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**No. ICC-02/11-01/12 OA
Date: 27 May 2015**

THE APPEALS CHAMBER

Before:
Judge Piotr Hofmański, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. SIMONE GBAGBO

Public redacted document

Judgment

**on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of
11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the
admissibility of the case against Simone Gbagbo"**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Simone Gbagbo
Ms Sylvia Geraghty

States Representatives
Mr Jean-Pierre Mignard
Mr Jean-Paul Benoit

Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of Côte d'Ivoire against the decision of Pre-Trial Chamber I entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" of 11 December 2014 (ICC-02/11-01/12-47-Red),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The "Prosecution's Request to Dismiss *In Limine* and Strike Portions of the Responses of the Government of the Republic of Côte d'Ivoire and the Defence for Simone Gbagbo" (ICC-02/11-01/12-66 (OA)) is partially granted in that: (i) paragraphs 44-48 of the "Response of the Republic of Côte d'Ivoire to the 'Observations of Victims on the Appeal of the Republic of Côte d'Ivoire against the Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'" (ICC-02/11-01/12-64-Red (OA)); (ii) portions of paragraphs 43-56 of the "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 »'" (ICC-02/11-01/12-62 (OA)); and (iii) portions of paragraphs 43 and 50 of Simone Gbagbo's "RESPONSE to 'OBSERVATIONS des Victimes sur l'appel de la République de Côte d'Ivoire contre la « Décision relative à l'exception d'irrecevabilité soulevée par la Côte d'Ivoire s'agissant de l'affaire concernant SIMONE GBAGBO »'" (ICC-02/11-01/12-65 (OA)), to the extent that they refer to facts post-dating the "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", are dismissed *in limine*.

2. The “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” is confirmed.

REASONS

I. KEY FINDINGS

1. Where the appellant, while alleging an error of law, challenges the factual finding based on that law, the Appeals Chamber will consider such an alleged error as an error of fact.
2. The presumption in favour of domestic jurisdictions only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 29 February 2012, Pre-Trial Chamber III issued a warrant of arrest¹ (hereinafter: “Warrant of Arrest”) under seal against Simone Gbagbo (hereinafter: “Ms Gbagbo”), for her alleged criminal responsibility within the meaning of article 25 (3) (a) of the Statute for the crimes against humanity of (i) murder under article 7 (1) (a); (ii) rape and other forms of sexual violence under article 7 (1) (g); (iii) other inhumane acts under article 7 (1) (k); and (iv) persecution under article 7 (1) (h) of the Statute, committed in the territory of the Republic of Côte d’Ivoire (hereinafter: “Côte d’Ivoire”) between 16 December 2010 and 12 April 2011.²

4. On 2 March 2012, Pre-Trial Chamber III issued the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo”³ (hereinafter: “Arrest Warrant Decision”), in which it found that the conditions established by article 58 (1) of the Statute for the issuance of a warrant of

¹ [“Warrant of Arrest for Simone Gbagbo”](#), ICC-02/11-01/12-1. This document was originally filed under seal but was reclassified as public pursuant to Pre-Trial Chamber I’s instruction of 22 November 2012.

² [Warrant of Arrest](#).

³ “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo”, ICC-02/11-01/12-2-US-Exp; a public redacted version was registered on 17 December 2012 ([ICC-02/11-01/12-2-Red](#)).

arrest against Ms Gbagbo were met. In particular, it noted that the Prosecutor relied on the same four incidents that supported the charges against Laurent Gbagbo in another case, namely: (i) the attacks relating to the *Radiodiffusion Télévision Ivoirienne* (RTI) demonstrations between 16 and 19 December 2010; (ii) the attack on the women’s march in Abobo on 3 March 2011; (iii) the Abobo market shelling on 17 March 2011; and (iv) the Yopougon massacre on 12 April 2011.⁴ Pre-Trial Chamber III further recalled that in its earlier decision authorising the investigation in Côte d’Ivoire, it had found that “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 [we]re potential cases that would be admissible”.⁵ Pre-Trial Chamber III did not examine further the admissibility of the case against Ms Gbagbo in the Arrest Warrant Decision.⁶

5. On 19 March 2012, the Registrar notified Côte d’Ivoire of the Warrant of Arrest and requested the arrest and surrender of Ms Gbagbo to the Court.⁷

6. On 22 November 2012, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber” or “Chamber”), to which the case was assigned, ordered the lifting of the seal on the Warrant of Arrest against Ms Gbagbo.

7. On 30 September 2013, Côte d’Ivoire filed an admissibility challenge pursuant to articles 17, 19 and 95 of the Statute⁸ (hereinafter: “Admissibility Challenge”). It submitted that on 6 February 2012 domestic proceedings had been instituted against Ms Gbagbo based on allegations similar to those made in the case before the Court.⁹ Côte d’Ivoire also submitted that it was willing and able to try Ms Gbagbo for those

⁴ [Arrest Warrant Decision](#), para. 16.

⁵ [Arrest Warrant Decision](#), para. 11, citing “[Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’](#)”, 15 November 2011, ICC-02/11-14-Corr, para. 206.

⁶ [Arrest Warrant Decision](#), para. 12.

⁷ “[Demande d’arrestation et de remise de Simone Gbagbo](#)”, ICC-02/11-01/12-6. This document was originally filed under seal but was reclassified as public pursuant to Pre-Trial Chamber I’s instruction of 12 November 2013.

⁸ “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”, dated 30 September 2013 and registered on 1 October 2013, ICC-02/11-01/12-11-Conf and annexes; a public redacted version was registered on 1 October 2013 ([ICC-02/11-01/12-11-Red](#)).

⁹ [Admissibility Challenge](#), paras 23-38.

crimes.¹⁰ To support its contentions, Côte d'Ivoire provided, as annexes to the challenge, 17 documents concerning the applicable domestic law and the proceedings brought against Ms Gbagbo in Côte d'Ivoire.

8. On 15 November 2013, the Pre-Trial Chamber issued, in accordance with rules 58 and 59 of the Rules of Procedure and Evidence, the “Decision on the conduct of the proceedings following Côte d'Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”,¹¹ whereby it, *inter alia*, invited the Prosecutor, Ms Gbagbo and the Office of Public Counsel for victims (hereinafter: “OPCV”) to submit observations on the Admissibility Challenge, if any, by 13 January 2014. This time limit was subsequently extended to 24 February 2014.¹²

9. On 20 February 2014, the Pre-Trial Chamber granted Côte d'Ivoire leave to submit additional documentation relevant to its Admissibility Challenge and the deadline for responses from the Prosecutor, Ms Gbagbo and the OPCV was extended by six weeks from the date of notification of the additional documentation.¹³

10. On 25 February 2014, Côte d'Ivoire supplemented its Admissibility Challenge with 21 annexes of further material.¹⁴

11. On 8 April 2014, Ms Gbagbo’s filed her response to the Admissibility Challenge.¹⁵ The response of the Prosecutor¹⁶ and the observations of the victims¹⁷ were filed on 9 April 2014.

¹⁰ [Admissibility Challenge](#), paras 39-56.

¹¹ [ICC-02/11-01/12-15](#).

¹² “[Decision on the ‘Defence Request for an Extension of Time’](#)”, 17 December 2013, ICC-02/11-01/12-24; “[Decision on the Prosecutor’s and the OPCV’s requests for extension of time](#)”, 19 December 2013, ICC-02/11-01/12-29.

¹³ Pre-Trial Chamber I, “[Decision on Côte d'Ivoire’s request to provide additional documents in support of its challenge to the admissibility of the case against Simone Gbagbo](#)”, ICC-02/11-01/12-35.

¹⁴ “Dépôt de documents complémentaires à l’appui de la 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”, dated 25 February 2014 and registered on 26 February 2014, ICC-02/11-01/12-37-Conf and annexes; a public redacted version was registered on 26 February 2014 ([ICC-02/11-01/12-37-Red](#)).

¹⁵ “[Response on behalf of Simone Gbagbo to the ‘Requête de la République de Côte d'Ivoire sur la recevabilité de l’affaire Le Procureur c. Simone Gbagbo, et demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut de Rome’](#)”, dated 8 April 2014 and registered on 9 April 2014, ICC-02/11-01/12-39.

12. On 28 August 2014, the Pre-Trial Chamber issued the “Decision on further submissions on issues related to the admissibility of the case against Simone Gbagbo”¹⁸ (hereinafter: “Decision of 28 August 2014”), wherein it granted Côte d’Ivoire until 10 October 2014 to make further submissions and provide evidence in support of its Admissibility Challenge.¹⁹ It also clarified that, after the filing by Côte d’Ivoire, it would determine the appropriateness of any response to such submissions upon request by the parties and participants.²⁰ In the same decision, the Pre-Trial Chamber recalled certain relevant aspects of the law applicable to the determination on the admissibility of a case and identified certain kinds of information and evidence as being of particular significance to its analysis.²¹

13. On 10 October 2014, Côte d’Ivoire filed its final submissions with additional documentation in support of the Admissibility Challenge, including four annexes.²² The annexed documents reproduce four records of interviews of Ms Gbagbo as part of the domestic proceedings brought against her, which took place on 9 and 10 September 2014, and 2 and 3 October 2014.

14. On 11 December 2014, the Pre-Trial Chamber issued the “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”²³ (hereinafter: “Impugned Decision”), rejecting Côte d’Ivoire’s Admissibility Challenge.

¹⁶ “Prosecution’s Response to Côte d’Ivoire’s Challenge to the admissibility of the case against Simone Gbagbo”, ICC-02/11-01/12-41-Conf with Confidential Annex 1; a public redacted version was registered on the same day ([ICC-02/11-01/12-41-Red](#)).

¹⁷ “Observations des victimes sur la ‘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””, ICC-02/11-01/12-40-Conf and annexes; a public redacted version was registered on the same day ([ICC-02/11-01/12-40-Red](#)).

¹⁸ [ICC-02/11-01/12-44](#).

¹⁹ [Decision of 28 August 2014](#), para. 11.

²⁰ [ICC-02/11-01/12-44](#), para. 11.

²¹ [ICC-02/11-01/12-44](#), paras 6, 9-10.

²² “Second dépôt de documents complémentaires à l’appui de la 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”, ICC-02/11-01/12-45-Conf and annexes; a public redacted version was registered on the same day ([ICC-02/11-01/12-45-Red](#)).

²³ [ICC-02/11-01/12-47-Red](#).

B. Proceedings before the Appeals Chamber

15. On 17 December 2014, Côte d'Ivoire filed its appeal against the Impugned Decision²⁴ (hereinafter: "Appeal"), including a request for suspensive effect pursuant to article 82 (3) of the Statute.²⁵

16. On 9 January 2015, after having been granted an extension of time,²⁶ Côte d'Ivoire filed its document in support of the appeal²⁷ (hereinafter: "Document in Support of the Appeal"), requesting that the Appeals Chamber reverse the Impugned Decision, allow its challenge and determine that the case against Ms Gbagbo is inadmissible before the Court.²⁸

17. On 20 January 2015, the Appeals Chamber rejected Côte d'Ivoire's request for suspensive effect of its Appeal.²⁹

18. On 2 February 2015, the Prosecutor filed the "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'"³⁰ (hereinafter: "Prosecutor's Response to the Appeal"), in which she contends that the Appeal should be dismissed.

19. On 6 February 2015, Ms Gbagbo filed the "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

²⁴ ["Appeal of the Republic of Côte d'Ivoire against Pre-Trial Chamber I's Decision on Côte d'Ivoire challenge to the admissibility of the case against Simone Gbagbo"](#), dated 17 December 2014 and registered on 27 January 2015, ICC-02/11-01/12-48-tENG (OA); original French version, dated 17 December 2014 ([ICC-02/11-01/12-48 \(OA\)](#)).

²⁵ [Appeal](#), paras 10-20.

²⁶ ["Decision on Côte d'Ivoire's request for time extension"](#), 23 December 2014, ICC-02/11-01/12-53 (OA).

²⁷ "Document in support of the appeal of the Republic of Côte d'Ivoire against Pre-Trial Chamber I's *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo* (ICC-02/11-01/12)", dated 9 January 2015 and registered on 2 February 2015, ICC-02/11-01/12-54-Conf-tENG (OA); original French version, dated 9 January 2015 (ICC-02/11-01/12-54-Conf); a public redacted version was registered on the same day ([ICC-02/11-01/12-54-Red](#)).

²⁸ [Document in Support of the Appeal](#), paras 14, 125.

²⁹ ["Decision on Côte d'Ivoire's request for suspensive effect of its appeal against the 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo' of 11 December 2014"](#), ICC-02/11-01/12-56 (OA).

³⁰ ICC-02/11-01/12-61-Conf (OA); a public redacted version was registered on the same day ([ICC-02/11-01/12-61-Red](#)).

d'Ivoire s'agissant de l'affaire concernant Simone Gbagbo »³¹ (hereinafter: "Ms Gbagbo's Response to the Appeal"), fully supporting the Appeal but reserving the right to raise legal challenges envisaged under the Statute, including applications pursuant to article 19 of the Statute.

20. On 19 February 2015, the OPCV filed its observations on the Appeal³² (hereinafter: "OPCV Observations"), requesting that the Appeals Chamber dismiss the appeal.

21. On 5 March 2015, Côte d'Ivoire filed its response to the OPCV Observations³³ (hereinafter: "Côte d'Ivoire's Response to the OPCV Observations"), reiterating its arguments that the Pre-Trial Chamber erred in law and in fact in finding the case to be admissible.

22. Also on 5 March 2015, Ms Gbagbo filed her response to the Victim's Observations³⁴ (hereinafter: "Ms Gbagbo's Response to the OPCV Observations"), requesting that the Appeals Chamber declare the case against her inadmissible.³⁵

23. On 9 March 2015, the Prosecutor filed the "Prosecution's Request to Dismiss *In Limine* and Strike Portions of the Responses of the Government of the Republic of

³¹ [ICC-02/11-01/12-62 \(OA\)](#). On 21 January 2015, Ms Gbagbo requested an extension of time for the filing of her response to the Document in Support of the Appeal. "[Request for an extension of time](#)", ICC-02/11-01/12-57 (OA). The Prosecutor's response to Ms Gbagbo's request for an extension of time was filed on 22 January 2015. "[Prosecution's Response to Simone Gbagbo's Request for Extension of Time](#)", ICC-02/11-01/12-59 (OA). On 28 January 2015, the Appeals Chamber extended the time limit for the filing of Ms Gbagbo's response to the Document in Support of the Appeal. "[Decision on Ms Simone Gbagbo's request for extension of time for the filing of a response to the document in support of the appeal](#)", ICC-02/11-01/12-60 (OA).

³² "Observations of Victims on the Appeal of the Republic of Côte d'Ivoire against the *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo*", dated 19 February 2015 and registered on 3 March 2015, ICC-02/11-01/12-63-Conf-tENG (OA); original French version, dated 19 February 2015 (ICC-02/11-01/12-63-Conf); a public redacted version was registered on the same day ([ICC-02/11-01/12-63-Red](#)).

³³ "Response of the Republic of Côte d'Ivoire to the 'Observations of Victims on the Appeal of the Republic of Côte d'Ivoire against the Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", dated 5 March 2015 and registered on 24 March 2015, ICC-02/11-01/12-64-Conf-tENG (OA); original French version, dated 5 March 2015 (ICC-02/11-01/12-64-Conf); a public redacted version was registered on the same day ([ICC-02/11-01/12-64-Red](#)).

³⁴ "[RESPONSE to 'OBSERVATIONS des Victimes sur l'appel de la République de Côte d'Ivoire contre la « Décision relative à l'exception d'irrecevabilité soulevée par la Côte d'Ivoire s'agissant de l'affaire concernant SIMONE GBAGBO »](#)", ICC-02/11-01/12-65 (OA).

³⁵ [Ms Gbagbo's Response to the OPCV Observations](#), para. 70.

Côte d’Ivoire and the Defence for Simone Gbagbo”³⁶ (hereinafter: “Request of 9 March 2015”), requesting that portions of the responses of Ms Gbagbo and Côte d’Ivoire to the OPCV Observations and Ms Gbagbo’s Response to the Appeal be dismissed *in limine* and struck from the record.³⁷ Ms Gbagbo’s response³⁸ (hereinafter: “Ms Gbagbo’s Response to the Request of 9 March 2015”) was filed on 23 March 2015.

24. On 13 March 2015, following the solemn undertaking of six newly elected judges to the Court on 10 March 2015 and the Presidency’s election on 11 March 2015, the Appeals Division was composed of Judge Silvia Fernández de Gurmendi, Judge Sanji Mmasenono Monageng, Judge Christine Van den Wyngaert, Judge Howard Morrison and Judge Piotr Hofmański.³⁹

25. On 20 March 2015, the Presidency of the Court granted the requests of Judge Christine Van den Wyngaert and Judge Silvia Fernández de Gurmendi for excusal from hearing the appeal in *The Prosecutor v. Simone Gbagbo* and temporarily attached Judge Marc Perrin de Brichambaut and Judge Chang-ho Chung to the Appeals Chamber for the purpose of hearing this appeal.⁴⁰

III. APPLICABLE LAW

A. Admissibility

26. Article 17 (1) (a) of the Statute provides:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

27. The Appeals Chamber has held that article 17 (1) (a) of the Statute entails a two-step analysis to determine whether a case is inadmissible:

³⁶ [ICC-02/11-01/12-66 \(OA\)](#).

³⁷ [Request of 9 March 2015](#), para. 6.

³⁸ “[RESPONSE to «Prosecution’s Request to Dismiss *In Limine* and Strike Portions of the Responses of the Government of the Republic of Côte d’Ivoire and the Defence for Simone Gbagbo’»](#)”, ICC-02/11-01/12-70 (OA).

³⁹ “[Decision assigning judges to divisions](#)”, ICC-02/11-01/12-67, p. 4.

⁴⁰ “[Decision replacing two judges in the Appeals Chamber](#)”, filed 20 March 2015 and registered on 23 March 2015, ICC-02/11-01/12-69 (OA), p. 4.

in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to 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.⁴¹

28. The Appeals Chamber has determined that the expression “the case is being investigated” appearing in article 17 (1) (a) of the Statute must be understood as requiring the “taking of steps” directed at ascertaining whether the person is responsible for the alleged conduct.⁴² The investigative steps undertaken by the domestic authorities may include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.⁴³

29. The Appeals Chamber has also clarified that a State that challenges the admissibility of a case “bears the burden of proof to show that the case is inadmissible”.⁴⁴ A State needs to prove that it is conducting “a genuine investigation or prosecution”.⁴⁵ To discharge its burden of proof, the State must provide the Court with “evidence of a sufficient degree of specificity and probative value” that

⁴¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “[Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#)”, 25 September 2009, ICC-01/04-01/07-1497 (OA 8) (hereinafter: “*Katanga Admissibility Judgment*”), para. 78. See also Appeals Chamber, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “[Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute’](#)”, 30 August 2011, ICC-01/09-01/11-307 (OA) (hereinafter: “*Ruto Admissibility Judgment*”), para. 41; Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “[Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute’](#)”, 30 August 2011, ICC-01/09-02/11-274 (OA) (hereinafter: “*Kenyatta Admissibility Judgment*”), para. 40.

⁴² [Ruto Admissibility Judgment](#), para. 41.

⁴³ [Ruto Admissibility Judgment](#), para. 41; [Kenyatta Admissibility Judgment](#), para. 40.

⁴⁴ [Ruto Admissibility Judgment](#), para. 62; [Kenyatta Admissibility Judgment](#), para. 61.

⁴⁵ Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “[Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’](#)”, 24 July 2014, ICC-01/11-01/11-565 (OA 6) (hereinafter: “*Al-Senussi Admissibility Judgment*”), para. 166.

demonstrates that it is indeed investigating the case.⁴⁶ “It is not sufficient merely to assert that investigations are ongoing”.⁴⁷

30. The Appeals Chamber has also established that “in case of inaction, the question of unwillingness or inability does not arise; 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”.⁴⁸

31. Regarding the meaning of the term “case” in article 17 (1) (a) of the Statute, the Appeals Chamber held that “the question is not merely a question of ‘investigation’ in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction”.⁴⁹

32. The Appeals Chamber has also stated that

the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa*.⁵⁰

The expression “time of the proceedings” used by the Appeals Chamber should be interpreted to refer to “the time of the proceedings on the admissibility challenge before the Pre-Trial Chamber and not to the subsequent proceedings on appeal”.⁵¹

33. The Appeals Chamber has explained that “[its function] is not to decide anew on the admissibility of the case”.⁵² Instead, it is “to determine whether the

⁴⁶ [Ruto Admissibility Judgment](#), para. 62; [Kenyatta Admissibility Judgment](#), para. 61.

⁴⁷ [Ruto Admissibility Judgment](#), para. 62; [Kenyatta Admissibility Judgment](#), para. 61.

⁴⁸ [Katanga Admissibility Judgment](#), para. 78.

⁴⁹ [Ruto Admissibility Judgment](#), para. 37; [Kenyatta Admissibility Judgment](#), para. 36.

⁵⁰ [Katanga Admissibility Judgment](#), para. 56.

⁵¹ Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “[Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’](#)”, 28 July 2011, ICC-01/09-02/11-202 (OA) (hereinafter: “*Muthaura Appeals Chamber Decision of 28 July 2011*”), para. 9; Appeals Chamber, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “[Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’](#)”, 28 July 2011, ICC-01/09-01/11-234 (OA) (hereinafter: “*Ruto Appeals Chamber Decision of 28 July 2011*”), para. 10.

determination [by the Pre-Trial Chamber] on the admissibility of the case [...] was in accord with the law”.⁵³ The Appeals Chamber emphasised:

As a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber. The instant proceedings before the Pre-Trial Chamber concluded with the issuance of the Impugned Decision. Facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal. [...] [They are] not relevant for this appeal and must be rejected *in limine*.⁵⁴

B. Challenge to the admissibility

34. Article 19 of the Statute provides, in relevant part:

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

[...]

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted;

[...]

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. [...]

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

35. The Appeals Chamber held that “[a]rticle 19 (5) of the Statute requires a State to challenge admissibility as soon as possible once it is in a position to actually assert

⁵² [Muthaura Appeals Chamber Decision of 28 July 2011](#), para. 10; [Ruto Appeals Chamber Decision of 28 July 2011](#), para. 11.

⁵³ [Muthaura Appeals Chamber Decision of 28 July 2011](#), para. 10, citing Appeals Chamber, *Prosecutor v. Joseph Kony et al.*, “[Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 \(1\) of the Statute’ of 10 March 2009](#)”, 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: “*Kony Admissibility Judgment*”), para. 80; [Ruto Appeals Chamber Decision of 28 July 2011](#), para. 11, citing [Kony Admissibility Judgment](#), para. 80.

⁵⁴ [Muthaura Appeals Chamber Decision of 28 July 2011](#), para. 12; [Ruto Appeals Chamber Decision of 28 July 2011](#), para. 13. See also Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’](#)”, 21 May 2014, ICC-01/11-01/11-547-Red (OA 4) (hereinafter: “*Gaddafi Admissibility Judgment*”), para. 43; [Al-Senussi Admissibility Judgment](#), para. 57.

a conflict of jurisdictions” (footnote omitted).⁵⁵ It has also stated that “[t]he State cannot expect to be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely”.⁵⁶ Indeed, “a State should, as a general rule, not challenge the admissibility of a case until it is in a position to substantiate that challenge”.⁵⁷ The Appeals Chamber emphasised:

admissibility proceedings should not be used as a mechanism or process through which a State may gradually inform the Court, over time and as its investigation progresses, as to the steps it is taking to investigate a case. Admissibility proceedings should rather only be triggered when a State is ready and able, in its view, to fully demonstrate a conflict of jurisdiction on the basis that the requirements set out in article 17 are met.⁵⁸

C. Standard of review

36. Article 82 (1) (a) of the Statute provides: “Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] decision with respect to [...] admissibility”.

37. Neither the Statute nor the Rules of Procedure and Evidence enumerate the grounds of appeal that can be raised pursuant to article 82. However, the Appeals Chamber has held that appeals under article 82 can include the grounds listed under article 81 (1) (a), namely procedural errors, errors of fact and errors of law.⁵⁹

38. In respect of factual errors, the Appeals Chamber has held that it will not interfere with the factual findings of a first-instance Chamber unless it is shown that the Pre-Trial or Trial Chamber “committed a clear error, namely: misappreciated the

⁵⁵ [Ruto Admissibility Judgment](#), para. 46. *See also* para. 100. [Kenyatta Admissibility Judgment](#), para. 45. *See also* para. 98.

⁵⁶ [Ruto Admissibility Judgment](#), para. 100.

⁵⁷ [Gaddafi Admissibility Judgment](#), para. 164.

⁵⁸ [Gaddafi Admissibility Judgment](#), para. 164.

⁵⁹ *See e.g. Situation in the Democratic Republic of the Congo*, “[Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’](#)”, 13 July 2006, ICC-01/04-169, paras 32-35. This document was originally filed under seal but was reclassified as public pursuant to the decision of the Appeals Chamber of 22 September 2008. *See also Prosecutor v. Thomas Lubanga Dyilo*, “[Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 \(2\) and \(4\) of the Rules of Procedure and Evidence’](#)”, 13 October 2006, ICC-01/04-01/06-568, para. 19.

facts, took into account irrelevant facts or failed to take into account relevant facts”.⁶⁰ Regarding the “misappreciation of facts”, the Appeals Chamber has also stated that it “will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the first-instance Chamber’s conclusion could have reasonably been reached from the evidence before it”.⁶¹

39. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber’s findings.⁶²

40. In respect of errors of law, the Appeals Chamber has held that it

will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.⁶³

41. Furthermore, the Appeals Chamber recalls that the burden is on the appellant to substantiate not only that the first-instance Chamber erred, but also that the purported error materially affected the Impugned Decision.⁶⁴ A judgment is “materially affected by an error of law” if the Trial Chamber “would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error” (footnotes omitted).⁶⁵

⁶⁰ [Ruto Admissibility Judgment](#), para. 56; [Kenyatta Admissibility Judgment](#), para. 55.

⁶¹ [Ruto Admissibility Judgment](#), para. 56; [Kenyatta Admissibility Judgment](#), para. 55.

⁶² *Prosecutor v. Thomas Lubanga Dyilo*, “[Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)”, 1 December 2014, ICC-01/04-01/06 A 5, paras 22, 24, 27 (hereinafter: “*Lubanga A 5 Judgment*”).

⁶³ [Gaddafi Admissibility Judgment](#), para. 49, citing Appeals Chamber, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “[Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements \(ICC-02/05-03/09-199\) and additional instructions on translation’](#)”, 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.

⁶⁴ See, for instance, [Al-Senussi Admissibility Judgment](#), para. 109.

⁶⁵ [Lubanga A 5 Judgment](#), para. 19. See also Appeals Chamber, *Prosecutor v. Mathieu Ngudjolo Chui*, “[Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’](#)”, 27 February 2015, ICC-01/04-02/12 A, para. 20.

IV. PRELIMINARY ISSUES

A. Request of 9 March 2015

42. In her Request of 9 March 2015, the Prosecutor requests that the Appeals Chamber dismiss *in limine* and strike from the record: (i) paragraphs 43-48 of Côte d'Ivoire's Response to the OPCV Observations, (ii) portions of paragraphs 43-56 of Ms Gbagbo's Response to the Appeal, and (iii) portions of paragraphs 43 and 50 of Ms Gbagbo's Response to the OPCV Observations, on the basis that they introduce information which falls outside the scope of the pre-trial proceedings and is thus irrelevant to the appeal.⁶⁶ In response to the Request of 9 March 2015, Ms Gbagbo argues that she has not sought to introduce any new matter during the appellate proceedings,⁶⁷ and requests that the Appeals Chamber reject the Prosecutor's request in its entirety, or in the alternative, to limit any dismissal and strike out to portions of paragraphs 43, 49 and 56 of Ms Gbagbo's Response to the Appeal, and portions of paragraphs 43 and 50 of Ms Gbagbo's Response to the OPCV Observations.⁶⁸ Ms Gbagbo argues that the Pre-Trial Chamber "was fully aware" of proceedings before the Abidjan Court of Appeal and that, therefore, the Request of 9 March 2015 is misguided in that in her filings Ms Gbagbo did not seek to introduce any matter which had not already been considered by the Pre-Trial Chamber.⁶⁹

43. The Appeals Chamber recalls its ruling that "[f]acts which postdate the [impugned decision on admissibility] fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal".⁷⁰ As some of the aforementioned paragraphs of Côte d'Ivoire's Response to the OPCV Observations, Ms Gbagbo's Response to the Appeal and Ms Gbagbo's Response to the OPCV Observations refer to facts postdating the Impugned Decision, they indeed fall outside the scope of the pre-trial proceedings. The Appeals Chamber considers that Côte d'Ivoire, by referring to facts postdating the Impugned Decision, attempts to seek a new ruling on admissibility, rather than a review of the proceedings before the Pre-Trial Chamber. In this regard, the Appeals

⁶⁶ [Request of 9 March 2015](#), paras 2, 6.

⁶⁷ [Ms Gbagbo's Response to the Request of 9 March 2015](#), para. 20.

⁶⁸ [Ms Gbagbo's Response to the Request of 9 March 2015](#), para. 29.

⁶⁹ [Ms Gbagbo's Response to the Request of 9 March 2015](#), paras 19, 21.

⁷⁰ [Ruto Appeals Chamber Decision of 28 July 2011](#), para. 13. See also [Gaddafi Admissibility Judgment](#), para. 43; [Al-Senussi Admissibility Judgment](#), para. 57.

Chamber recalls that “[its] function [...] is not to decide anew on the admissibility of the case”.⁷¹ The Appeals Chamber further recalls that proceedings on appeal are corrective in nature, conducted with the purpose of reviewing the proceedings before the Pre-Trial Chamber and that “[t]o conflate the proceedings before the Pre-Trial and Appeals Chamber [...] would render the two sets of proceedings indistinguishable and the concept of appeal incoherent” (footnotes omitted).⁷²

44. In these circumstances, the Appeals Chamber does not find it appropriate to consider the submissions contained in some of the above-listed portions of the filings when the Pre-Trial Chamber has not done so. The Appeals Chamber notes that, contrary to the Prosecutor’s assertion, there is no information regarding facts postdating the Impugned Decision in paragraph 43 of Côte d’Ivoire’s Response to the OPCV Observations. Accordingly, the Request of 9 March 2015 is granted in part: (i) paragraphs 44-48 of Côte d’Ivoire’s Response to the OPCV Observations, (ii) portions of paragraphs 43-56 of Ms Gbagbo’s Response to the Appeal, and (iii) portions of paragraphs 43 and 50 of Ms Gbagbo’s Response to the OPCV Observations to the extent that they refer to facts post-dating the Impugned Decision, are dismissed *in limine*. However, the Appeals Chamber does not consider it necessary to strike the relevant portions of the documents from the record. In particular, the Prosecutor does not explain why these portions should be struck, especially in view of the fact that the Appeals Chamber needed to examine the content of these portions in order to rule on the Request of 9 March 2015.

45. The Appeals Chamber is aware that by excluding facts postdating the Impugned Decision from the scope of its review, it limits the review to the issue of the correctness of the Impugned Decision, which determined the admissibility of the case as of the date of its issuance.

B. Lack of clarity of Côte d’Ivoire’s submissions

46. The Appeals Chamber is of the view that the legal and factual reasons in support of the grounds of Côte d’Ivoire’s appeal are not always presented with sufficient clarity. Some alleged errors are set out as errors of law, even though the

⁷¹ [Ruto Appeals Chamber Decision of 28 July 2011](#), para. 11.

⁷² [Ruto Appeals Chamber Decision of 28 July 2011](#), para. 12.

nature of the supporting arguments is clearly factual. Where the appellant, while alleging an error of law, challenges the factual finding based on that law, the Appeals Chamber will consider such an alleged error as an error of fact. In some instances, Côte d'Ivoire puts forward arguments without clearly identifying an alleged error. Furthermore, the appellant at times identifies an alleged error without specifying the impact of that error on the Impugned Decision. This lack of clarity or substantiation in the pleading of the grounds of appeal affects the Appeals Chamber's ability to properly consider the arguments presented in support of the Appeal, and to determine whether the Pre-Trial Chamber erred. Specific examples of such unclear pleading are discussed, where relevant, in the section of this judgment that deals with the merits of the Appeal.

V. MERITS

A. First ground of appeal

47. Under its first ground of appeal, Côte d'Ivoire submits that the Pre-Trial Chamber “erred in law in its interpretation and application of the admissibility criteria established by article 17 of the Rome Statute”.⁷³

48. In essence, three errors are alleged: (i) that the Pre-Trial Chamber erred in applying overly rigorous criteria for the determination of the existence of an investigation or prosecution in Côte d'Ivoire,⁷⁴ (ii) that the Pre-Trial Chamber erred in applying the “same person/same conduct” test by undertaking a “purely formal examination” of the proceedings in Côte d'Ivoire,⁷⁵ and (iii) that the Pre-Trial Chamber erred by restricting its comparison of the conduct covered by the international proceedings and the conduct covered by the domestic proceedings to the four incidents referred to in the Arrest Warrant Decision.⁷⁶ These arguments will be addressed in turn.

⁷³ [Document in Support of the Appeal](#), para. 14.

⁷⁴ [Document in Support of the Appeal](#), paras 22-28, 29-37.

⁷⁵ [Document in Support of the Appeal](#), paras 38-44.

⁷⁶ [Document in Support of the Appeal](#), paras 45-51.

1. *Existence of an investigation or prosecution*

(a) **Relevant part of the Impugned Decision**

49. The Pre-Trial Chamber recalled that

in 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.⁷⁷

50. The Pre-Trial Chamber found that it was not satisfied that Côte d’Ivoire’s domestic authorities were “taking tangible, concrete and progressive investigative steps into [Ms] Gbagbo’s criminal responsibility for the crimes alleged in the proceedings before the Court or that they [were] prosecuting her for these alleged crimes”.⁷⁸ The Pre-Trial Chamber considered that, since the answer to the first question was not affirmative, “it [wa]s 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”.⁷⁹

51. The Pre-Trial Chamber held that “for a State to discharge its burden of proof that there is currently no situation of ‘inaction’ at the national level, it needs to substantiate that an investigation or prosecution is in progress at this moment.”⁸⁰

(b) **Submissions of the parties and participants**

52. Côte d’Ivoire first submits that the Pre-Trial Chamber “revers[ed] the logic underlying the principle of complementarity”⁸¹ by setting “excessively rigorous criteria” to determine the first limb of the admissibility test.⁸² Côte d’Ivoire argues that

“the very high threshold set by the Appeals Chamber to determine a State’s inability and unwillingness [*i.e.* the second limb of the admissibility test] [...] must also, and *a fortiori*, apply to determination of the existence of proceedings

⁷⁷ [Impugned Decision](#), para. 27, referring to [Katanga Admissibility Judgment](#), paras 1, 75-79.

⁷⁸ [Impugned Decision](#), para. 36.

⁷⁹ [Impugned Decision](#), para. 36.

⁸⁰ [Impugned Decision](#), para. 35.

⁸¹ [Document in Support of the Appeal](#), para. 28.

⁸² [Document in Support of the Appeal](#), para. 27.

[i.e. the first limb], since that examination precedes and takes precedence over any examination of inability and unwillingness”.⁸³

In Côte d’Ivoire’s view, “there can be no justification for using radically different methods to assess each of the criteria”⁸⁴ under article 17 of the Statute, and thus the Chamber erred in its interpretation and application of the law.⁸⁵

53. Côte d’Ivoire further argues that the Pre-Trial Chamber’s interpretation of the “inaction” criterion is erroneous.⁸⁶

54. Côte d’Ivoire finally submits that the Pre-Trial Chamber “fail[ed] to consider the legal implications of [...] developments” in the domestic legal proceedings.⁸⁷ It argues that it “has provided the Court with a considerable amount of documentary evidence, accompanied by substantial explanations, to support the existence of proceedings in Côte d’Ivoire concerning Ms Gbagbo for crimes justifying the Court’s request for surrender”.⁸⁸

55. Ms Gbagbo “fully supports” Côte d’Ivoire’s submissions regarding the determination of the existence of an investigation or prosecution.⁸⁹

56. The Prosecutor submits that Côte d’Ivoire “fails to show that the Pre-Trial Chamber legally erred in articulating and applying the law on admissibility”,⁹⁰ since “the Chamber appropriately followed *inter alia* [the] Appeals Chamber’s consistent law adopting a two part analysis on admissibility”.⁹¹ The Prosecutor argues that the Pre-Trial Chamber did not violate the principle of complementarity and notes that “[a]lthough article 17 (1) (a) to (c) does indeed favour national jurisdictions, it does so

⁸³ [Document in Support of the Appeal](#), para. 27.

⁸⁴ [Document in Support of the Appeal](#), para. 27.

⁸⁵ [Document in Support of the Appeal](#), para. 28. *See also* [Côte d’Ivoire’s Response to the OPCV Observations](#), paras 12-15.

⁸⁶ [Document in Support of the Appeal](#), paras 33-37. *See also* [Côte d’Ivoire’s Response to the OPCV Observations](#), paras 17, 20, 22-23.

⁸⁷ [Document in Support of the Appeal](#), para. 37.

⁸⁸ [Document in Support of the Appeal](#), para. 32.

⁸⁹ [Ms Gbagbo’s Response to the Appeal](#), paras 29-37.

⁹⁰ [Prosecutor’s Response to the Appeal](#), para. 13.

⁹¹ [Prosecutor’s Response to the Appeal](#), para. 13, referring to [Katanga Admissibility Judgment](#), [Kenyatta Admissibility Judgment](#), [Gaddafi Admissibility Judgment](#).

only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level”.⁹²

57. The OPCV submits that the Pre-Trial Chamber correctly interpreted article 17 (1) (a) of the Statute.⁹³ It submits that Côte d’Ivoire fails to demonstrate which error of law the Pre-Trial Chamber allegedly committed in its interpretation of the criterion of inaction.⁹⁴

(c) Determination by the Appeals Chamber

58. With respect to Côte d’Ivoire’s argument regarding the applicable legal test, the Appeals Chamber recalls that:

the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions does not contradict this conclusion. Although 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.⁹⁵

59. It follows that the presumption in favour of domestic jurisdictions only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level. As the Pre-Trial Chamber found that no relevant investigations and/or prosecutions were ongoing at the national level, it was not an error for it not to follow the above-mentioned presumption. Côte d’Ivoire’s argument regarding the alleged violation of the principle of complementarity is therefore rejected.

60. With respect to Côte d’Ivoire’s argument that the criteria for establishing the existence of investigations and/or prosecutions at the national level should be similar to those applicable to the determination of a State’s unwillingness or inability genuinely to carry out the investigation or prosecution, the Appeals Chamber notes that Côte d’Ivoire bases its argument on two premises: (i) the alleged violation of the principle of complementarity, which has been discussed above, and (ii) the Pre-Trial Chamber’s

⁹² [Prosecutor’s Response to the Appeal](#), para. 18, quoting [Ruto Admissibility Judgment](#), para. 44.

⁹³ [OPCV Observations](#), para. 21.

⁹⁴ [OPCV Observations](#), paras 20-21.

⁹⁵ [Ruto Admissibility Judgment](#), para. 44; [Kenyatta Admissibility Judgment](#), para. 43.

finding in the *Al-Senussi* Admissibility Decision that “the two limbs of the admissibility test are intimately and inextricably linked”.⁹⁶ The Appeals Chamber notes, however, that this finding was made in a different context. The finding concerned the possibility of relying on the same considerations with respect to both limbs of the admissibility test,⁹⁷ rather than comparing the criteria for establishing each of the limbs of the test. Therefore, the Pre-Trial Chamber’s finding does not support the proposition made by Côte d’Ivoire. As no other basis for this argument has been provided, the Appeals Chamber rejects it as unsubstantiated.

61. As regards the argument that the Pre-Trial Chamber’s interpretation of “inaction” is erroneous, the Appeals Chamber finds that this argument is limited to mere statements that the interpretation was erroneous, and that the developments in domestic proceedings since the issuance of the Warrant of Arrest against Ms Gbagbo were disregarded. In particular, Côte d’Ivoire does not explain why the interpretation adopted by the Pre-Trial Chamber was an error. Its arguments on this point are therefore dismissed as having failed to identify an error.

62. As regards Côte d’Ivoire’s argument that the Pre-Trial Chamber failed to consider relevant procedural activities undertaken domestically, the Appeals Chamber considers that Côte d’Ivoire incorrectly presents this argument as an error of law. The Appeals Chamber finds that it is more appropriate to examine this argument as an alleged error of fact. In addition, the Appeals Chamber notes that a similar argument, alleging an error of fact, is presented under the second ground of Côte d’Ivoire’s appeal.⁹⁸ In these circumstances, the Appeals Chamber considers it appropriate to examine this argument with the argument presented under the second ground of appeal.⁹⁹

⁹⁶ [Document in Support of the Appeal](#), para. 27, referring to [Impugned Decision](#), para. 30, quoting *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red (hereinafter: “*Al-Senussi* Admissibility Decision”), para. 210.

⁹⁷ “[E]vidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness”. [Al-Senussi Admissibility Decision](#), para. 210.

⁹⁸ [Document in Support of the Appeal](#), paras 88-110.

⁹⁹ *See infra*, paras 128-131.

2. *Application of the “same person/same conduct” test*

(a) **Relevant part of the Impugned Decision**

63. The Pre-Trial Chamber noted that three sets of proceedings, running in parallel, were opened against Ms Gbagbo in Côte d’Ivoire.¹⁰⁰ In the first set of proceedings, Ms Gbagbo is charged with economic crimes, such as [REDACTED].¹⁰¹ In this regard, the Pre-Trial Chamber found that “[t]he conduct alleged against [Ms] Gbagbo in these proceedings is clearly of a different nature to that giving rise to her criminal responsibility as alleged in the case before the Court. Documents from the record of these proceedings are therefore irrelevant for the purpose of the present decision”.¹⁰²

64. The Pre-Trial Chamber further noted that a second set of proceedings instituted against Ms Gbagbo in Côte d’Ivoire concerns alleged crimes against the State, including charges of [REDACTED].¹⁰³ In this respect, the Pre-Trial Chamber found that “[t]he factual description of the allegations against [Ms] Gbagbo as well as their legal characterisation make clear that the scope of the alleged conduct covers only [REDACTED].¹⁰⁴ It concluded that “these proceedings – in which a determination could only be made on whether [Ms] Gbagbo’s actions [REDACTED] – do not cover the same conduct that is alleged in the case before the Court”.¹⁰⁵

65. Finally, the Pre-Trial Chamber noted that a third set of proceedings instituted against Ms Gbagbo in Côte d’Ivoire concerns crimes against individuals, including [REDACTED].¹⁰⁶ The Pre-Trial Chamber concluded that “these are crimes of the same nature as those alleged in the case before the Court [...] [and] must be considered in further detail”.¹⁰⁷ However, having found that the documentation available to it “[did] not demonstrate that concrete, tangible and progressive investigative steps [we]re being undertaken”,¹⁰⁸ the Pre-Trial Chamber concluded that Côte d’Ivoire had not demonstrated “that the case against [Ms] Gbagbo alleged in the

¹⁰⁰ [Impugned Decision](#), para. 46.

¹⁰¹ [Impugned Decision](#), fn. 82, referring to Annex 8 to the [Admissibility Challenge](#), p. 8.

¹⁰² [Impugned Decision](#), para. 47.

¹⁰³ [Impugned Decision](#), para. 48; Annex 10 to the [Admissibility Challenge](#), pp. 67-69, 77.

¹⁰⁴ [Impugned Decision](#), para. 49.

¹⁰⁵ [Impugned Decision](#), para. 49.

¹⁰⁶ [Impugned Decision](#), paras 50-51, referring to Annexes 2 and 4 to the [Admissibility Challenge](#).

¹⁰⁷ [Impugned Decision](#), para. 50.

¹⁰⁸ [Impugned Decision](#), para. 78.

proceedings before the Court is currently subject to domestic proceedings within the meaning of article 17(1)(a) of the Statute”.¹⁰⁹

(b) Submissions of the parties and participants

66. Côte d’Ivoire’s primary argument with respect to the Pre-Trial Chamber’s assessment of the subject matter of the domestic proceedings, in respect of “economic crimes” and “crimes against the State”, is that it was a “purely formal examination”¹¹⁰ and that the Pre-Trial Chamber “fail[ed] to undertake a substantive examination” of the steps taken by Côte d’Ivoire in its proceedings against Ms Gbagbo.¹¹¹ Côte d’Ivoire considers that the Pre-Trial Chamber erred in law by finding that domestic proceedings in respect of “economic crimes” and “crimes against the State” are irrelevant or do not cover the same conduct as alleged in the case before the Court.¹¹²

67. Ms Gbagbo fully supports Côte d’Ivoire’s submissions regarding the application of the same person/same conduct test.¹¹³

68. The Prosecutor submits that the Pre-Trial Chamber properly considered the alleged conduct underlying economic crimes according to the applicable legal standard, but found that the conduct was “clearly of a different nature”, and therefore “irrelevant”.¹¹⁴ The Prosecutor contends that the Pre-Trial Chamber also properly considered the scope of the alleged conduct underlying crimes against the State, which “bears no similarity to the crimes before this Court”.¹¹⁵

69. The OPCV submits that the Pre-Trial Chamber did not err in law in considering that the conduct underlying economic crimes and crimes against the State was “clearly of a different nature” to the conduct giving rise to her criminal responsibility before the Court.¹¹⁶ It submits that Côte d’Ivoire’s claims amount to no more than a

¹⁰⁹ [Impugned Decision](#), para. 79.

¹¹⁰ [Document in Support of the Appeal](#), para. 39. *See also* [Côte d’Ivoire’s Response to the OPCV Observations](#), para. 27.

¹¹¹ [Document in Support of the Appeal](#), para. 44. *See also* [Côte d’Ivoire’s Response to the OPCV Observations](#), para. 27.

¹¹² [Document in Support of the Appeal](#), para. 39. *See also* [Côte d’Ivoire’s Response to the OPCV Observations](#), paras 29-30.

¹¹³ [Ms Gbagbo’s Response to the Appeal](#), paras 27-54.

¹¹⁴ [Prosecutor’s Response to the Appeal](#), para. 25, quoting [Impugned Decision](#), para. 47.

¹¹⁵ [Prosecutor’s Response to the Appeal](#), para. 28.

¹¹⁶ [OPCV Observations](#), paras 32-33.

“mere disagreement with the Pre-Trial Chamber’s assessment of the evidence in keeping [with] the Court’s relevant jurisprudence”.¹¹⁷

(c) Determination by the Appeals Chamber

70. The Appeals Chamber finds that although Côte d’Ivoire alleges errors of law under this section, in view of the actual nature of the arguments, it is more appropriate to consider them as alleged errors of fact.

71. The Appeals Chamber notes that, contrary to Côte d’Ivoire’s arguments, the Pre-Trial Chamber did not carry out a purely formal examination, without reviewing the actual subject matter of the domestic proceedings. The Appeals Chamber notes in particular that the Pre-Trial Chamber considered both the factual description and legal characterisation of the allegations, in order to determine that the conduct covered by the purported domestic proceedings in Côte d’Ivoire was irrelevant to the Court’s proceedings.¹¹⁸ Indeed, the Chamber primarily based its findings on the alleged conduct underlying the crimes and considered their legal characterisation as an added indicator of the actual subject matter of the domestic proceedings.¹¹⁹ In view of the foregoing, the Appeals Chamber finds that Côte d’Ivoire has not demonstrated an error in the Pre-Trial Chamber’s assessment of the conduct underlying the economic crimes and the crimes against the State. Côte d’Ivoire’s argument on this point is therefore rejected.

72. Finally, regarding Côte d’Ivoire’s arguments with respect to the actual assessment of the subject matter of the domestic proceedings and the conclusions based on that assessment, the Appeals Chamber notes that similar arguments were presented under the second ground of Côte d’Ivoire’s appeal, under which errors of fact are alleged. These arguments will be discussed jointly under the second ground of appeal.¹²⁰

¹¹⁷ [OPCV Observations](#), para. 36.

¹¹⁸ [Impugned Decision](#), para. 49, fn. 87.

¹¹⁹ [Impugned Decision](#), para. 49, fn. 87.

¹²⁰ *See infra*, paras 98-101.

3. *Consideration of the four incidents*

(a) **Relevant part of the Impugned Decision**

73. The Pre-Trial Chamber found that

the present case concerns the individual criminal responsibility of [Ms] Gbagbo for the commission, jointly with Laurent Gbagbo and his inner circle and through the Ivorian Defence and Security Forces (FDS), who were reinforced by youth militias and mercenaries, of the crimes of murder, rape and other forms of sexual violence, inhumane acts and persecution committed: (i) in the context of the march on the *Radiodiffusion Télévision Ivoirienne* (RTI) building on 16 December 2010; (ii) in the context of the women's march in Abobo on 3 March 2011; (iii) in the context of the Abobo market shelling on 17 March 2011; and (iv) in relation to the Yopougon massacre on 12 April 2011.¹²¹

(b) **Submissions of the parties and participants**

74. Côte d'Ivoire argues that the Pre-Trial Chamber erred in law when it unduly restricted its analysis of the relevant conduct to a comparison of the incidents covered by domestic proceedings and those selected by the Court, and that it failed to attach due weight to the circumstances of the case and the context of the crimes.¹²²

75. Ms Gbagbo supports Côte d'Ivoire's submissions regarding the Pre-Trial Chamber's alleged erroneous consideration of the four incidents.¹²³

76. The Prosecutor argues that the Pre-Trial Chamber "made clear that its analysis was not confined to a narrow consideration of the four incidents alone".¹²⁴ The Prosecutor further submits that the Pre-Trial Chamber "did not err by considering the incidents before the Court as the starting point for its analysis".¹²⁵

77. The OPCV submits that Côte d'Ivoire failed to demonstrate that the Pre-Trial Chamber erred in its consideration of the four incidents.¹²⁶

¹²¹ [Impugned Decision](#), para. 44.

¹²² [Document in Support of the Appeal](#), paras 45, 51. *See also* [Côte d'Ivoire's Response to the OPCV Observations](#), paras 33-35.

¹²³ [Ms Gbagbo's Response to the Appeal](#), paras 45-51, 54.

¹²⁴ [Prosecutor's Response to the Appeal](#), para. 32.

¹²⁵ [Prosecutor's Response to the Appeal](#), para. 33.

¹²⁶ [OPCV Observations](#), paras 37-40.

(c) Determination by the Appeals Chamber

78. The Appeals Chamber notes that although Côte d'Ivoire argues that the Pre-Trial Chamber committed an error of law, in view of the actual nature of the argument, it is more appropriate to consider it as an alleged error of fact.

79. The Appeals Chamber notes the Pre-Trial Chamber's finding, quoted above, concerning the subject matter of the case against Ms Gbagbo before the Court.¹²⁷ The Appeals Chamber further observes that the Impugned Decision makes reference to a decision in the case of *The Prosecutor v. Laurent Gbagbo*, where a number of alleged crimes are listed in relation to each of the four incidents listed above.¹²⁸ However, regarding Côte d'Ivoire's argument that the Pre-Trial Chamber failed to attach due weight to the circumstances of the case and context of the crimes, the Appeals Chamber notes that its argument is limited to this general statement. Côte d'Ivoire does not explain which circumstances or context the Pre-Trial Chamber ought to have considered and how such consideration would have affected the Pre-Trial Chamber's conclusions. Accordingly, Côte d'Ivoire's argument on this point is rejected.

4. Conclusion

80. For the foregoing reasons, Côte d'Ivoire's first ground of appeal is rejected, subject to the examination of those arguments that will be addressed under the second ground of appeal.

B. Second ground of appeal

81. Under the second ground of appeal, Côte d'Ivoire presents two sets of arguments. First, it contends that the Pre-Trial Chamber "erred in fact and in law in its assessment of the investigations and proceedings in respect of Ms Gbagbo" in Côte d'Ivoire.¹²⁹ It asserts that "the investigative measures are sufficiently clarified both in law and in fact to establish that the domestic proceedings concern the same conduct as that alleged in the proceedings before the Court," and that the Pre-Trial Chamber erred

¹²⁷ [Impugned Decision](#), para. 44.

¹²⁸ Pre-Trial Chamber III, "[Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo'](#)", 30 November 2011, ICC-02/11-01/11-9-Red, paras 57, 59, 61, 64.

¹²⁹ [Document in Support of the Appeal](#), para. 14.

in failing to reach that conclusion.¹³⁰ Second, Côte d'Ivoire argues that the Pre-Trial Chamber erred in fact by failing to consider the various investigative measures undertaken by its domestic authorities.¹³¹ These arguments will be addressed in turn.

I. Assessment of facts

(a) Factual parameters of the domestic investigations

(i) Relevant part of the Impugned Decision

82. The Pre-Trial Chamber noted that “[t]he documentation that Côte d'Ivoire made available to the Chamber indicates that in [the proceedings opened for allegations of crimes against individuals] the competent domestic authorities undertook a number of activities, of both a procedural and investigative nature”.¹³² However, it found that Côte d'Ivoire's documentation did not demonstrate that its domestic authorities were undertaking “tangible, concrete and progressive” investigative steps to ascertain Ms Gbagbo's criminal responsibility for the same conduct as that alleged in the proceedings before the Court.¹³³ The Pre-Trial Chamber held that the investigative activities undertaken by the Ivorian judicial authorities were “sparse and disparate”.¹³⁴

83. The Pre-Trial Chamber found that between 6 February 2012 and 10 October 2014, the relevant investigative activities were limited to (i) [REDACTED]; (ii) [REDACTED] in November 2012; (iii) the hearing of a civil party on 23 January 2013; and (iv) the questioning of Ms Gbagbo.¹³⁵ In particular, the Chamber noted that “in the last 20 months of investigations, [...] the steps directed at determining [Ms] Gbagbo's responsibility for the alleged crimes appear to be limited to one single activity: the questioning of [Ms] Gbagbo”.¹³⁶ It concluded that the investigative activities by the domestic authorities are “scarce in quantity”, “lacking in progression”, “disparate in nature and purpose to the extent that the overall factual contours of the alleged domestic investigations [...] remain indiscernible”.¹³⁷

¹³⁰ [Document in Support of the Appeal](#), para. 124.

¹³¹ [Document in Support of the Appeal](#), paras 88-110.

¹³² [Impugned Decision](#), para. 50.

¹³³ [Impugned Decision](#), paras 36, 78.

¹³⁴ [Impugned Decision](#), para. 65.

¹³⁵ [Impugned Decision](#), para. 66.

¹³⁶ [Impugned Decision](#), para. 69.

¹³⁷ [Impugned Decision](#), para. 70.

84. The Pre-Trial Chamber was unable to establish “whether these limited steps undertaken at the national level are together directed at ascertaining [Ms] Gbagbo’s criminal responsibility for the same conduct as that alleged in the proceedings before the Court”.¹³⁸ The Pre-Trial Chamber concluded that the documentation provided by Côte d’Ivoire “only contains generic descriptions of the crimes alleged and provides extremely vague information as to the factual parameters of the purported investigations”.¹³⁹ The Pre-Trial Chamber also found that “the information available to [it] on the scope of the national proceedings against [Ms] Gbagbo is also unclear with respect to the crimes that are allegedly being pursued”.¹⁴⁰ It held 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”.¹⁴¹

(ii) *Submissions of the parties and participants*

85. Côte d’Ivoire submits that, contrary to the Pre-Trial Chamber’s assessment, the factual parameters of the domestic investigations involving Ms Gbagbo are “specific and clear”.¹⁴² It further submits that the details concerning the investigations currently underway in Côte d’Ivoire are known, including the dates of the charges, the places of the offences and the provisions of the Criminal Code under which the crimes are punishable.¹⁴³ In particular, it asserts that the dates of the charges, the locations of the crimes and the charges are specifically mentioned in (1) the three *réquisitoires introductifs* (initial indictments) dated 6 February 2012 and the *réquisitoire supplétif* (additional indictment) dated 16 May 2012,¹⁴⁴ (2) the decision of the Indictments Chamber of the Abidjan Court of Appeal dated 13 February 2013, which reassigns to the investigating judge of the 8th Investigations Office the different dossiers opened

¹³⁸ [Impugned Decision](#), para. 70.

¹³⁹ [Impugned Decision](#), para. 71. *See also* paras 72, 74.

¹⁴⁰ [Impugned Decision](#), para. 75.

¹⁴¹ [Impugned Decision](#), para. 76.

¹⁴² [Document in Support of the Appeal](#), paras 62, 111-122.

¹⁴³ [Document in Support of the Appeal](#), paras 112-113.

¹⁴⁴ [Document in Support of the Appeal](#), paras 57-59, 113-114.

against Ms Gbagbo,¹⁴⁵ and (3) the initial appearance interviews and other interviews of Ms Gbagbo.¹⁴⁶

86. The Prosecutor submits that the Pre-Trial Chamber's analysis was reasonable.¹⁴⁷ She submits in particular that, contrary to Côte d'Ivoire's assertion that the factual parameters of the domestic case are known, the known dates are limited to [REDACTED], and the known places to [REDACTED] and [REDACTED].¹⁴⁸ Thus, she avers, "[n]either the dates nor the places contain sufficient detail to demonstrate that the case mirrors that before the Court".¹⁴⁹

87. The OPCV submits that "the Pre-Trial Chamber was right in considering that the documentation submitted by [Côte d'Ivoire] to substantiate its challenge 'only contains generic descriptions of the crimes alleged and provides extremely vague information as to the factual parameters of the purported investigations'".¹⁵⁰ Thus, it argues that the Pre-Trial Chamber was reasonable in finding that the facts underpinning the charges against Ms Gbagbo in Côte d'Ivoire remain "unclear and undefined" and consequently could not establish that Côte d'Ivoire is investigating the same case.¹⁵¹

(iii) Determination by the Appeals Chamber

88. The Appeals Chamber has previously held that "the contours of the case being investigated domestically [...] must be clear" irrespective of the stage of the investigation.¹⁵² It has further held that

[i]f a State is unable to present such parameters to the Court, no assessment of whether the same case is being investigated can be meaningfully made. In such circumstances, it would be unreasonable to suggest that the Court should accept that an investigation, capable of rendering a case inadmissible before the Court, is underway.¹⁵³

¹⁴⁵ [Document in Support of the Appeal](#), paras 107-108, 115.

¹⁴⁶ [Document in Support of the Appeal](#), paras 61, 116-123.

¹⁴⁷ [Prosecutor's Response to the Appeal](#), para. 35.

¹⁴⁸ [Prosecutor's Response to the Appeal](#), para. 57, quoting [Document in Support of the Appeal](#), paras 116, 119.

¹⁴⁹ [Prosecutor's Response to the Appeal](#), para. 57.

¹⁵⁰ [OPCV Observations](#), para. 55.

¹⁵¹ [OPCV Observations](#), para. 56, quoting [Impugned Decision](#), para. 71.

¹⁵² [Gaddafi Admissibility Judgment](#), para. 83. *See also* para. 84.

¹⁵³ [Gaddafi Admissibility Judgment](#), para. 84.

89. The Appeals Chamber notes that in order to determine the subject matter of the investigative activities on which the Admissibility Challenge relied, the Pre-Trial Chamber considered all of the documents presented by Côte d'Ivoire in support of its argument that the parameters of the domestic investigations are "specific and clear".¹⁵⁴ As indicated earlier, the Pre-Trial Chamber found the information regarding the domestic investigations vague¹⁵⁵ and concluded that

[i]n essence, the only information available to the Chamber is that the opened investigations concern crimes against individuals allegedly committed by [Ms] Gbagbo and others in the time frame and context of the 2010-2011 post-electoral violence in Abidjan. However, the facts underpinning the charges against her and the underlying criminal acts that the national authorities have purportedly investigated since 6 February 2012 remain unclear and undefined.¹⁵⁶

90. In its Document in Support of the Appeal, Côte d'Ivoire refers to information which is contained in the relevant documents, but was allegedly not considered by the Pre-Trial Chamber. For instance, Côte d'Ivoire points to documents which, in its view, specify that crimes were allegedly committed in [REDACTED].¹⁵⁷ In this regard, the Appeals Chamber notes that, the fact that the Pre-Trial Chamber did not specifically refer to these locations and to the crimes allegedly committed at those locations, does not mean that it did not consider the information at all.¹⁵⁸ The Pre-Trial Chamber summarised the available information only "[i]n essence".¹⁵⁹ However, it is clear from the analysis preceding this summary, that the Pre-Trial Chamber did consider the documents to which Côte d'Ivoire points.

91. Furthermore, the Pre-Trial Chamber's difficulty in determining the subject matter of domestic proceedings was not only as a result of the scarcity of information in the available documents. The Pre-Trial Chamber also noted that it was unable to

¹⁵⁴ [Impugned Decision](#), paras 72-75.

¹⁵⁵ [Impugned Decision](#), para. 70.

¹⁵⁶ [Impugned Decision](#), para.71.

¹⁵⁷ [Document in Support of the Appeal](#), para. 119, referring to ICC-02/11-01/12-45-Conf-Anx2.

¹⁵⁸ The Appeals Chamber recalls that a Pre-Trial Chamber's "reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion"; *Prosecutor v. Thomas Lubanga Dyilo*, "[Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'](#)", 14 December 2006, ICC-01/04-01/06-773 (OA 5), para. 20.

¹⁵⁹ [Impugned Decision](#), para. 71.

establish which of the crimes mentioned in earlier documents were still under investigation, as some of them did not appear in the documents that were issued later.¹⁶⁰ In this regard, the Appeals Chamber notes that Côte d’Ivoire does not point to any information that could have enabled the Pre-Trial Chamber to determine with clarity which crimes were actually being investigated.

92. For these reasons, the Appeals Chamber considers that Côte d’Ivoire has failed to demonstrate that it was unreasonable for the Pre-Trial Chamber to conclude that, on the basis of the available documentation, the factual parameters of the case or cases being investigated domestically were unclear. Accordingly, Côte d’Ivoire’s argument on this point is rejected.

(b) Economic crimes and crimes against the State

(i) Relevant part of the Impugned Decision

93. The Pre-Trial Chamber found that the conduct alleged to constitute economic crimes was “clearly of a different nature” to that alleged in the case before the Court and that documents from the record of these proceedings are, therefore, “irrelevant”.¹⁶¹ It also determined that the conduct alleged for crimes against the State covers only [REDACTED] and found that “these proceedings [...] do not cover the same conduct that is alleged in the case before the Court”.¹⁶²

(ii) Submissions of the parties and participants

94. Côte d’Ivoire contends that the Pre-Trial Chamber erred in fact when it found that the economic crimes and crimes against the State that were being prosecuted domestically do not cover the same conduct as that alleged before the Court.¹⁶³ Côte d’Ivoire contends that the Pre-Trial Chamber drew an “excessively rigid distinction” between [REDACTED].¹⁶⁴

¹⁶⁰ [Impugned Decision](#), para. 75.

¹⁶¹ [Impugned Decision](#), para. 47.

¹⁶² [Impugned Decision](#), para. 49.

¹⁶³ [Document in Support of the Appeal](#), paras 39, 64.

¹⁶⁴ [Document in Support of the Appeal](#), para. 63.

95. Côte d'Ivoire asserts that some of the crimes charged, such as [REDACTED], were preparatory acts to the commission of [REDACTED].¹⁶⁵

96. The Prosecutor submits that the Pre-Trial Chamber properly assessed these crimes, and found them to be irrelevant to the Court's proceedings.¹⁶⁶ Thus, "[n]o error is shown".¹⁶⁷

97. Similarly, the OPCV submits that no Chamber could have reasonably concluded that [REDACTED] were the same as the charges of crimes against humanity brought in proceedings before the Court.¹⁶⁸

(iii) Determination by the Appeals Chamber

98. Regarding the Pre-Trial Chamber's assessment of the nature of the economic crimes and crimes against the State, the Appeals Chamber recalls that "under article 17 (1) (a), [...] the question is not merely a question of 'investigation' in the abstract, but is whether the *same case* is being investigated by both the Court and a national jurisdiction".¹⁶⁹ It does not suffice that some or any case is being investigated domestically; it must be the same case (substantially the same conduct) that is being investigated domestically.¹⁷⁰

99. The Pre-Trial Chamber found that the conduct underlying the alleged economic crimes was "clearly of a different nature" from the conduct alleged in the proceedings before the Court, and therefore "irrelevant".¹⁷¹ The Pre-Trial Chamber further found that according to the documentation provided by Côte d'Ivoire, in particular Annex 8 to the Admissibility Challenge, the alleged conduct was characterised as [REDACTED].¹⁷² In view of the description of the alleged acts provided in the material submitted by Côte d'Ivoire, the Appeals Chamber finds that it was not unreasonable for the Pre-Trial Chamber to find this conduct to be of a different nature to Ms Gbagbo's alleged conduct in relation to the crimes against humanity of murder,

¹⁶⁵ [Document in Support of the Appeal](#), para. 66.

¹⁶⁶ [Prosecutor's Response to the Appeal](#), para. 37.

¹⁶⁷ [Prosecutor's Response to the Appeal](#), para. 37.

¹⁶⁸ [OPCV Observations](#), para. 43.

¹⁶⁹ [Ruto Admissibility Judgment](#), para. 37; [Kenyatta Admissibility Judgment](#), para. 36.

¹⁷⁰ [Gaddafi Admissibility Judgment](#), para. 83.

¹⁷¹ [Impugned Decision](#), para. 47.

¹⁷² [Impugned Decision](#), fn. 82, referring to Annex 8 to the [Admissibility Challenge](#), p. 8.

rape and other forms of sexual violence, persecution and other inhumane acts, on the basis of which the Warrant of Arrest was issued against her by the Court. In addition, Côte d'Ivoire does not explain why “excessively rigid distinction” between the crimes allegedly investigated domestically and those before the Court is erroneous.

100. As regards crimes against the State, the Pre-Trial Chamber noted that in the domestic proceedings it is alleged that Ms Gbagbo [REDACTED].¹⁷³ The Pre-Trial Chamber further noted that, in the domestic proceedings, “there are references to, *inter alia*, the allegations of [REDACTED].¹⁷⁴ The Pre-Trial Chamber observed that the provisions criminalising such alleged conduct are included in the section of the Ivorian Criminal Code concerning felonies and misdemeanours against the safety of the State, the national defence and the public security.¹⁷⁵ The Pre-Trial Chamber concluded that the alleged conduct only includes [REDACTED] and therefore the domestic proceedings in question “do not cover the same conduct” that is alleged in the case before the Court.¹⁷⁶ The Appeals Chamber finds that it was not unreasonable for the Pre-Trial Chamber to find, on the basis of the description of the alleged conduct contained in the documents provided by Côte d'Ivoire, read in light of the applicable provisions of the Ivorian Criminal Code, that this conduct, characterised as infringing [REDACTED], is not the same as that alleged before the Court. In addition, as indicated earlier, Côte d'Ivoire does not explain why “excessively rigid distinction” between the crimes allegedly investigated domestically and those before the Court is erroneous.

101. As regards Côte d'Ivoire's argument that some of the crimes with which Ms Gbagbo is charged in the domestic proceedings were preparatory acts,¹⁷⁷ the Appeals Chamber notes that Côte d'Ivoire does not explain, how, in its view, the preparatory nature of the conduct underlying those crimes shows that it is substantially the same conduct as that alleged in the proceedings before the Court and, consequently, that the Pre-Trial Chamber erred by failing to consider those crimes' preparatory nature. Furthermore, even if it is accepted that these submissions of Côte

¹⁷³ [Impugned Decision](#), para. 48, referring to Annex 10 to the [Admissibility Challenge](#), pp. 47-50.

¹⁷⁴ [Impugned Decision](#), para. 48, referring to Annex 10 to the [Admissibility Challenge](#), pp. 67-69, 77.

¹⁷⁵ [Impugned Decision](#), para. 49.

¹⁷⁶ [Impugned Decision](#), para. 49.

¹⁷⁷ [Document in Support of the Appeal](#), para. 66.

d'Ivoire identify an error, Côte d'Ivoire does not demonstrate that this error renders the Pre-Trial Chamber's conclusion unreasonable. Accordingly, Côte d'Ivoire's arguments in this regard are dismissed *in limine*.

(c) Hearing of a civil party conducted on 23 January 2013

(i) Relevant part of the Impugned Decision

102. With respect to the evidence provided by the civil party in connection with certain events, which had occurred on [REDACTED] and which allegedly involved Ms Gbagbo,¹⁷⁸ the Pre-Trial Chamber found that “certain discrete aspects referred to by the civil party may be relevant to determine [Ms] Gbagbo's conduct in the context of the 2010-2011 post-electoral crisis”.¹⁷⁹ The Pre-Trial Chamber also noted that in an interview dated 9 September 2014, Ms Gbagbo [REDACTED].¹⁸⁰ However, the Pre-Trial Chamber found that “[the events that had occurred on [REDACTED]] are not, in themselves, covered by the case against [Ms] Gbagbo before the Court”.¹⁸¹

(ii) Submissions of the parties and participants

103. Côte d'Ivoire asserts that the “Pre-Trial Chamber fail[ed] to note the relevance and significance of the interview conducted on 23 January 2013 by the investigating judge of the 9th Investigations Office [REDACTED]”.¹⁸² It argues that, [REDACTED].¹⁸³ It submits the information provided by the civil party “is useful for the purpose of identifying the resources available to Ms Gbagbo for the commission of the offences which are the subject matter of the Court's warrant of arrest”.¹⁸⁴

104. The Prosecutor submits that the Pre-Trial Chamber properly considered all of the evidence, including the evidence provided by the civil party, but found that those specific events were not covered by the case against Ms Gbagbo before the Court.¹⁸⁵

¹⁷⁸ [Impugned Decision](#), para. 60.

¹⁷⁹ [Impugned Decision](#), para. 60.

¹⁸⁰ [Impugned Decision](#), para. 60.

¹⁸¹ [Impugned Decision](#), para. 60.

¹⁸² [Document in Support of the Appeal](#), para. 68. *See also* [Côte d'Ivoire's Response to the OPCV Observations](#), para. 37.

¹⁸³ [Document in Support of the Appeal](#), para. 69. *See also* [Côte d'Ivoire's Response to the OPCV Observations](#), para. 39.

¹⁸⁴ [Document in Support of the Appeal](#), para. 70.

¹⁸⁵ [Prosecutor's Response to the Appeal](#), paras 38-39.

105. Similarly, the OPCV argues that the Pre-Trial Chamber properly determined that the civil party's statement does not establish the contours of the domestic investigations of Ms Gbagbo.¹⁸⁶

(iii) Determination by the Appeals Chamber

106. The Appeals Chamber notes that the Pre-Trial Chamber considered the evidence provided by the civil party in connection with the events of [REDACTED]¹⁸⁷ and acknowledged that it may be relevant to Ms Gbagbo's conduct in the context of the 2010-2011 post-electoral crisis.¹⁸⁸ However, the Pre-Trial Chamber found these events to fall outside the scope of the case against Ms Gbagbo before the Court.¹⁸⁹ The Pre-Trial Chamber also noted that the interview of 23 January 2013 is recorded as having taken place in proceedings unrelated to Ms Gbagbo.¹⁹⁰

107. Having regard to the scope of the case before the Court, specified by the Pre-Trial Chamber in the Impugned Decision by reference to the Arrest Warrant Decision,¹⁹¹ the Appeals Chamber does not find any clear error or unreasonableness in the Pre-Trial Chamber's approach. Accordingly, Côte d'Ivoire's arguments in this regard are rejected.

(d) Interview of Ms Gbagbo conducted on 10 September 2014

(i) Relevant part of the Impugned Decision

108. The Pre-Trial Chamber found that during the interview of 10 September 2014, Ms Gbagbo was asked "whether she knew about [REDACTED] and what her reaction to this event had been at that time".¹⁹² The Pre-Trial Chamber noted that "[n]o answer on the merits was, however, given by [Ms] Gbagbo on this particular issue, which was not addressed any further by the [investigating judge]".¹⁹³

¹⁸⁶ [OPCV Observations](#), paras 44-45.

¹⁸⁷ [Impugned Decision](#), para. 60.

¹⁸⁸ [Impugned Decision](#), para. 60.

¹⁸⁹ [Impugned Decision](#), para. 60.

¹⁹⁰ [Impugned Decision](#), para. 60.

¹⁹¹ [Impugned Decision](#), para. 44.

¹⁹² [Impugned Decision](#), para. 63.

¹⁹³ [Impugned Decision](#), para. 63.

(ii) *Submissions of the parties and participants*

109. Côte d'Ivoire submits that the Pre-Trial Chamber erred in fact by considering that Ms Gbagbo had not answered "on the merits" [REDACTED].¹⁹⁴ Côte d'Ivoire avers that Ms Gbagbo stated [REDACTED] and that "[t]his was a response on the merits that could be compared against other evidence gathered by the investigating judge of the 8th Investigations Office to possibly prove that the statement was false".¹⁹⁵

110. Ms Gbagbo submits that "a clear negative innuendo against [herself] is inherent in the repeated highlighting by the Chamber of the lack of response or the brief responses [on her part] to questions put to her during interrogations".¹⁹⁶ She submits that "[i]t is a basic tenet of the rights of an accused that, no adverse inference can be drawn from his/her silence or refusal to answer and in doing so, the Chamber erred".¹⁹⁷

111. The Prosecutor submits that Côte d'Ivoire's submissions regarding the questioning of Ms Gbagbo "relitigate earlier submissions but show no factual error".¹⁹⁸ According to the Prosecutor, the "broad and generic" questioning of Ms Gbagbo "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'".¹⁹⁹ Thus, the Prosecutor argues that Côte d'Ivoire's "attempts to replace the Chamber's assessment of Ms Gbagbo's questioning with its own, [does not show] that the Chamber's findings were unreasonable".²⁰⁰

112. The OPCV agrees with the assertions of the Prosecutor.²⁰¹

(iii) *Determination by the Appeals Chamber*

113. The Appeals Chamber notes that the Pre-Trial Chamber's conclusion that Ms Gbagbo gave no answer on the merits to the question regarding [REDACTED] is consistent with the information contained in the minutes of the interview, upon which

¹⁹⁴ [Document in Support of the Appeal](#), paras 73-74.

¹⁹⁵ [Document in Support of the Appeal](#), para. 75.

¹⁹⁶ [Ms Gbagbo's Response to the OPCV Observations](#), para. 63.

¹⁹⁷ [Ms Gbagbo's Response to the OPCV Observations](#), para. 63.

¹⁹⁸ [Prosecutor's Response to the Appeal](#), para. 40.

¹⁹⁹ [Prosecutor's Response to the Appeal](#), para. 40.

²⁰⁰ [Prosecutor's Response to the Appeal](#), para. 40.

²⁰¹ [OPCV Observations](#), paras 44-45.

the Pre-Trial Chamber relied and which is provided by Côte d'Ivoire in support of its present argument.²⁰² The Appeals Chamber further notes that the Pre-Trial Chamber correctly stated that the issue of [REDACTED] was not addressed any further by the investigating judge.²⁰³ At any rate, the Appeals Chamber notes that even if it were to accept that the Pre-Trial Chamber misrepresented the answers given by Ms Gbagbo during the interview, Côte d'Ivoire does not demonstrate that such an error would render the Pre-Trial Chamber's conclusion unreasonable. Accordingly, Côte d'Ivoire's argument in this regard is rejected.

(e) Civil party applications lodged on 24 April 2012

(i) Relevant part of the Impugned Decision

114. The Pre-Trial Chamber found that the [REDACTED] civil party applications lodged on 24 April 2012 were “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*”.²⁰⁴ The Pre-Trial Chamber noted that these documents neither indicate “any procedural step on the part of the national authorities”, nor do they demonstrate that “the competent authorities [we]re actually investigating these alleged crimes”.²⁰⁵

(ii) Submissions of the parties and participants

115. Côte d'Ivoire submits that the Pre-Trial Chamber erred “in fact by failing to take account of the scale of the civil party applications [REDACTED]”.²⁰⁶ According to Côte d'Ivoire, this information is significant in light of Côte d'Ivoire's procedural rules allowing victims to report an offence to the judicial authorities.²⁰⁷ It asserts that these civil party applications demonstrate “[the victims'] obvious desire to be involved in the Ivorian investigations”.²⁰⁸ Côte d'Ivoire also highlights that the civil party

²⁰² [Impugned Decision](#), para. 63; [Document in Support of the Appeal](#), para. 75, referring to “Second dépôt de documents complémentaires à l'appui de la 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”, 10 October 2014, ICC-02/11-01/12-45-Conf-Anx2.

²⁰³ [Impugned Decision](#), para. 63.

²⁰⁴ [Impugned Decision](#), para. 64.

²⁰⁵ [Impugned Decision](#), para. 64.

²⁰⁶ [Document in Support of the Appeal](#), paras 80-81. *See also* [Côte d'Ivoire's Response to the OPCV Observations](#), para. 40.

²⁰⁷ [Document in Support of the Appeal](#), para. 52.

²⁰⁸ [Document in Support of the Appeal](#), para. 82.

applications had not been challenged by either the Ivorian Public Prosecution Service or Ms Gbagbo herself, demonstrating that “these civil-party applications were thoroughly examined by the judicial authorities”²⁰⁹ and that “the causal link between the offences reported by [REDACTED] which are the subject-matter of the judicial investigation into Ms Gbagbo is clear”.²¹⁰

116. The Prosecutor argues that the submissions of the civil parties and victims neither demonstrate that Côte d’Ivoire is investigating the crimes which are before the Court nor shed significant light on the subject matter allegedly being investigated.²¹¹ According to the Prosecutor, “[t]he victims’ search for justice cannot supplant [Côte d’Ivoire’s] own responsibility to actively and appropriately investigate and prosecute the same case”.²¹²

(iii) Determination by the Appeals Chamber

117. The Appeals Chamber notes that the Pre-Trial Chamber considered the civil party applications lodged on 24 April 2012 in its analysis of whether domestic investigations were conducted against Ms Gbagbo. However, it found that these applications did not demonstrate that the competent authorities were investigating the crimes alleged by the civil parties.²¹³ The Pre-Trial Chamber also noted that they provided “no concrete information as to the actual subject-matter of the domestic investigations”.²¹⁴ The Appeals Chamber can find no error in the reasoning of the Pre-Trial Chamber in this regard. The scale of the civil party applications is of no relevance to the determination of the subject matter of the domestic investigations in question and the Pre-Trial Chamber did not err in not taking that scale into account. Côte d’Ivoire’s argument in this regard is rejected.

118. As regards Côte d’Ivoire’s assertion that the civil party applications demonstrate “[the] obvious desire [of the victims] to be involved in the Ivorian investigations”, the Appeals Chamber notes that Côte d’Ivoire does not explain how such desire relates to the question of whether domestic authorities are investigating the same case as that

²⁰⁹ [Document in Support of the Appeal](#), paras 83-84.

²¹⁰ [Document in Support of the Appeal](#), para. 85.

²¹¹ [Prosecutor’s Response to the Appeal](#), para. 43.

²¹² [Prosecutor’s Response to the Appeal](#), para. 42.

²¹³ [Impugned Decision](#), para. 64.

²¹⁴ [Impugned Decision](#), para. 64.

before the Court. As Côte d'Ivoire has failed to identify an error in the Pre-Trial Chamber's reasoning in this regard, its argument is therefore dismissed.

2. *Assessment of the investigative measures taken by the Ivorian judicial authorities*

(a) **Difficulties encountered by domestic authorities**

(i) *Relevant part of the Impugned Decision*

119. As indicated earlier, the Pre-Trial Chamber found that it was not satisfied that Côte d'Ivoire's domestic authorities were "taking tangible, concrete and progressive investigative steps into [Ms] Gbagbo's criminal responsibility for the crimes alleged in the proceedings before the Court or that they [were] prosecuting her for these alleged crimes".²¹⁵

(ii) *Submissions of the parties and participants*

120. Côte d'Ivoire argues that the Pre-Trial Chamber "fails to take account of various factors which highlight the problems faced by the investigating judges in the conduct of the investigations involving Ms Gbagbo".²¹⁶ It refers to, *inter alia*, the search and seizure operation [REDACTED]²¹⁷ and the number of civil parties who lodged their applications.²¹⁸ It points out the "considerable material and human resources" required to conduct complex investigations and the "problems encountered [...] in gathering evidence".²¹⁹

121. The Prosecutor submits that the alleged difficulties faced by the judges in collecting evidence "are irrelevant to the Chamber's determination of whether the same case is being investigated".²²⁰ The Prosecutor notes that, if anything, these arguments could only be relevant to show Côte d'Ivoire's inability to investigate, but that question is not at issue here.²²¹

²¹⁵ [Impugned Decision](#), para. 36.

²¹⁶ [Document in Support of the Appeal](#), para. 89.

²¹⁷ [Document in Support of the Appeal](#), para. 90.

²¹⁸ [Document in Support of the Appeal](#), para. 91.

²¹⁹ [Document in Support of the Appeal](#), para. 90.

²²⁰ [Prosecutor's Response to the Appeal](#), para. 47.

²²¹ [Prosecutor's Response to the Appeal](#), para. 47.

(iii) *Determination by the Appeals Chamber*

122. The Appeals Chamber notes that Côte d'Ivoire merely explains difficulties allegedly encountered in its investigations, without explaining the relevance of these submissions to the Pre-Trial Chamber's analysis of whether "concrete and progressive investigative steps"²²² were being undertaken. The Appeals Chamber notes in particular that Côte d'Ivoire fails to demonstrate that the alleged difficulties had any impact on the Pre-Trial Chamber's conclusion that the investigative steps were "scarce in quantity and lacking in progression".²²³ Accordingly, Côte d'Ivoire's arguments in this regard are rejected.

(b) **Examination of all relevant investigative measures**

(i) *Relevant part of the Impugned Decision*

123. After having examined the procedural activities undertaken by the Ivorian judicial authorities, the Pre-Trial Chamber found that they were "sparse and disparate".²²⁴

(ii) *Submissions of the parties and participants*

124. Côte d'Ivoire challenges the Pre-Trial Chamber's finding that the investigative measures taken by the national authorities as part of the proceedings involving Ms Gbagbo are "sparse and disparate".²²⁵ It argues that the Pre-Trial Chamber erred in fact by failing to consider the various investigative measures undertaken by the investigating judges following the *réquisitoires introductifs* (initial indictments).²²⁶

125. Côte d'Ivoire also contests the Pre-Trial Chamber's finding that it had not undertaken any investigative measures or procedural steps before filing the Admissibility Challenge on 30 September 2013.²²⁷ To support its contention, Côte d'Ivoire relies on the decision of the Indictments Chamber of the Abidjan Court of Appeal dated 10 July 2013, ordering that Ms Gbagbo be committed for trial [REDACTED].²²⁸

²²² [Impugned Decision](#), para. 36.

²²³ [Impugned Decision](#), para. 70.

²²⁴ [Impugned Decision](#), para. 65.

²²⁵ [Document in Support of the Appeal](#), para. 88.

²²⁶ [Document in Support of the Appeal](#), paras 37, 88-110.

²²⁷ [Document in Support of the Appeal](#), para. 109.

²²⁸ [Document in Support of the Appeal](#), para. 109.

126. The Prosecutor submits that Côte d'Ivoire “persists in arguing alternative interpretations of individual investigative steps, without demonstrating the unreasonableness of the Chamber’s findings”.²²⁹ The Prosecutor notes that “the *réquisitoires introductifs* themselves [...] only quote the relevant provisions of the Ivorian Criminal Code. This sheds no light on the factual parameters of the investigation purportedly being conducted”.²³⁰

127. The OPCV submits that the Pre-Trial Chamber was correct in considering that Côte d'Ivoire’s documentation “only contains generic descriptions of the crimes alleged and provides extremely vague information as to the factual parameters of the purported investigations”,²³¹ which amounts solely to investigative steps which are “disparate”, “sparse” and “lacking in progression”.²³²

(iii) Determination by the Appeals Chamber

128. The Appeals Chamber has previously interpreted the expression “the case is being investigated” in article 17 (1) (a) of the Statute as requiring the “taking of steps” to ascertain whether the person is responsible for the alleged conduct.²³³ It has held that the investigative steps undertaken by the domestic authorities may, for instance, include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.²³⁴ The Appeals Chamber has also clarified that a State that challenges the admissibility of a case “bears the burden of proof to show that the case is inadmissible”.²³⁵ A State needs to prove that it is conducting “a genuine investigation or prosecution”.²³⁶ To discharge its burden of proof, the State must provide the Court with “evidence of a sufficient degree of specificity and probative value” that demonstrates that it is indeed investigating the case.²³⁷

129. The Appeals Chamber notes that in support of its argument, Côte d'Ivoire describes a number of procedural activities allegedly undertaken by its domestic

²²⁹ [Prosecutor’s Response to the Appeal](#), para. 45.

²³⁰ [Prosecutor’s Response to the Appeal](#), para. 46.

²³¹ [OPCV Observations](#), para. 55, quoting [Impugned Decision](#), para. 71.

²³² [OPCV Observations](#), para. 55, quoting [Impugned Decision](#), para. 70.

²³³ [Ruto Admissibility Judgment](#), paras 41.

²³⁴ [Ruto Admissibility Judgment](#), para. 41; [Kenyatta Admissibility Judgment](#), para. 40.

²³⁵ [Ruto Admissibility Judgment](#), para. 62; [Kenyatta Admissibility Judgment](#), para. 61.

²³⁶ [Al-Senussi Admissibility Judgment](#), para. 166.

²³⁷ [Ruto Admissibility Judgment](#), para. 62; [Kenyatta Admissibility Judgment](#), para. 61.

authorities. In considering these activities,²³⁸ the Pre-Trial Chamber observed that in the 32 months following the issuance of the *réquisitoires introductifs* (initial indictments) of 6 February 2012 only four such activities were undertaken: (i) [REDACTED]; (ii) [REDACTED] in November 2012; (iii) the hearing of a civil party on 23 January 2013; and (iv) the questioning of Ms Gbagbo.²³⁹ The Pre-Trial Chamber also noted that “in the last 20 months of investigations, between 23 January 2013 and 10 October 2014, the steps directed at determining [Ms] Gbagbo’s responsibility for the alleged crimes appear to be limited to one single activity: the questioning of [Ms] Gbagbo”.²⁴⁰

130. Furthermore, the Pre-Trial Chamber observed that, in the proceedings against Ms Gbagbo, no investigative step, such as the “taking of witness testimonies, ordering confrontations between the suspect and the witnesses or between the suspect and the *parties civiles*, or ordering any necessary forensic or other expertise concerning the crimes committed”, was ordered by the investigating judge, whether on his own motion or at the request of the Public Prosecutor.²⁴¹

131. In light of the foregoing, the Appeals Chamber finds that it was not unreasonable for the Pre-Trial Chamber to conclude that the investigative steps, in view of their number and frequency, were “sparse and disparate”. Furthermore, the Appeals Chamber finds that Côte d’Ivoire does not demonstrate that the Pre-Trial Chamber committed a clear error by either misappreciating the facts, or taking into account irrelevant facts or by failing to take into account relevant facts. Accordingly, Côte d’Ivoire’s arguments on this point are rejected.

(c) Interviews of Ms Gbagbo in 2012 and 2014

(i) *Relevant part of the Impugned Decision*

132. As stated above, the Pre-Trial Chamber found that during the interview of 10 September 2014, Ms Gbagbo gave “[n]o answer on the merits” to a question posed to her by the investigating judge.²⁴²

²³⁸ [Impugned Decision](#), paras 48, 57-58, 60, 64.

²³⁹ [Impugned Decision](#), para. 66.

²⁴⁰ [Impugned Decision](#), para. 69.

²⁴¹ [Impugned Decision](#), para. 67.

²⁴² [Impugned Decision](#), para. 63.

(ii) *Submissions of the parties and participants*

133. Côte d'Ivoire submits that the Pre-Trial Chamber erred in fact by inferring from the interviews of Ms Gbagbo held in December 2012 and February 2014 that it had not been possible to obtain any evidence due to Ms Gbagbo's silence.²⁴³ Côte d'Ivoire contends that the Pre-Trial Chamber erred by imputing the consequences of Ms Gbagbo's silence to the investigating judge with respect to the conduct of his judicial investigation.²⁴⁴ Côte d'Ivoire notes that the "Pre-Trial Chamber criticises the Ivorian judicial authorities for Ms Gbagbo's conduct",²⁴⁵ but "the investigating judge cannot be held responsible for the nature and content of Ms Gbagbo's responses".²⁴⁶

134. The Prosecutor submits that Côte d'Ivoire's "arguments on the questioning of Ms Gbagbo by the national authorities [...] relitigate earlier submissions but show no factual error".²⁴⁷ Rather than focusing on Ms Gbagbo's silence, however, the Prosecutor points out that when no answer on the merits was given, "[REDACTED]. [...] [T]here was no follow up from the Judge".²⁴⁸

135. The OPCV argues that Côte d'Ivoire in no way demonstrates the existence of a manifest error in the Pre-Trial Chamber's assessment of the questioning of Ms Gbagbo, which provided no information about the contours of Côte d'Ivoire's investigation against her.²⁴⁹ It submits that "Ms Gbagbo's response on the merits, or lack thereof, should have no impact on the Pre-Trial Chamber's assessment of the evidence presented by the Republic of Côte d'Ivoire".²⁵⁰

(iii) *Determination by the Appeals Chamber*

136. The Appeals Chamber notes that Côte d'Ivoire's arguments express concerns over the Pre-Trial Chamber's purported criticism of its judicial authorities, rather than attempting to establish an error on the part of the Pre-Trial Chamber in its assessment of whether Côte d'Ivoire was investigating the same case as the one before the Court. Accordingly, Côte d'Ivoire's arguments in this regard are dismissed *in limine*.

²⁴³ [Document in Support of the Appeal](#), para. 101.

²⁴⁴ [Document in Support of the Appeal](#), para. 102.

²⁴⁵ [Document in Support of the Appeal](#), para. 78.

²⁴⁶ [Document in Support of the Appeal](#), paras 76, 78.

²⁴⁷ [Prosecutor's Response to the Appeal](#), para. 40.

²⁴⁸ [Prosecutor's Response to the Appeal](#), para. 40.

²⁴⁹ See [OPCV Observations](#), paras 44-45.

²⁵⁰ [OPCV Observations](#), para. 46.

(d) Significance of the interviews conducted in autumn 2014

(i) Relevant part of the Impugned Decision

137. The Pre-Trial Chamber noted that the interviews of Ms Gbagbo in September and October 2014 were conducted “after the [Pre-Trial] Chamber’s Decision of 28 August 2014 authorising Côte d’Ivoire to provide [...] further evidence in support of the Admissibility Challenge”.²⁵¹

(ii) Submissions of Côte d’Ivoire

138. Côte d’Ivoire argues that the Pre-Trial Chamber erred in law when it attempted to “play down the significance” of the interviews conducted in autumn 2014 as being conducted after the Pre-Trial Chamber’s Decision of 28 August 2014.²⁵² Côte d’Ivoire notes that the only thing that matters is that the admissibility decision be “based on the circumstances prevailing at the time of [the] issuance [of the admissibility decision]”.²⁵³

(iii) Determination by the Appeals Chamber

139. The Appeals Chamber finds that, as pointed out by the Prosecutor,²⁵⁴ Côte d’Ivoire misreads the Pre-Trial Chamber’s findings on these interviews. The Chamber did not dismiss the relevance of this questioning outright, nor did it fail to consider the number of interviews. To the contrary, the Pre-Trial Chamber acknowledged that some of the questioning in September and October 2014 addressed “some relevant aspects of the factual case against [Ms] Gbagbo that is before the Court”, but found that the questioning did not reveal that the conduct underlying the domestic investigations was the same as that alleged in the case before the Court.²⁵⁵ Therefore, the Appeals Chamber rejects Côte d’Ivoire’s argument regarding these interviews.

3. Conclusion

140. For the foregoing reasons, Côte d’Ivoire’s second ground of appeal is rejected.

²⁵¹ [Impugned Decision](#), para. 69.

²⁵² [Document in Support of the Appeal](#), para. 123.

²⁵³ [Document in Support of the Appeal](#), para. 123, quoting [Impugned Decision](#), para. 69.

²⁵⁴ [Prosecutor’s Response to the Appeal](#), paras 52-53.

²⁵⁵ [Impugned Decision](#), para. 73.

VI. APPROPRIATE RELIEF

141. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to confirm the Impugned Decision.

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



Judge Piotr Hofmański
Presiding Judge

Dated this 27th day of May 2015

At The Hague, The Netherlands