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**International
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Court**

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Date: 13 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 Redacted Document

Public redacted version of "Prosecution's Response to the Government of the Republic of Côte d'Ivoire's Appeal against Pre-Trial Chamber I's "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"', 2 February 2015, ICC-02/11-01/12-61-Conf

Source: Office of the Prosecutor

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Introduction

1. The Government of the Republic of Côte d'Ivoire's ("GoCIV") Appeal¹ against Pre-Trial Chamber I's "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"² should be dismissed. The GoCIV fails to show that the Pre-Trial Chamber erred in law or fact in rejecting its challenge to the admissibility of Simone Gbagbo's case before the Court. To succeed under article 82(1)(a) of the Rome Statute ("Statute"), the GoCIV must establish an error of law that has materially affected the Decision, in that without that error, the Pre-Trial Chamber would have rendered a substantially different decision.³ Likewise, for any alleged errors of fact, the GoCIV must show that the Chamber erred in misappreciating the facts, took into account irrelevant facts or failed to consider relevant facts, bearing in mind that the Appeals Chamber will only interfere when "it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it."⁴ In addition, an alleged error of fact must be shown to have materially affected the decision.⁵ The GoCIV's appeal fails to meet these applicable standards.

2. To the contrary, the appeal misunderstands the Appeals Chamber's binding case law and standard on admissibility. The appeal also in large part simply relies on the GoCIV's submissions made before the Pre-Trial Chamber in its admissibility challenge, without demonstrating error. However, mere disagreements with the Chamber's findings do not make appealable errors. More so, the GoCIV's submissions before the Pre-Trial Chamber—and now in its appeal—rely on a few isolated domestic investigative measures to argue that the case is inadmissible, but fails to show that these measures are "concrete, tangible and progressive". Nor do

¹ ICC-02/11-01/12-54-Conf ("Appeal").

² ICC-02/11-01/12-47-Conf ("Decision").

³ ICC-01/04-01/06-3121-Red A5 ("*Lubanga* Appeals Judgement"), paras.18-19; ICC-01/04-169 OA, para.84; ICC-02/05-03/09-295 OA2, para.20.

⁴ *Lubanga* Appeals Judgement, para.21; ICC-01/09-01/11-307 OA ("*Ruto* Admissibility Decision"), para.56; ICC-01/09-02/11-274 OA ("*Kenyatta* Admissibility Decision"), para.55.

⁵ ICC-02/04-01/05-408 OA3 ("*Kony* Admissibility Decision"), para.80.

these domestic investigative steps show that Ms Gbagbo is currently being prosecuted nationally for the same conduct attributed to her in the case before the Court. As the Chamber's findings on the national authorities' questioning of Ms Gbagbo and the hearing of the *partie civile* amply demonstrate,⁶ mere passing references to matters which may be of some limited relevance to the Prosecutor's case against Ms Gbagbo are insufficient to establish that the case is inadmissible. To successfully challenge admissibility in this case, the GoCIV was required to show that its domestic case against Ms Gbagbo "sufficiently mirrored" the one before the Court. As the appellant, the GoCIV now has the burden to show that the Pre-Trial Chamber erred. Since it has not, the GoCIV's appeal should be dismissed.

Level of Confidentiality

3. The Office of the Prosecutor ("Prosecution") files this response as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court ("RoC"), because it responds to the appeal of the same classification. It will file a public redacted version of its response.

Procedural Background

4. On 29 February 2012, Pre-Trial Chamber III issued a warrant of arrest against Simone Gbagbo.⁷ On 2 March 2012, the Pre-Trial Chamber found that the conditions under article 58(1) of the Statute to issue an arrest warrant for Ms Gbagbo were met.⁸ The Warrant of Arrest, read with the Arrest Warrant Decision (which incorporated the relevant parts of the "Decision on the Prosecutor's Application pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo"),⁹ laid out the criminal conduct alleged against Ms Gbagbo in the case before the

⁶ Decision, paras.60, 62-63,72-73.

⁷ ICC-02/11-01/12-1("Warrant of Arrest").

⁸ ICC-02/11-01/12-2-Red ("Arrest Warrant Decision").

⁹ ICC-02/11-01/11-9-Red ("*Laurent Gbagbo* Arrest Warrant Decision").

Court. Accordingly, Ms Gbagbo's case at this Court concerns her individual criminal responsibility for the commission—jointly with Laurent Gbagbo and his inner circle and through the Ivorian Defence and Security Forces (FDS), 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 2011.¹⁰

5. On 30 September 2013, the GoCIV filed an admissibility challenge,¹¹ supported by 17 annexes. On 14 February 2014, it sought a further opportunity to buttress its Admissibility Challenge, which was granted.¹² It then supplemented its challenge by including 21 annexes of further material.¹³ Following a review of the documentation provided, on 28 August 2014, the Chamber found that “it would benefit” from “further documentation from [the GoCIV] indicating with more precision the contours of the alleged proceedings held against Simone Gbagbo in Côte d'Ivoire.”¹⁴ In particular, the GoCIV was directed to provide information, properly substantiated by concrete, tangible and pertinent evidence, on (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

¹⁰ Decision, para.44.

¹¹ ICC-02/11-01/12-11-Conf (“Admissibility Challenge”).

¹² ICC-02/11-01/12-30.

¹³ ICC-02/11-01/12-37-Conf.

¹⁴ ICC-02/11-01/12-44 (“Decision of 28 August 2014”), paras.6, 9.

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 2011.¹⁵

6. In this context, the Chamber considered that particularly relevant additional and updated information—and supporting evidence—related to (i) investigative and/or procedural steps, if any, that had been taken after the filing of [the GoCIV's] latest submissions; (ii) what type of evidence, if any, had been collected as a result of any such investigative steps; (iii) at which phase of the proceedings the alleged national case against Simone Gbagbo was at that moment; and (iv) the timeline of the national proceedings conducted to date, and the envisaged timeline of the anticipated continuation of such proceedings.¹⁶ On 10 October 2014, the GoCIV filed its final submissions, supported by four annexes.¹⁷

Relevant Findings of the Pre-Trial Chamber

7. The Pre-Trial Chamber rejected the GoCIV's challenge to the admissibility of Simone Gbagbo's case before the Court. It found that the GoCIV had not demonstrated that the case against Ms Gbagbo alleged in the Court's proceedings was currently subject to domestic proceedings within the meaning of article 17(1)(a) of the Statute.¹⁸ In particular, the Chamber found that the GoCIV's documentation did not demonstrate that its domestic authorities were undertaking concrete, tangible and progressive investigative steps to ascertain Ms Gbagbo's criminal responsibility for the same conduct as that alleged in the Court's proceedings. Nor did this documentation indicate that Simone Gbagbo is currently being prosecuted

¹⁵ Decision of 28 August 2014, para.9.

¹⁶ Decision of 28 August 2014, para.10.

¹⁷ ICC-02/11-01/12-45-Conf.

¹⁸ Decision, para.79.

by Côte d'Ivoire for the same conduct attributed to her in the case before the Court.¹⁹

8. The Chamber found that based on the documentation provided by the GoCIV, the investigative activities undertaken by its domestic authorities were “sparse and disparate.”²⁰ Between 6 February 2012 and 10 October 2014, the relevant investigative activities were limited to:

- i. [REDACTED];
- ii. [REDACTED];
- iii. the hearing of a *partie civile* on 23 January 2013; and
- iv. the questioning of Ms Gbagbo.²¹

9. The Chamber was unable to establish “whether these limited steps undertaken at the national level are together directed at ascertaining Simone Gbagbo’s criminal responsibility for the same conduct as that alleged in the proceedings before the Court.”²² The documentation available to the Chamber “only contains generic descriptions of the crimes alleged and provides extremely vague information as to the factual parameters of the purported investigations.”²³ It found that the documents on the discrete investigative activities and procedural activities by the domestic authorities did not provide any further information as to defining the factual parameters of the domestic investigations.²⁴ Further, it held “the information available to the Chamber on the scope of the national proceedings against Simone Gbagbo is also unclear with respect to the crimes that are allegedly being pursued.”²⁵

¹⁹ Decision, paras.36,78.

²⁰ Decision, para.65.

²¹ Decision, para.66.

²² Decision, para.70.

²³ Decision, para.71.

²⁴ Decision, paras.72, 74.

²⁵ Decision, para.75.

10. The Chamber found that, “even considering the different documents altogether, [it] is not in a position to discern, with sufficient clarity, the subject-matter of the limited, discrete investigative steps undertaken by the domestic authorities, as well as, more in general, the overall factual scope of Côte d’Ivoire’s purported investigations.”²⁶

Submissions

I. Response to Ground 1: The Pre-Trial Chamber correctly stated and applied the law on the admissibility criteria under article 17 of the Statute

1.1 The Chamber properly applied the two-step analysis in assessing admissibility

11. The GoCIV’s first ground of appeal is flawed because it misunderstands the article 17 criteria for the admissibility of a case before this Court and the Appeals Chamber’s binding case law. As a result, its arguments under this ground of appeal are wrong and should be dismissed.

12. The GoCIV claims that the Pre-Trial Chamber followed an incoherent methodology in assessing the admissibility of the case.²⁷ It argues that, in effect, the Chamber reversed the principle of complementarity by preserving the Court’s competence over Ms Gbagbo to the detriment of national proceedings against her in Côte d’Ivoire.²⁸ It claims that because the two limbs of the admissibility criteria are “inextricably linked”, the “high threshold” favouring national prosecutions used to determine the second limb (*i.e.* unwillingness or inability of a State to carry out an investigation or prosecution) should equally apply to the first limb (*i.e.* the existence

²⁶ Decision, para.76.

²⁷ Appeal, para.22.

²⁸ Appeal, paras.18, 23.

of an investigation or prosecution for the same case).²⁹ It argues that the Pre-Trial Chamber erred in fixing excessively rigorous standards to determine the first limb, *i.e.*, the existence of national proceedings against Ms Gbagbo in Côte d'Ivoire for the same case.³⁰

13. The GoCIV fails to show that the Pre-Trial Chamber legally erred in articulating and applying the law on admissibility. To the contrary, the Chamber scrupulously adhered to the applicable legal standard on admissibility to find that the GoCIV had not demonstrated “that the case against Simone Gbagbo alleged in the proceedings before the Court is currently subject to domestic proceedings within the meaning of article 17(1)(a) of the Statute.”³¹ In so finding, the Chamber appropriately followed *inter alia* this Appeals Chamber’s consistent law adopting a two part analysis on admissibility, as expressed in the *Katanga*, *Kenyatta* and *Gaddafi* admissibility appeal decisions.³² The Pre-Trial Chamber accordingly held that:

“[I]n considering an admissibility challenge brought under article 17(1)(a) of the Statute two questions shall be addressed: (i) whether, at the time of the proceedings in respect of an admissibility challenge, there is an ongoing investigation or prosecution of the case at the national level; and, in case the answer to the first question is in the affirmative, (ii) whether the State is “unwilling” or “unable” to genuinely carry out such investigation or prosecution within the terms further elaborated in articles 17(2) and 17(3) of the Statute. Accordingly, the first determination to be made by the Chamber is with respect to the existence of an ongoing investigation or prosecution. In this regard, the Appeals Chamber stated that “inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court.”³³

Because the Chamber found that on the facts the first question was answered in the negative, it did not address the criteria for the second question. Accordingly, it

²⁹ Appeal, paras.23-27.

³⁰ Appeal, para.28.

³¹ Decision, para.79.

³² See Decision, paras.26-36.

³³ Decision, para.27, citing ICC-01/04-01/07-1497 OA8 (“*Katanga* Admissibility Decision”), paras.1, 2, 75-79.

found that “[...]it is unnecessary to set out the Chamber’s understanding of the criteria of unwillingness and inability within the meaning of article 17(1)(a) and as detailed in article 17(2) and (3) of the Statute.”³⁴

14. The Pre-Trial Chamber’s two-step analysis is consistent with—and indeed required by—the Appeals Chamber’s case law. As the Appeals Chamber has held, “determining the existence of an investigation must be distinguished from assessing whether [a] State is ‘unwilling or unable to genuinely carry out the investigation or prosecution’, which is the second question to consider when determining the admissibility of a case.”³⁵ Further, “it is only when answers to these [initial] questions [on whether there are ongoing investigations or prosecutions] are in the affirmative that one has to look at the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.”³⁶

15. The GoCIV’s arguments put the cart before the horse. The GoCIV unduly relies on the law governing the second limb of the admissibility test, without first addressing the test in the first limb. Although the GoCIV refers to the *Katanga* and *Gaddafi* Admissibility Decisions on the two-step analysis³⁷ and the Chamber’s finding declining to examine the second limb,³⁸ it fails to apply the import of these decisions and findings to its arguments.

16. Significantly, the GoCIV’s reliance on the law pertaining to the second limb of the admissibility test to advance its submission is misplaced for the following reasons. First, the Pre-Trial Chamber’s Decision and findings were limited to

³⁴ Decision, para.36.

³⁵ *Ruto* Admissibility Decision, para.41; *Kenyatta* Admissibility Decision, para.40.

³⁶ ICC-01/11-01/11-565 OA6 (“*Senussi* Admissibility Decision”), para.68; ICC-01/11/01/11-547-Red OA4 (“*Gaddafi* Admissibility Decision”), para.213; *Katanga* Admissibility Decision, para.78.

³⁷ Appeal, para.19 fn. 30, citing *Katanga* Admissibility Decision, para.78 and *Gaddafi* Admissibility Decision, para.213.

³⁸ Appeal, para.20.

determining the first limb of the admissibility test: any attempt to advance arguments showing the GoCIV's willingness or ability to try Ms Gbagbo in Côte d'Ivoire is therefore irrelevant to this appeal, when the Pre-Trial Chamber's finding on the first limb was in the negative. To the extent that the GoCIV claims compliance with the second limb of the test, its submissions are irrelevant.³⁹

17. Second, the GoCIV's argument that "the two limbs of the admissibility test are intimately and inextricably linked" is not supported by its reliance on the *Senussi* Pre-Trial Chamber's decision of 11 October 2013.⁴⁰ That finding was limited to noting that *the evidence* used to substantiate the assertion of ongoing proceedings covering the same case that is before the Court (first limb) *may* also be relevant to demonstrate their genuineness (second limb).⁴¹ The question of what evidence may be used to prove the two limbs does not detract from the two-step legal test prescribed by the Appeals Chamber to assess admissibility. In fact, the *Senussi* Pre-Trial Chamber itself recognised the "distinct" nature of the two limbs of the admissibility test.⁴²

18. Third, the Chamber properly applied the correct standard to assess admissibility.⁴³ The GoCIV's apparent disagreement with the standard does not show error. The GoCIV wrongly suggests that the principle of complementarity was violated because the Pre-Trial Chamber imposed rigid criteria to determine the existence of investigations. In doing so, it misunderstands the relation between the principle of complementarity and admissibility. The presumption in favour of domestic jurisdictions does not contradict the requirement that a case is admissible, unless a jurisdictional conflict exists.⁴⁴ The Court's case law has set out the relevant

³⁹ See e.g., Appeal, paras.21, 87-91, 97.

⁴⁰ Appeal, para.27, citing Decision, para.30, which in turn relies on ICC-01/11-01/11-466-Red ("*Senussi* PTC Decision of 11 October 2013"), paras.66 (viii), 210.

⁴¹ *Senussi* PTC Decision of 11 October 2013, para.210 (emphasis added).

⁴² *Senussi* PTC Decision of 11 October 2013, para.210.

⁴³ Decision, paras.26-36.

⁴⁴ *Ruto* Admissibility Decision, para.44; *Kenyatta* Admissibility Decision, para.43.

criteria to assess whether such conflict exists. Significantly, this Court's law does not authorise blind deference to national jurisdiction processes. As the Appeals Chamber has held, "[a]lthough article 17(1)(a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level."⁴⁵ Moreover, the question to be assessed is not merely a question of "investigation" in the abstract, but whether the *same case* is being investigated by both the Court and a national jurisdiction.⁴⁶ The GoCIV's argument fails to mention this latter requirement. Further, despite claiming that the Chamber was unduly rigorous in its consideration of the first limb, the GoCIV fails to demonstrate how this was so. In any event, the GoCIV's incorrect reliance on the law relating to the admissibility test's second limb obfuscates the real issue: it failed to meet its burden under the first limb.

1.2 The Chamber correctly stated and applied the law on the first limb of the admissibility test

19. In essence, the GoCIV claims that, because the Chamber found the existence of the relevant investigation on the facts,⁴⁷ it should have declared the case inadmissible, unless it was shown that Côte d'Ivoire was unwilling or unable to try Ms Gbagbo.⁴⁸ Accordingly, the GoCIV appears to contest the Chamber's interpretation of Côte d'Ivoire's "inaction" over the investigation. This argument rests on a misreading of the Decision and a continued misunderstanding of the applicable law.

⁴⁵ *Ruto* Admissibility Decision, para.44.

⁴⁶ *Ruto* Admissibility Decision, para.37; *Kenyatta* Admissibility Decision, para.36.

⁴⁷ The GoCIV also alleges an error of fact, challenging the Chamber's assessment of the documentation provided. Because the GoCIV submissions cross-refer to parts of its second ground of appeal here (Appeal, para.32, fn. 37), the Prosecution will also respond to this issue accordingly. *See* paras.35-61.

⁴⁸ Appeal, paras.31, 37.

20. Contrary to the GoCIV's claim, the Chamber did not find that Côte d'Ivoire had successfully demonstrated it was investigating or prosecuting Ms Gbagbo for the same crimes alleged before the Court. Instead, it found that it was "not satisfied that Côte d'Ivoire 's domestic authorities are currently taking tangible, concrete and progressive investigative steps into Simone Gbagbo's criminal responsibility for the crimes alleged in the proceedings before the Court or that they are prosecuting her for these alleged crimes."⁴⁹ In an attempt to advance its argument, the GoCIV's appeal ignores this ultimate finding, and instead grasps at the straws of individual unrelated observations that do not assist it.

21. Firstly, it wrongly suggests that the Chamber failed to consider the evolution of the national proceedings as a matter of fact.⁵⁰ However, the Chamber devoted no less than 19 paragraphs in its Decision to a chronological analysis of the different proceedings against Ms Gbagbo and their different stages and developments.⁵¹ On that basis, it then analysed in detail—in 14 further paragraphs—the admissibility of the case against Ms Gbagbo.⁵² The Pre-Trial Chamber's reasoning shows that it comprehensively considered all relevant developments in the national processes against Ms Gbagbo, based on the documentation provided.

22. Secondly, the GoCIV appears to suggest that the Chamber did recognise that it had taken certain measures. But the GoCIV's reliance on the Chamber's remarks in paragraphs 50 and 69 of the Decision is inapposite: they do not support the GoCIV's reading of the Decision.⁵³ In particular, the Chamber, in paragraph 50, made only a preliminary observation relating to the third set of proceedings against Ms Gbagbo, "crimes against individuals". Since these crimes "were of the same nature as those

⁴⁹ Decision, para.36.

⁵⁰ Appeal, paras.32-37.

⁵¹ Decision, paras.46-64 ("The national proceedings against Simone Gbagbo according to the documents provided to the Chamber").

⁵² Decision, paras.65-78 ("The Chamber's determination on the admissibility of the case against Simone Gbagbo").

⁵³ *Contra* Appeal, para.36.

alleged in the case before the Court” —as opposed to the earlier examined economic offences and crimes against the State⁵⁴—the Chamber proceeded to analyse them in further detail to determine if they met the necessary admissibility criteria.⁵⁵ This does not indicate that the Chamber made a determinative finding on the matter. Neither did it do so in paragraph 69. There the Chamber only found that, “in the last 20 months of investigations”, “the steps directed at determining Simone Gbagbo’s responsibility for the alleged crimes appear to be limited to one single activity: the questioning of Simone Gbagbo.”⁵⁶ The Chamber’s criticism of the pace of Côte d’Ivoire’s investigation cannot be understood as an affirmation that it had in fact met its burden of investigating the same case.

23. The GoCIV’s submissions also appear to misapprehend the Court’s law on “inaction” by a State. “Inaction”—the fact that a State is not investigating or prosecuting, or has not done so—renders a case admissible before the Court.⁵⁷ The case is only inadmissible if Ms Gbagbo were “being investigated” by Côte d’Ivoire for substantially the same conduct. Such investigative steps include taking steps to ascertain whether Simone Gbagbo is responsible for that conduct, including interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.⁵⁸ The mere preparedness to take such steps is not sufficient.⁵⁹ It does not suffice—as the GoCIV appears to claim—that any slight evolution in the national investigation will meet this threshold for inadmissibility. When the investigative steps taken are found to be “scarce in quantity and lacking in progression” and “disparate in nature”,⁶⁰ as in this case, Côte d’Ivoire’s efforts amount to “inaction” and the case is admissible. Moreover, the GoCIV’s proffered interpretation would effectively mean that, despite its inaction, the case would be

⁵⁴ Decision, paras.46-49.

⁵⁵ Decision, para.50.

⁵⁶ Decision, para.69.

⁵⁷ *Katanga* Admissibility Decision, para.78.

⁵⁸ *Ruto* Admissibility Decision, para.41; *Kenya* Admissibility Decision, para.40.

⁵⁹ *Ruto* Admissibility Decision, para.41; *Kenya* Admissibility Decision, para.40.

⁶⁰ Decision, para.70.

inadmissible before the Court unless that State was unwilling or unable to open investigations.⁶¹ The Court's statutory regime and case law does not support this approach. Equally, it is irreconcilable with the object and purpose of the Statute "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished."⁶²

1.3 The Chamber correctly assessed the conduct underlying the economic crimes and crimes against the State

24. The GoCIV faults the Chamber's application of the criteria of "same conduct" in analysing the economic crimes and the crimes against the State⁶³—but shows no error. In assessing both sets of crimes, the Chamber properly considered the alleged conduct according to the applicable legal standard.⁶⁴

25. The GoCIV's suggestion that the Chamber was somehow swayed by the "legal characterisation" of the economic crimes in finding them irrelevant lacks merit. That the Chamber assessed the alleged conduct is apparent from the Decision. With respect to the economic crimes (proceedings RI-09/2012, RI-33/2012 and RI-04/2012), the Chamber found that "*the conduct* alleged against Simone Gbagbo in these proceedings is clearly of a different nature [...]" and "therefore irrelevant for the purpose of the present decision[...]"⁶⁵ The Chamber relied on Côte d'Ivoire's own documentation in which the alleged conduct was described as including "[REDACTED]".⁶⁶ Indeed, Annex 8⁶⁷ makes this clear: none of this conduct bears any similarity to Ms Gbagbo's alleged conduct in relation to the crimes of murder, rape and other forms of sexual violence, inhumane acts and persecution committed by pro-Gbagbo forces in Abidjan between 16 December 2010 and 12 April 2011. The

⁶¹ See Appeal, paras.31-37. *Contra Katanga* Admissibility Decision, para.79, rejecting this argument.

⁶² *Katanga* Admissibility Decision, para.79.

⁶³ Appeal, paras.38-44.

⁶⁴ Decision, paras.46-49.

⁶⁵ Decision, para.46 (emphasis added).

⁶⁶ Decision, fn.82, referring to Annex 8 to the Admissibility Challenge.

⁶⁷ ICC-02/11-01/12-11-Conf-Anx8, pp.2,7-8.

Chamber therefore did not err in finding the GoCIV's supporting documents "irrelevant". As such, the GoCIV's submissions as to their relevance lack merit.⁶⁸

26. Contrary to the GoCIV's claim,⁶⁹ the Chamber properly considered the relevant documentation including "[REDACTED]" and "*la constitution de partie civile du 23 avril 2012.*" The GoCIV fails to read the Decision as a whole. The Chamber fully considered "[REDACTED]"—[REDACTED]⁷⁰—but found that this investigative step—together with others—was "scarce in quantity", "lacking in progression", "disparate in nature and purpose", and "indiscernible" as to the overall factual contours.⁷¹ In particular, the Chamber found that the "[REDACTED]" and the subsequent *procès-verbal* [REDACTED]—albeit an attempt to collect documentary and tangible evidence on alleged economic crimes and crimes against individuals—contained no further information on the factual allegations against Ms Gbagbo being investigated by the domestic authorities.⁷²

27. Likewise, the Chamber found that the "*constitution de partie civile*" was only a claim by purported victims of certain crimes. It indicated neither a procedural step by the national authorities nor showed that the latter were actually investigating the alleged crimes. Nor did this document provide concrete information on the actual subject-matter of the investigation.⁷³

28. Equally, the GoCIV's cursory challenge to the Chamber's findings regarding crimes against the State⁷⁴ is without merit. Here too, the Chamber properly considered the scope of the alleged conduct as covering only [REDACTED].⁷⁵

⁶⁸ *Contra* Appeal, paras.40-42.

⁶⁹ *Contra* Appeal, para.43.

⁷⁰ Decision, para.66, citing ICC-02/11-01/12-37-Conf-Anx20 and ICC-02/11-01/12-37-Conf-Anx21.

⁷¹ Decision, paras.57, 66-71.

⁷² Decision, para.72. See also ICC-02/11-01/12-37-Conf-Anx20; ICC-02/11-01/12-37-Conf-Anx21.

⁷³ Decision, para.64.

⁷⁴ Appeal, para.44.

⁷⁵ Decision, para.49.

According to these proceedings (RI-01/2011), [REDACTED].⁷⁶ Yet again, this conduct bears no similarity to the crimes before this Court, and cannot be an appropriate comparator to determine admissibility. Killings, rapes and acts causing great suffering or serious injury—and Simone Gbagbo’s contribution to such criminal conduct—remain unaddressed.⁷⁷

29. Further, in considering the conduct underlying the crimes against the State, the Chamber was fully aware of the applicable law discouraging sole reliance on the legal characterisation of crimes to determine admissibility.⁷⁸ Accordingly, the Chamber considered the *factual* description of the allegations to determine the conduct. Additionally, it *also* considered the legal characterisation because it found that this was a significant indicator of the actual subject matter of the domestic proceedings.⁷⁹ Indeed, in the circumstances of these particular crimes, the relevant legal characterisation is an added indicator of the subject matter, particularly since they fall within the chapter of the Ivorian Criminal Code entitled “*Crimes et délits contre la sûreté de l’État, la défense nationale et la sécurité publique.*”⁸⁰ The Chamber was not barred from considering their legal characterisation as an added indicator, as long as it primarily based its finding on the alleged conduct underlying the crimes. The GoCIV shows no error.

1.4 The Chamber correctly assessed the four incidents

30. The GoCIV argues that the Chamber unduly restricted its analysis of the relevant conduct to the four incidents,⁸¹ but fails to show error.

⁷⁶ Decision, para.48.

⁷⁷ See e.g., ICC-02/11-01/12-11-Conf-Anx5, p.9; ICC-02/11-01/12-11-Conf-Anx10, pp.17-30.

⁷⁸ See e.g., *Senussi* Admissibility Decision, para.119 where the Appeals Chamber found that the Pre-Trial Chamber is required to assess whether the domestic case sufficiently mirrors the case before the Court. It is the alleged *conduct*, as opposed to its legal characterisation, that matters. See Decision, fn 87, citing this principle.

⁷⁹ Decision, fn.87.

⁸⁰ Decision, para.49.

⁸¹ Appeal, paras.45-51.

31. The Chamber properly articulated the applicable law on the “parameters of the case” and assessed the conduct accordingly.⁸² The Appeals Chamber has held that “[t]he conduct that defines the “case” is both that of the suspect, and that described in the incidents under investigation which is imputed to the suspect.”⁸³ Further, “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.”⁸⁴ In reaching this judicial assessment, the underlying incidents under investigation are a necessary comparator and play a central role.⁸⁵ The Pre-Trial Chamber therefore correctly considered the conduct outlined in the four incidents—the 16 December 2010 march on the RTI building, the 3 March 2011 women’s march in Abobo, the 17 March 2011 Abobo market shelling, and the 12 April 2011 Yopougon massacre—as part of its core assessment.⁸⁶ The GoCIV acknowledges this.⁸⁷

32. Further, the Decision makes clear that the alleged conduct was considered “in the context of” and “in relation to” the four incidents at issue.⁸⁸ By framing the relevant conduct in this manner, the Chamber made clear that its analysis was not confined to a narrow consideration of the four incidents alone. Equally, it factored in the broader context surrounding these incidents. Moreover, despite claiming that the Chamber erred by not considering the context and circumstances of the incidents, the GoCIV is unable to point to one tangible instance where this was so. Such unsubstantiated arguments should not be entertained.⁸⁹

33. In any event, to determine a case’s admissibility, it is the conduct, including the relevant incidents, before the Court that governs. No matter how numerous or broad the incidents charged by a particular State may be, if they do not sufficiently

⁸² Decision, paras.32,33.

⁸³ *Senussi* Admissibility Decision, para.99; *Gaddafi* Admissibility Decision, para.62.

⁸⁴ *Senussi* Admissibility Decision, para.100; *Gaddafi* Admissibility Decision, para.73.

⁸⁵ *Senussi* Admissibility Decision, paras.100-101; *Gaddafi* Admissibility Decision, para.73.

⁸⁶ Decision, para.44.

⁸⁷ Appeal, para.49.

⁸⁸ Decision, para.44.

⁸⁹ See *Lubanga* Appeals Judgement, paras.30-31.

mirror the conduct before the Court, a case will be admissible. Accordingly, the Pre-Trial Chamber did not err by considering the incidents before the Court as the starting point for its analysis.

34. For all these reasons, the first ground of appeal should be dismissed.

II. Response to Ground 2: The Pre-Trial Chamber correctly assessed the domestic proceedings

35. The GoCIV's second ground of appeal rests precariously on its mere assurance that it is investigating and prosecuting Simone Gbagbo for the same conduct as the Court. The Appeals Chamber is effectively asked to take this assertion at face value, and to conduct no independent determination. However, as the Appeals Chamber has held, it is not sufficient to merely assert that investigations are ongoing: "Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; and [the Chamber does] not base [its] decisions on impulse, intuition and conjecture or on mere sympathy or emotion."⁹⁰ The GoCIV must support its statements with tangible proof to demonstrate that it is actually carrying out relevant investigations, through the submission of probative evidence.⁹¹ Moreover, on appeal, the question is whether the Pre-Trial Chamber's analysis was reasonable, and not whether the Appeals Chamber itself would have determined the facts in the same way. In its admissibility challenge, the GoCIV bore the burden of showing that it was investigating and prosecuting the same case as that before the Court. On appeal, it continues to bear the burden, of showing clear errors in the Pre-Trial Chamber's factual findings. The GoCIV has failed to discharge either burden. Instead, it merely relies on its earlier submissions, makes conclusory statements and provides alternative interpretations.⁹² But this does not dent the reasonableness of the Chamber's findings. To the extent that the GoCIV argues errors of law under

⁹⁰ *Ruto* Admissibility Decision, para.62; *Kenyatta* Admissibility Decision, para.61.

⁹¹ *Kenyatta* Admissibility Decision, para.62.

⁹² See e.g., Appeal, paras.56-62.

Ground 2, no such error materially affecting the decision is established. The Appeals Chamber, in its corrective review function, need not intervene.⁹³

2.1 The Chamber correctly assessed the facts

36. The GoCIV argues that the Chamber erred in fact [REDACTED].⁹⁴

37. As shown above,⁹⁵ the Chamber properly assessed the economic crimes and the crimes against the State. No error is shown. The GoCIV misstates the Decision:⁹⁶ paragraph 47 relates only to the findings on the conduct alleged for economic crimes as being “of a different nature” and “therefore irrelevant.”⁹⁷ The Chamber separately considered the proceedings alleging crimes against the State [REDACTED].⁹⁸ The Pre-Trial Chamber cannot be said to have failed to further assess either of these proceedings when they were found to be irrelevant to the Court’s proceedings. In any case, the GoCIV—apart from offering its preferred conclusion—fails to properly elaborate how this conduct was preparatory to the Court’s crimes, and to which particular incident(s) it purportedly relates. Moreover, even if *arguendo* this conduct was preparatory in nature, and somehow connected in factual scope to the crimes before the Court, the GoCIV fails to show that conduct underlying the crimes before the Court was being appropriately investigated.

38. The GoCIV’s reliance on the hearing of the *partie civile* is inadequate. Firstly, the Pre-Trial Chamber properly considered the evidence of the *partie civile*.⁹⁹ The GoCIV has not shown that the Chamber failed to properly consider the evidence [REDACTED].¹⁰⁰ To the contrary, the Chamber considered all the evidence

⁹³ See *Ruto* Admissibility Decision, para.56.

⁹⁴ Appeal, paras.63-70.

⁹⁵ See paras.24-29.

⁹⁶ Appeal, para.63, wrongly relying on paragraph 47 for findings on both sets of crimes.

⁹⁷ Decision, para.47.

⁹⁸ Decision, paras.48-49.

⁹⁹ Decision, para.60.

¹⁰⁰ *Contra* Appeal, paras.68-69.

provided by the *partie civile*, but found that specific events were not covered by the case against Ms Gbagbo before the Court. [REDACTED] is not specifically among the four core incidents contained in the Court's warrant of arrest.¹⁰¹ Despite this, the Chamber did not exclude the interview, even though registered in proceedings unrelated to Ms Gbagbo (RI-38/2012). As apparent from the Decision, the Chamber was equally aware [REDACTED].¹⁰² No error is therefore shown.

39. Secondly, [REDACTED], the *procès-verbal* of the *partie civile's* hearing did not reveal the breadth of the domestic case against Ms Gbagbo.¹⁰³ Neither has the GoCIV shown, by relying on this document, that the national authorities of Côte d'Ivoire are appropriately investigating the case. Taken at its highest, it can only be considered as one isolated and fractional step, not remotely resembling the concrete, tangible, and progressive investigative measures that the GoCIV would be expected to take to meet the threshold to establish the inadmissibility of the case before the Court. The purportedly large number of details provided by the *partie civile* is also irrelevant to this analysis,¹⁰⁴ because the entirety of the *partie civile's* hearing qualifies as only one isolated investigative activity. Equally, contrary to the GoCIV's cursory submission,¹⁰⁵ [REDACTED]: it does not demonstrate the factual scope of the GoCIV's case nor that it is investigating the matter.

40. The GoCIV's arguments on the questioning of Ms Gbagbo by the national authorities likewise relitigate earlier submissions¹⁰⁶ but show no factual error. The GoCIV attempts to replace the Chamber's assessment of Ms Gbagbo's questioning with its own, without showing that the Chamber's findings were unreasonable. In doing so, the GoCIV yet again misunderstands the Decision. The phrase "*ont pris un*

¹⁰¹ See Decision, para.44.

¹⁰² Decision, para.60.

¹⁰³ Decision, para.72.

¹⁰⁴ *Contra* Appeal, para.70.

¹⁰⁵ Appeal, para.70.

¹⁰⁶ Appeal, paras.71-79.

certain nombre d'actes de procédure et de mesures d'enquête"¹⁰⁷—relied upon by the GoCIV—was only an introductory remark by the Chamber, prior to its detailed analysis in subsequent paragraphs.¹⁰⁸ The statement did not represent the Chamber's conclusion on the matter, and the GoCIV is wrong to portray it as such. Again, while the GoCIV challenges the Chamber's assessment of one of Ms Gbagbo's answers during questioning and claims she did indeed answer on the "merits",¹⁰⁹ the facts do not support this. The Chamber correctly found that Ms Gbagbo did not answer "on the merits" [REDACTED].¹¹⁰ [REDACTED].¹¹¹ [REDACTED]. As the Chamber found, there was no follow up from the Judge.¹¹² If anything, the lack of any persistent questioning only further supports the Chamber's conclusion that while "[it] did address some relevant aspects of the factual case against Simone Gbagbo that is before the Court[...]", it did not provide "any real assistance in discerning the factual criminal conduct attributed to her or the facts underlying the accusations that are purportedly being investigated."¹¹³ The "broad and generic questions"¹¹⁴ posed further illustrate this.

41. The GoCIV also apparently claims that the Chamber in effect found that the national authorities were responsible for Ms Gbagbo's behaviour during the questioning, [REDACTED].¹¹⁵ The Chamber did not err. [REDACTED],¹¹⁶ [REDACTED].¹¹⁷ This does not imply that the Chamber held the national authorities responsible for any "defence strategy" adopted. Nevertheless, as the Appeals Chamber has held, if a State does not investigate a suspect due to a lack of evidence, then there simply is no conflict of jurisdictions, and no reason why the case should

¹⁰⁷ Appeal, para.71.

¹⁰⁸ See Decision, paras.51-78.

¹⁰⁹ Appeal, paras.74-75.

¹¹⁰ Decision, para.63.

¹¹¹ ICC-02/11-01/12-45-Conf-Anx2, p.8; Decision, para.63.

¹¹² Decision, para.63.

¹¹³ Decision, para.73.

¹¹⁴ Decision, para.73.

¹¹⁵ Appeal, paras.76-79.

¹¹⁶ Decision, paras.59, 62,

¹¹⁷ Decision, para.63.

be inadmissible before the Court.¹¹⁸ The burden remained on Côte d'Ivoire to explore other investigative measures, when the questioning of Ms Gbagbo did not yield results. As the Chamber correctly found, despite having direct access to any relevant evidence on their territory, no investigative step—such as, *inter alia*, taking witness statements, ordering confrontations between the suspect and witnesses or between the suspect and the *parties civiles*, or ordering any necessary forensic or other expertise concerning the crimes committed—was ordered.¹¹⁹ Integral parts of the investigation were thus left unattended. Moreover, any significant questioning of Ms Gbagbo (9 and 10 September 2014, 2 and 3 October 2014) only occurred after the Chamber had indicated the ambiguity of the GoCIV's provided documentation—giving it a second bite at the cherry.¹²⁰ And even that did not yield the necessary clarity of the factual scope of the domestic case.

42. The GoCIV wrongly amplifies the relevance of the victims' role in the Chamber's assessment of the admissibility of the case. To the contrary, the alleged large number of victims as *parties civiles* is immaterial to this analysis.¹²¹ The victims' search for justice cannot supplant the GoCIV's own responsibility to actively and appropriately investigate and prosecute the same case. Neither is it relevant that the Chamber did not list all the procedural rules allowing the participation of victims in the criminal process.¹²² That the Chamber was clearly aware of the roles of *parties civiles* is apparent from its consideration of the "*constitution de partie civile*" of 24 April 2012¹²³ and the hearing of the *partie civile* of 23 January 2013.¹²⁴

¹¹⁸ *Kenyatta* Admissibility Decision, para.42.

¹¹⁹ Decision, para.67.

¹²⁰ Decision, para.69.

¹²¹ *Contra* Appeal, paras.52, 80, 91.

¹²² *Contra* Appeal, para.52. *See* Decision, paras.39-42, setting out the significant features of Côte d'Ivoire's criminal procedure law. *See also* Decision, fn.70, indicating the provisions under which the *juge d'instruction* may also open an investigation at the request of a victim.

¹²³ *See e.g.*, Decision, para.64.

¹²⁴ *See e.g.*, Decision, para.60.

43. In any event, the Chamber did not err in assessing the *constitution de partie civile* of 24 April 2012. The submission on the *parties civiles' "ferme volonté d'être associées aux enquêtes ivoiriennes"*¹²⁵ does not advance the GoCIV's case. It still remains "a claim by individuals who assert themselves as victims of certain crimes and who exercise their procedural rights under article 87 of the *Code de procédure pénale*".¹²⁶ Not only is it not a procedural step by national authorities, it does not demonstrate that these authorities are investigating the crimes which are before the Court. Nor does it shed significant light on the subject matter being investigated.¹²⁷ The possibility that some of the *parties civiles* may be connected to the incidents before the Court—[REDACTED]¹²⁸—are, at best, only a few isolated pieces of the larger jigsaw. It does not give the overall picture of the breadth of the case. The puzzle as to the scope of the domestic case remains unsolved.

44. In this context, the GoCIV somewhat obscurely claims that the lack of "contestation" to the participation of the *parties civiles* shows that it is investigating the matter.¹²⁹ This submission lacks elaboration, and should be dismissed *in limine*.¹³⁰ It is unclear how any lack of contestation to the *parties civiles'* participation in a yet indeterminate case could concretely show that the GoCIV is investigating the same case as that before the Court. When the exact factual parameters of the GoCIV's case against Ms Gbagbo remain confused, any purportedly robust victim or *partie civile* participation is immaterial. Moreover, while the GoCIV's claim that "*ces constitutions de parties civiles sont instruites avec sérieux*",¹³¹ could be used to show the GoCIV's willingness to try the case, this is not an issue either in the Decision or this appeal.

¹²⁵ Appeal, para.82.

¹²⁶ Decision, para.64.

¹²⁷ Decision, para.64.

¹²⁸ Appeal, paras.81, 86-87.

¹²⁹ Appeal, paras.83-85.

¹³⁰ *Lubanga* Appeal Judgement, paras.30-33.

¹³¹ Appeal, para.84.

2.2 The Chamber correctly assessed the investigative measures taken

45. Challenging the Chamber's finding that the GoCIV's investigative activities of the case were "sparse and disparate", the GoCIV haphazardly relies on isolated steps that it implies amounted to a robust national investigation.¹³² However, when these steps are cumulatively incapable of showing "concrete, tangible and progressive" investigative measures,¹³³ they can have no greater merit individually. Even so, the GoCIV persists in arguing alternative interpretations of individual investigative steps, without demonstrating the unreasonableness of the Chamber's findings. Moreover, in many instances, the GoCIV claims that the Chamber failed to consider certain steps, when there is clear indication to the contrary. The GoCIV's submissions in this regard cannot succeed before the Appeals Chamber.

46. Firstly, the GoCIV wrongly claims that the Chamber erred in not considering the investigative measures taken by the *juges d'instruction* following the *réquisitoires introductifs*.¹³⁴ However, it fails to elaborate what these "*plusieurs mesures d'enquête*" were. Yet again, such submissions should be dismissed *in limine*.¹³⁵ The appeal only refers to Annex 2 of the GoCIV's admissibility challenge.¹³⁶ However, the Chamber gave ample consideration to Annex 2: it noted that on 6 February 2012, the *Procureur de la République* transmitted three *réquisitoires introductifs* to the *juges d'instruction*, describing allegations of "[REDACTED]". On this basis, three proceedings were opened against Ms Gbagbo and others.¹³⁷ Nonetheless, this preliminary step of initiating proceedings—as the Chamber correctly found—does not show that the case "is being investigated" for the purposes of article 17(1)(a) of the Statute. As of the date of the Decision, the proceedings remained before the *juge d'instruction*, without any determination on whether dismissal of the case or referral

¹³² Appeal, paras.88-124.

¹³³ Decision, paras.65, 70,76.

¹³⁴ Appeal, para.88.

¹³⁵ *Lubanga Appeals Judgement*, para.33.

¹³⁶ See Appeal, fn.98. [REDACTED]

¹³⁷ Decision, para.51. The Chamber also considered the additional allegations of "[REDACTED]", following a *réquisitoire supplétif* on 16 May 2012.

to the *Procureur Général* to seize the *Chambre d'Accusation* was warranted.¹³⁸ Only four limited investigative steps followed the issuing of the *réquisitoires introductifs* on 6 February 2012—and they yielded little or no result in the 32 months that followed.¹³⁹ Moreover, the *réquisitoires introductifs* themselves—Annex 2—only quote the relevant provisions of the Ivorian Criminal Code. This sheds no light on the factual parameters of the investigation purportedly being conducted.¹⁴⁰

47. The alleged difficulties faced by the judges in collecting evidence, [REDACTED],¹⁴¹ are irrelevant to the Chamber's determination of whether the same case is being investigated. These submissions do not advance consideration of the first limb of the admissibility test upon which the Decision is based. If anything, the GoCIV's arguments on the difficulties faced in the collection of evidence could only show its inability to investigate. Although such a question is not at issue here, such submissions only further support the admissibility of the case before this Court.

48. The GoCIV's argument that the number of victims as *parties civiles* purportedly shows the "*l'intérêt et le sérieux de l'affaire*"¹⁴² is conclusory. It does not explain how this translates into an active investigation of the same case before the domestic courts.¹⁴³

49. Without the necessary elaboration, the GoCIV argues that [REDACTED] was a necessary measure to be used to confront Ms Gbagbo during her questioning.¹⁴⁴ In almost the same breath—and somewhat contradictorily—however, it justifies that, because [REDACTED] required "*une longue et rigoureuse analyse*",¹⁴⁵ no investigative

¹³⁸ Decision, para.65.

¹³⁹ Decision, para.66.

¹⁴⁰ Decision, para.74.

¹⁴¹ Appeal, paras.89-90.

¹⁴² Appeal, para.91.

¹⁴³ See paras.38-39, 42-44.

¹⁴⁴ Appeal, para.92.

¹⁴⁵ Appeal, paras.103-106.

step was taken for several months before the filing of the admissibility challenge, and in particular, between 23 January 2013 and 4 February 2014.¹⁴⁶ However, any alleged challenges encountered by the GoCIV in its investigation are immaterial to showing an error on appeal. More so, [REDACTED],¹⁴⁷ this does not demonstrate that that activity related to the same case before this Court. Indeed, it seems likely that [REDACTED] pertained more globally to the numerous national proceedings against Ms Gbagbo—many of which bear no relevance to this Court’s proceedings.¹⁴⁸

50. Further, while the GoCIV claims that [REDACTED] led to further questioning of Ms Gbagbo,¹⁴⁹ the examples given mostly featured vague questioning *vis-à-vis* the conduct before this Court, [REDACTED].¹⁵⁰ [REDACTED].¹⁵¹ The generic nature of the questioning did not sufficiently mirror the case of the Prosecutor at this Court. Even taken at their highest, the GoCIV’s claimed investigative measures are a mere drop in the ocean of what it would be expected to do if it were actually investigating the conduct underlying the case before the Court.

51. [REDACTED]. It did not reveal the factual scope of the domestic case against her.¹⁵² The GoCIV’s reference to Annex 15 does not advance its claim that Ms Gbagbo was further questioned on the merits.¹⁵³ It should be dismissed *in limine*. Likewise, the hearing of the *partie civile*—even if used to question Ms Gbagbo—did not reveal the factual breadth of the domestic case.¹⁵⁴ Yet again, the GoCIV relies on a splintered understanding of the article 17(1)(a) criteria. It does not suffice that

¹⁴⁶ Decision, para.68.

¹⁴⁷ Appeal, para.105.

¹⁴⁸ See ICC-02/11-01/12-37-Conf-Anx20, ICC-02/11-01/12-37-Conf-Anx21.

¹⁴⁹ Appeal, para.106.

¹⁵⁰ ICC-02/11-01/12-45-Conf-Anx2, p.11.

¹⁵¹ ICC-02/11-01/12-45-Conf-Anx3.

¹⁵² Decision, para.72. See ICC-02/11-01/12-11-Conf-Anx5.

¹⁵³ Appeal, para.93, citing ICC-02/11-01/12-37-Conf-Anx15.

¹⁵⁴ Decision, para.72. See paras.38-39. *Contra* Appeal, para.94.

some or any case is being investigated domestically; it must be the “same conduct” that is being investigated.

52. The GoCIV’s appeal misreads the Chamber’s findings on Ms Gbagbo’s questioning by national authorities.¹⁵⁵ The Chamber did not dismiss the relevance of this questioning outright, nor did it fail to consider the number of interviews, as the GoCIV appears to suggest. To the contrary, the Chamber acknowledged that some of the questioning in September and October 2014 addressed “some relevant aspects of the factual case against Simone Gbagbo that is before the Court”.¹⁵⁶ It also found that “the questions posed indicate[d] an attempt by the domestic authorities to elicit relevant information on the events [which] occurred between the second round of the presidential elections on 28 November 2010 and Laurent Gbagbo’s arrest on 11 April 2011.”¹⁵⁷

53. Furthermore, the national authorities’ willingness (“*sa volonté intacte de recueillir des éléments de preuve [...]*”¹⁵⁸)—and attempts to secure relevant information—are immaterial at this juncture. What matters is whether their questioning revealed that the factual criminal conduct underlying the accusations against Ms Gbagbo in the domestic investigation was the same as that alleged against her in the case before the Court. It did not. Broad and generic indications that the domestic proceedings may touch upon the alleged commission by Ms Gbagbo (and others) of crimes against individuals in the context of the 2010-2011 post-electoral violence in Abidjan do not suffice.¹⁵⁹ They do not show that the domestic case sufficiently mirrors the one the Prosecutor is bringing before this Court. At the very least, the four incidents before the Court (the 16 December 2010 march on the RTI building, the 3 March 2011 women’s march in Abobo, the 17

¹⁵⁵ Appeal, paras.95-102.

¹⁵⁶ Decision, para.73.

¹⁵⁷ Decision, para.73.

¹⁵⁸ Appeal, para.97.

¹⁵⁹ Decision, para.73.

March 2011 Abobo market shelling, and the 12 April 2011 Yopougon massacre)¹⁶⁰ are indiscernible. Partial passing references in questioning to some potentially relevant aspects of the case before the Court cannot demonstrate that the GoCIV is investigating the same case as that before the Court.

54. Given that it was the GoCIV's burden to prove it was investigating the same case, the Pre-Trial Chamber was not required to fill in the blanks. Neither was it expected to ameliorate the rigour of this Court's law *vis-à-vis* the GoCIV because of the purported defence strategy [REDACTED] during Ms Gbagbo's questioning. The Chamber correctly applied the existing standard on admissibility. The fact that the results of the application of the law may not please the GoCIV does not make the Chamber's assessment erroneous.¹⁶¹ In any case, there is no objective indication that the Chamber faulted the GoCIV for [REDACTED].

55. Demonstrative of its piecemeal approach to this appeal, the GoCIV relies on a February 2013 decision by the *Chambre d'Accusation* to claim it was investigating the same case.¹⁶² This decision, however, is merely an isolated procedural step taken to reassign the different *dossiers* to a single *juge d'instruction*.¹⁶³ Even if this procedural step is considered as part of the investigation, it merely lists the provisions of the Ivorian Criminal Code. Significantly, the decision of the *Chambre d'Accusation* fails to refer to [REDACTED]—a key allegation before this Court—and does not show that Ms Gbagbo is being investigated for those very serious crimes in Côte d'Ivoire.¹⁶⁴

56. The GoCIV contests the Chamber's finding that "no investigative (or procedural step)" was taken "since several months before the filing of the

¹⁶⁰ Decision, para.44.

¹⁶¹ *Contra* Appeal, paras.101-102. See para.41.

¹⁶² Appeal, paras.107-108.

¹⁶³ Decision, para.61. See ICC-02/11-01/12-Conf-Anx8.

¹⁶⁴ Decision, para.75.

Admissibility Challenge on 30 September 2013” —by relying on a solitary *Chambre d’Accusation* decision of 10 July 2013 [REDACTED].¹⁶⁵ As the GoCIV acknowledges, this document relates to “[REDACTED].”¹⁶⁶ As already shown above,¹⁶⁷ these proceedings were irrelevant to the Chamber’s analysis. In any case, the GoCIV does not contest that no activity to collect relevant evidence was undertaken from 23 January 2013 until 4 February 2014.¹⁶⁸

57. The GoCIV argues that the domestic case’s factual parameters are known because the “*dates de prévention, lieux de prévention et chefs de prévention*” are known.¹⁶⁹ They are not: at least, not in any manner sufficient to find that the case mirrors the case before the Court. Indeed, as the GoCIV acknowledges, the known dates are limited to “[REDACTED]”;¹⁷⁰ the known places are limited to “[REDACTED]”.¹⁷¹ Neither the dates nor the places contain sufficient detail to demonstrate that the case mirrors that before the Court. Yet again, the GoCIV’s reliance on Ms Gbagbo’s questioning¹⁷² is misplaced. As shown above,¹⁷³ no matter the (limited) questioning on certain relevant aspects to the Court’s case, the broad and generic questions [REDACTED].¹⁷⁴ While the questioning may have skimmed the surface of some aspects of the Prosecutor’s case, it failed to do this in a consistent manner. The indeterminate case and the meandering nature of the questioning do not show that the GoCIV is investigating the same case.

58. The GoCIV’s remark about “*une allégation malveillante [...] à jeter le discrédit sur la bonne foi de l’Etat ivoirien*”¹⁷⁵ is gratuitous. The Chamber was perfectly justified to

¹⁶⁵ Appeal, para.109. See ICC-02/11-01/12-11-Conf-Anx10.

¹⁶⁶ Appeal, para.109.

¹⁶⁷ See paras.24-29.

¹⁶⁸ Decision, para.68.

¹⁶⁹ Appeal, paras.111-122.

¹⁷⁰ Appeal, para.116.

¹⁷¹ Appeal, paras.116, 119.

¹⁷² Appeal, paras.118-122.

¹⁷³ See paras.50, 52-53.

¹⁷⁴ Decision, para.73.

¹⁷⁵ Appeal, para.123.

note—as a matter of fact—that the only questioning which rendered limited information from Ms Gbagbo was conducted “after the Chamber’s Decision of 28 August 2014 authorising Côte d’Ivoire to provide, by 10 October 2014, further evidence in support of the Admissibility Challenge.”¹⁷⁶ Contrary to the GoCIV’s assertion, this was not a subjective assessment, but one that was grounded in the facts of this case.

59. Indeed, following a review of the documentation provided, on 28 August 2014, the Chamber found that “it would benefit” from “further documentation from [the GoCIV] indicating with more precision the contours of the alleged proceedings held against Simone Gbagbo in Côte d’Ivoire.”¹⁷⁷ The GoCIV was asked to provide information, properly substantiated by concrete, tangible and pertinent evidence, *inter alia* on Simone Gbagbo’s conduct allegedly being investigated/prosecuted by the domestic authorities and the parameters of the anticipated case at the national level.¹⁷⁸ The Chamber also requested relevant additional and updated information—and supporting evidence—related to investigative and/or procedural steps, if any, that had been taken after the filing of [the GoCIV’s] latest submissions.¹⁷⁹ Ms Gbagbo’s questioning of September and October 2014 took place after this Decision was issued. The Chamber therefore did not err in making its observation.

60. Finally, the GoCIV briefly refers to purportedly ongoing proceedings before the *Juge du 8ème Cabinet* and states that it is available to provide additional information.¹⁸⁰ However, post-Decision developments are irrelevant to this

¹⁷⁶ Decision, para.69.

¹⁷⁷ Decision of 28 August 2014, paras.6, 9.

¹⁷⁸ Decision of 28 August 2014, para.9.

¹⁷⁹ Decision of 28 August 2014, para.10.

¹⁸⁰ Appeal, para.98.

appeal.¹⁸¹ Following three extensive opportunities to complement its admissibility challenge underpinning this appeal, the GoCIV is now out of time.

61. For all these reasons, the GoCIV's second ground of appeal should be dismissed.

Relief sought

62. Because the appeal demonstrates neither errors of law or fact warranting appellate intervention, it should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 13th day of February 2015

At The Hague, The Netherlands

Word Count: 9671¹⁸²

¹⁸¹ *Gaddafi* Admissibility Decision, para.41.

¹⁸² It is hereby certified that this document contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the RoC. This statement (53 words), not itself included in the word count, follows the Appeals Chamber's recent direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32.