 50 et seq.

⁵⁷ ICC-02/11-01/12-54-Conf, p33, para118

⁵⁸ ICC-02/11-01/12-47-Red, p26, para56

⁵⁹ *ibid.*, p27, para60

⁶⁰ ICC-02/11-01/12-54-Conf, p11, para 22, 23; p12, para 28 ; p22, para 63,64; p24,para80;p32, para109,110,112 ; p33,115,116,120.121,124.

that the domestic proceedings **do** cover *substantially the same conduct /case* as that alleged before the Court and as such, **do** give rise to a conflict of jurisdictions between the Court and Côte d'Ivoire, pursuant to Article 17 (1) (a) of the Statute, rendering the case inadmissible.

Errors of fact and of law

d) in its appreciation of the investigations and proceedings in Côte d'Ivoire against Mme. Gbagbo [paras 55-62]

55. In summary, Côte d'Ivoire submits that, the *contours and parameters* of its investigations underway against Mme. Gbagbo are clear and precise and that its judicial proceedings are ongoing.

The Defence fully supports that the *contours and parameters* are clear and that judicial proceedings are ongoing.

56. The Defence briefly attended the trial of Mme. Gbagbo in Abidjan for *inter alia*, crimes against the civil population as contained in the generic charge *crimes contre l'Etat*. Reasons are as set out above.

e) in its examination of the facts [paras 63-87]

f) in its appreciation of the tangible, concrete and progressive measures taken within the framework of the Ivorienne proceedings [paras 88-124]

57. The Defence submits that as regards the examination of the facts and the measures taken, except where otherwise treated, the burden of proof⁶¹ remains with Côte d'Ivoire to provide this specificity.

58. The Defence takes issue with the matters set out in paragraphs 66, 68, 69, 70, 75, 78, 85, 92, 94, 100 and reserves its rights in their regard, as referred to above.⁶²

⁶¹ ICC-01/09-02/11-274 OA, para 2,61

⁶² at para 19.

59. The Defence fully supports the matters set out in paragraphs 63, 64, 67, 71-72, 74, 76-79, 83 and paragraphs 88, 95, 101, 102, 103, 107, 109, 110, 111, 112, 114, 118, 124.

In Conclusion

For the foregoing reasons, while reserving its rights as set out at paragraphs 19, 58 above, the Defence supports Côte d'Ivoire in respectfully inviting the Appeals Chamber to

- Reverse the Decision taken by Pre-Trial Chamber 1, on 11 December 2014 and
- Declare the case *The Prosecutor v. Simone Gbagbo* inadmissible before the International Criminal Court.


Sylvia Geraghty

Lead Counsel to Mme. Simone GBAGBO

Dated this 6th day of February 2015

At Dublin, Ireland.