



Original: English

No.: ICC-02/11-01/12
Date: 11 December 2014

PRE-TRIAL CHAMBER I

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

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

Public redacted

**Decision on Côte d'Ivoire's challenge to the admissibility of the case against
Simone Gbagbo**

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Simone Gbagbo
Sylvia Geraghty

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

Counsel for Côte d'Ivoire

Jean-Pierre Mignard
Jean-Paul Benoit

Competent authorities of Côte d'Ivoire

REGISTRY

Registrar
Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TABLE OF CONTENTS

I. PROCEDURAL HISTORY	4
II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS	6
A. Côte d’Ivoire	6
B. The Prosecutor	8
C. The Defence	9
D. The OPCV	10
III. APPLICABLE LAW	11
IV. ANALYSIS	17
A. Preliminary matter: the Prosecutor’s request for leave to respond.....	17
B. Significant features of Côte d’Ivoire’s criminal procedure law	18
C. Whether the same case against Simone Gbagbo that is before the Court is being investigated or prosecuted by Côte d’Ivoire	20
1. The national proceedings against Simone Gbagbo according to the documents provided to the Chamber	21
2. Chamber’s determination on the admissibility of the case against Simone Gbagbo	30
V. CONCLUSION.....	38

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) hereby renders its decision under articles 17 and 19 of the Rome Statute (the “Statute”) on the challenge to the admissibility of the case against Simone Gbagbo before the Court (the “Admissibility Challenge”) lodged by the Republic of Côte d’Ivoire (“Côte d’Ivoire”).¹

I. PROCEDURAL HISTORY

1. On 29 February 2012, Pre-Trial Chamber III issued a warrant of arrest against Simone Gbagbo² (the “Warrant of Arrest”) and, on 2 March 2012, the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo” (the “Article 58 Decision”).³

2. On 19 March 2012, the Registrar notified Côte d’Ivoire of the Warrant of Arrest and requested its execution.⁴

3. On 30 September 2013, Côte d’Ivoire filed the Admissibility Challenge.

4. On 15 November 2013, the Chamber issued, in accordance with rules 58 and 59 of the Rules of Procedure and Evidence (the “Rules”), the “Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, whereby the Chamber, *inter alia*, invited the Prosecutor, the Defence of Simone Gbagbo, and Paolina Massidda from the Office of Public Counsel for victims (the “OPCV”) as legal representative of the victims who had communicated with the Court in relation to the case, to submit observations on the Admissibility Challenge, if

¹ ICC-02/11-01/12-11-Conf and annexes. A public redacted version of the filing is also available ([ICC-02/11-01/12-11-Red](#)).

² Pre-Trial Chamber III, [ICC-02/11-01/12-1](#).

³ Pre-Trial Chamber III, [ICC-02/11-01/12-2-Red](#).

⁴ [ICC-02/11-01/12-6](#).

any, by 13 January 2014.⁵ This time limit was subsequently extended to 24 February 2014.⁶

5. On 14 February 2014, Côte d'Ivoire requested authorization to complement its Admissibility Challenge with further documentation.⁷

6. On 20 February 2014, Judge Silvia Fernández de Gurmendi, acting as Single Judge in the present case,⁸ granted Côte d'Ivoire's request to submit additional documentation, and extended the time limit for the submission by the Prosecutor, the Defence and the legal representative of victims of their respective observations in relation to the Admissibility Challenge until six weeks after notification of the additional documentation.⁹

7. On 25 February 2014, Côte d'Ivoire submitted its further documentation in support of its Admissibility Challenge.¹⁰

8. The observations of the Defence on the Admissibility Challenge were filed on 8 April 2014,¹¹ while the observations of the Prosecutor¹² and the legal representative of victims¹³ were both filed on 9 April 2014.

9. On 28 August 2014, the Chamber issued the "Decision on further submissions on issues related to the admissibility of the case against Simone

⁵ Pre-Trial Chamber I, [ICC-02/11-01/12-15](#).

⁶ Pre-Trial Chamber I, "[Decision on the 'Defence Request for an Extension of Time'](#)", 17 December 2013, ICC-02/11-01/12-24; and *id.*, "[Decision on the Prosecutor's and the OPCV's requests for extension of time](#)", 19 December 2013, ICC-02/11-01/12-29.

⁷ ICC-02/11-01/12-30.

⁸ Pre-Trial Chamber I, "[Décision portant désignation d'un juge unique](#)", 16 March 2012, ICC-02/11-01/12-5.

⁹ 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](#)", 20 February 2014, ICC-02/11-01/12-35.

¹⁰ ICC-02/11-01/12-37-Conf and annexes. A public redacted version of the filing is also available ([ICC-02/11-01/12-37-Red](#)).

¹¹ [ICC-02/11-01/12-39](#).

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

¹³ ICC-02/11-01/12-40-Conf and annexes. A public redacted version of the filing is also available ([ICC-02/11-01/12-40-Red](#)).

Gbagbo” (the “Decision of 28 August 2014”), wherein it recalled certain relevant aspects of the law applicable to the determination on the admissibility of a case; it also granted Côte d’Ivoire until 10 October 2014 to make further submissions (and provide any evidence in support thereof) relevant to the Admissibility Challenge, including on some issues identified by the Chamber as particularly significant.¹⁴ In the same decision, the Chamber clarified that it would determine the appropriateness of any response to such submissions upon request of the parties and participants after the filing by Côte d’Ivoire.¹⁵

10. On 10 October 2014, Côte d’Ivoire filed its final submissions with the additional documentation in support of the Admissibility Challenge.¹⁶

11. On 17 October 2014, the Prosecutor requested leave to file a response to Côte d’Ivoire’s final submissions.¹⁷

II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

A. Côte d’Ivoire

12. Côte d’Ivoire challenges the admissibility of the case against Simone Gbagbo before the Court on the grounds that the same case is being investigated or prosecuted by its domestic authorities, within the meaning of article 17(1)(a) of the Statute.¹⁸

13. Côte d’Ivoire submits that domestic proceedings were instituted against Simone Gbagbo on 6 February 2012¹⁹ and that these proceedings cover allegations similar to those brought before the Court as they relate to the same

¹⁴ Pre-Trial Chamber I, [ICC-02/11-01/12-44](#).

¹⁵ *Ibid.*, para. 11.

¹⁶ ICC-02/11-01/12-45-Conf and annexes. A public redacted of this filing is also available ([ICC-02/11-01/12-45-Red.](#))

¹⁷ [ICC-01/11-01/12-46](#).

¹⁸ Admissibility Challenge, paras 1 and 22.

¹⁹ *Ibid.*, para. 27.

crimes committed in Cote d'Ivoire after the second round of the presidential election of 28 November 2010.²⁰ According to Côte d'Ivoire, the judicial investigation is complex due to the broad nature and diversity of the alleged crimes as well as the extension of the area in which they were committed. However, it is currently pursued in an efficient and regular manner.²¹

14. With respect to the criterion of “unwillingness” within the meaning of article 17(2) of the Statute, Côte d'Ivoire essentially argues that the documents provided show the gravity of the charges brought against Simone Gbagbo, and emphasises that the proceedings are not being undertaken for the purpose of shielding Simone Gbagbo from her criminal responsibility.²² Also, Côte d'Ivoire submits that there has not been an unjustified delay in the investigations against Simone Gbagbo as constant investigative steps have been taken since the three *réquisitoires introductifs* of 6 February 2012²³ and that the length of the whole procedure is owed to the complexity and gravity of the case.²⁴

15. In relation to the criterion of “inability” within the meaning of article 17(3) of the Statute, Côte d'Ivoire argues that although the functioning of the judicial system was seriously affected by the political crisis unfolding in Côte d'Ivoire since 2002 and, in particular, during the post-electoral crisis of 2010-2011 there has been a substantial improvement since that time.²⁵ Indeed, on 30 January 2012 the national courts and judicial institutions were reopened throughout Côte d'Ivoire and the judges resumed their work.²⁶ Côte d'Ivoire also states that exceptional measures have been taken to ensure prosecution

²⁰ *Ibid.*, para. 38.

²¹ *Ibid.*, para. 31.

²² ICC-02/11-01/12-37-Conf, paras 19-20.

²³ Admissibility Challenge, para. 54.

²⁴ ICC-02/11-01/12-45-Conf, para 11.

²⁵ Admissibility Challenge, para. 43.

²⁶ *Ibid.*, paras 40-43.

for the crimes committed during the post-electoral crisis. In particular, a special investigative unit, “*Cellule spéciale d’Enquêtes*”, was established in July 2011.²⁷ In Côte d’Ivoire’s submission, the activities of this unit permitted the institution of the proceedings against Simone Gbagbo.²⁸

B. The Prosecutor

16. The Prosecutor submits that Côte d’Ivoire has not demonstrated that it is investigating the same case against Simone Gbagbo that is before the Court. The Prosecutor reaches this conclusion on two main grounds.

17. First, the Prosecutor argues that, while “it appears that national criminal investigations and court proceedings against Ms Gbagbo have been initiated” and that “the national proceedings appear to bear broad similarity to the case before the Court”, the information provided by Côte d’Ivoire “is insufficient to establish that the case being investigated in Côte d’Ivoire pertains to the same conduct that is alleged before the ICC”.²⁹ In particular, according to the Prosecutor, “it remains unclear whether the national offences described in the [Admissibility Challenge] cover all aspects of the offences which are the subject of the case before the Court, such that there continues to be insufficient information and evidence to demonstrate the actual contours of the case at the national level”.³⁰ Therefore, in the Prosecutor’s submission, “it is not possible to compare with any precision the statement of facts in each case as a basis for identifying the relevant conduct in the proceedings before the ICC set against those at the national level”.³¹

18. Second, the Prosecutor argues that the information provided by Côte d’Ivoire “is clearly insufficient to establish that Ms Gbagbo ‘is being

²⁷ *Ibid.*, para. 45.

²⁸ *Ibid.*

²⁹ ICC-02/11-01/12-41-Conf, para. 47.

³⁰ *Ibid.*

³¹ *Ibid.*

investigated' within the terms of Article 17 (1)(a), namely, that [the] national proceedings include concrete and progressive investigative steps directed at ascertaining whether Ms Gbagbo is responsible for the alleged conduct".³²

19. Finally, the Prosecutor states that given that "[Côte d'Ivoire] has not demonstrated that it is indeed investigating the same case, there is no need to consider at this stage the issue of genuineness", as "the unwillingness or inability of a State having jurisdiction over the case becomes relevant only where the first limb of the test has been satisfied".³³

C. *The Defence*

20. The Defence submits that as domestic proceedings have been instituted against Simone Gbagbo, "it would not be unreasonable to believe that, on the balance of probability, some investigations should have been carried out".³⁴ Nevertheless, the Defence avers that Simone Gbagbo "is insufficiently informed to definitively agree or disagree with the submissions put forward by [Côte d'Ivoire]"³⁵ and, therefore, "can neither confirm nor deny the existence, nature or scope of any such investigation/s".³⁶

21. In any case, the Defence stresses that it is for Côte d'Ivoire "to provide the Chamber with any specificity and/or probative value it may require to demonstrate the nature and scope of its investigation and/or prosecution of its case against Mme. Gbagbo".³⁷

³² *Ibid.*, para. 55.

³³ *Ibid.*, para. 57.

³⁴ ICC-02/11-01/12-39, para. 35.

³⁵ *Ibid.*, para. 30.

³⁶ *Ibid.*, para. 35.

³⁷ *Ibid.*, para. 36.

22. Finally, the Defence submits that, while it neither opposes nor joins the Admissibility Challenge,³⁸ Simone Gbagbo's wish is "[to] be tried in public, in full transparency, in her National Jurisdiction of Côte d'Ivoire".³⁹

D. The OPCV

23. The OPCV requests the Chamber to reject the Admissibility Challenge.

24. The OPCV submits that the information provided by Côte d'Ivoire in support of the Admissibility Challenge is so unclear, vague and contradictory that it does not permit the identification of the contours of the purported domestic proceedings against Simone Gbagbo and, therefore, does not demonstrate that Côte d'Ivoire is investigating or prosecuting Simone Gbagbo for the same conduct that is alleged in the proceedings before the Court.⁴⁰ In particular, according to the OPCV, none of the available documentation contains sufficient information as to the factual allegations, and their temporal and geographic parameters, brought against Simone Gbagbo in the national proceedings instituted against her.⁴¹

25. In the alternative, and under the hypothesis that the Chamber would find it necessary to examine the criteria of willingness and ability within the meaning of articles 17(1)(a), 17(2) and 17(3) of the Statute, the OPCV submits, *inter alia*, that: (i) the current judicial system of Côte d'Ivoire is unable to carry out investigations or prosecutions into complex and sensitive cases like the one against Simone Gbagbo, as also demonstrated by the fact that the proceedings against Simone Gbagbo appear "*fragmentées, incertaines et approximatives*";⁴² and (ii) the release, between December 2012 and August 2013, of several members of the former government of Laurent Gbagbo, the

³⁸ *Ibid.*, para. 37.

³⁹ *Ibid.*, para. 42.

⁴⁰ ICC-02/11-01/12-40-Conf, para. 49. See also paras 33, 44.

⁴¹ *Ibid.*, paras 36-49.

⁴² *Ibid.*, paras 79-80.

unjustified delay of the national proceedings against Simone Gbagbo and their ambiguous and fragmented nature indicates that Côte d'Ivoire also lacks real and genuine willingness to bring Simone Gbagbo to justice.⁴³

III. APPLICABLE LAW

26. As recalled above, the Admissibility Challenge is brought by Côte d'Ivoire as a State having jurisdiction over the case against Simone Gbagbo, in accordance with article 19(2)(b) of the Statute, and based on the ground of inadmissibility under article 17(1)(a) of the Statute. This latter provision reads: "the Court shall determine that a case is inadmissible where [...] [t]he 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 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.⁴⁴ Accordingly, the first determination to be made by the Chamber is with respect to the existence of an ongoing investigation or prosecution. In this regard, the Appeals Chamber stated that "inaction on the part of a State having jurisdiction (that is, the fact

⁴³ *Ibid.*, para. 93.

⁴⁴ Appeals Chamber, "[Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#)", 25 September 2009, ICC-01/04-01/07-1497, paras 1, 75-79.

that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court".⁴⁵

28. The Appeals Chamber further clarified that a State challenging the admissibility of a case "bears the burden of proof to show that the case is inadmissible" and that, to discharge this burden, the State must provide the Court with "evidence with a sufficient degree of specificity and probative value" that demonstrates that it is investigating or prosecuting the case.⁴⁶ Indeed, "[i]t is not sufficient to merely assert that investigations are ongoing".⁴⁷ Similarly, as previously stated by this Chamber, "a mere assurance that the national ongoing investigation covers the same conduct as the case before the Court cannot be deemed sufficient to discharge [the] burden of proof in this regard".⁴⁸

29. This Chamber also stated that the evidence that the State is requested to provide in order to demonstrate that the case is being investigated or prosecuted is not only "evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes", but extends to all material capable of proving that an investigation or prosecution is ongoing, including, for example, "directions, orders and decisions issued by authorities in charge [...] as well as internal reports,

⁴⁵ *Ibid.*, paras 2 and 78.

⁴⁶ Appeals Chamber, "[Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute'](#)", 30 August 2011, ICC-01/09-02/11-274, paras 2 and 61.

⁴⁷ *Ibid.*

⁴⁸ Pre-Trial Chamber I, "[Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi](#)", 7 December 2012, ICC-01/11-01/11-239, para. 28.

updates, notifications or submissions contained in the file arising from the [domestic proceedings]”.⁴⁹

30. The expression “the case is being investigated” within the meaning of article 17(1)(a) of the Statute must be understood as requiring the taking of “concrete and progressive investigative steps” to ascertain whether the person is responsible for the conduct alleged against him or her.⁵⁰ As held by the Appeals Chamber, these investigative steps may include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.⁵¹ Considerations with respect to the quantity and quality of the alleged investigative steps may therefore be relevant to the determination of whether an “investigation” is indeed being conducted, like they may be to the assessment of the genuineness of the concerned investigation in order to establish, as the case may be, whether the State is “unwilling” or “unable” to carry it out. Indeed, as previously held in this regard, the Chamber considers that “the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked” and that “evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as

⁴⁹ *Ibid.*, paras 10 and 11; see also Pre-Trial Chamber I, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 66(viii).

⁵⁰ Appeals Chamber, “[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’](#)”, 21 May 2014, ICC-01/11-01/11-547-Red, paras 54, 55 and 73. See also Pre-Trial Chamber I, “[Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi](#)”, 7 December 2012, ICC-01/11-01/11-239, para. 11.

⁵¹ Appeals Chamber, “[Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute’](#)”, 30 August 2011, ICC-01/09-02/11-274, paras 1 and 40.

well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs”.⁵²

31. At the same time, the Chamber recalls that, in its analysis on whether the State is investigating or prosecuting the same case that is before the Court, it is not called to determine whether the evidence on the merits of the national case collected by the domestic authorities “is strong enough to establish the [person's] criminal responsibility”.⁵³ Indeed, a finding that the domestic authorities are taking steps to investigate the person's responsibility in relation to the same case as the one before the Court “would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities”.⁵⁴

32. In relation to the comparison of the conduct allegedly forming the subject of national investigation and the conduct which forms the subject of proceedings before the Court, the Appeals Chamber clarified that “[i]n assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that [is before the Court]” and that for this assessment “it will be necessary for a Chamber to know the contours or parameters of the investigation being carried out both by the Prosecutor and by the State”.⁵⁵ Only when the terms of reference for the relevant comparison are satisfactorily identified, can the Chamber proceed to the determination of whether there is sufficient overlap

⁵² Pre-Trial Chamber I, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 210. See also *ibid.*, paras 161 and 211.

⁵³ Pre-Trial Chamber I, “[Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi](#)”, 7 December 2012, ICC-01/11-01/11-239, para. 122; *id.* Pre-Trial Chamber I, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 66(vii).

⁵⁴ *Ibid.*

⁵⁵ Appeals Chamber, “[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’](#)”, 21 May 2014, ICC-01/11-01/11-547-Red, para. 2.

such that the domestic case can be said to be the same as the case before the Court.⁵⁶

33. As far as the parameters of a case before the Court are concerned, the Chamber recalls that a case is defined by: (i) the suspect against whom the proceedings before the Court are being conducted; and (ii) the conduct giving rise to criminal liability under the Statute that is alleged in the proceedings.⁵⁷ As stated by the Chamber, “the identification of the conduct that is alleged in the proceedings before the Court cannot be done in the abstract, but is necessarily dependent on the factual parameters of each individual case and requires a case-by-case analysis”.⁵⁸ Further, “the parameters of the ‘conduct’ alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question”.⁵⁹

34. In relation to the defining parameters of the alleged domestic proceedings, the Chamber notes the Appeals Chamber’s jurisprudence according to which these parameters must be clear even during an investigation and irrespective of its stage.⁶⁰ To be successful, a challenge to the admissibility of a case “must be able to show what is being investigated by the State (the contours or parameters of the case)”.⁶¹ Indeed, “[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

⁵⁶ See Pre-Trial Chamber I, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 67.

⁵⁷ See e.g. Appeals Chamber, “[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’](#)”, 21 May 2014, ICC-01/11-01/11-547-Red, para. 1.

⁵⁸ Pre-Trial Chamber I, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 74.

⁵⁹ *Ibid.*, para. 66(iii).

⁶⁰ Appeals Chamber, “[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’](#)”, 21 May 2014, ICC-01/11-01/11-547-Red, paras 83-84.

⁶¹ *Ibid.*, para. 84.

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".⁶²

35. Finally, given that the relevant factual situation as to the existence and scope of domestic proceedings "is not necessarily static, but ambulatory"⁶³ and that "a decision on the admissibility of the case must be based on the circumstances prevailing at the time of its issuance",⁶⁴ 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.⁶⁵

36. As explained below, the Chamber is not satisfied that Côte d'Ivoire's domestic authorities are currently taking tangible, concrete and progressive investigative steps into Simone Gbagbo's criminal responsibility for the crimes alleged in the proceedings before the Court or that they are prosecuting her for these alleged crimes. Accordingly, it is unnecessary to set out the Chamber's understanding of the criteria of unwillingness and inability within the meaning of article 17(1)(a) and as detailed in article 17(2) and (3) of the Statute.

⁶² *Ibid.*

⁶³ Appeals Chamber, "[Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#)", 25 September 2009, ICC-01/04-01/07-1497, para. 56.

⁶⁴ Pre-Trial Chamber I, "[Decision on the OPCD requests in relation to the hearing on the admissibility of the case](#)", ICC-01/11-01/11-212, para. 9.

⁶⁵ Pre-Trial Chamber I, "[Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi](#)", 7 December 2012, ICC-01/11-01/11-239, para. 14.

IV. ANALYSIS

A. *Preliminary matter: the Prosecutor's request for leave to respond*

37. At the outset, the Chamber addresses the Prosecutor's request for leave to file a response to Côte d'Ivoire's submissions and additional documentation filed on 10 October 2014.⁶⁶ The Prosecutor anticipates that her response "will provide submissions on why the evidence currently on record, including the additional evidence recently submitted by Côte d'Ivoire, is still insufficient" to identify the actual contours of the national case against Simone Gbagbo and to discharge Côte d'Ivoire's burden to prove that the domestic authorities are currently investigating the case.⁶⁷

38. The Chamber recognizes that under rule 58(3) of the Rules the Prosecutor has the right to submit observations on a challenge to the admissibility of a case before the Court. In principle, this extends to all the evidence provided in support of the challenge, irrespective of whether it was filed together with the challenge or submitted thereafter in the course of the admissibility proceedings. However, in the specific circumstances of the present case, the Chamber is of the view that receiving submissions by the Prosecutor on the additional evidence provided by Côte d'Ivoire on 10 October 2014 is not necessary to ensure the fairness of the present admissibility proceedings nor would it otherwise be of assistance to the final disposal of the Admissibility Challenge. The Chamber reaches this conclusion in light of the fact that on 10 October 2014 Côte d'Ivoire provided limited information and documentation in addition to that which had been filed previously and on which the Prosecutor had submitted her observations in April 2014. In this respect, the Prosecutor anticipates that in her response she would reiterate, on the same grounds, the arguments already made in her

⁶⁶ ICC-02/11-01/12-46.

⁶⁷ *Ibid.*, para. 4.

previous observations. This makes it all the more unnecessary to authorise the Prosecutor to file a response to Côte d'Ivoire's final submissions and further prolong the present proceedings. Accordingly, the Prosecutor's request must be rejected.

B. Significant features of Côte d'Ivoire's criminal procedure law

39. As part of the consideration of the merits of the Admissibility Challenge, the Chamber considers it important to take into account the basic features of the relevant procedural law applicable in the purported national proceedings against Simone Gbagbo as set out in the Ivorian *Code de Procédure Pénale*, the relevant part of which were filed by Côte d'Ivoire with the Admissibility Challenge.⁶⁸ In light of Côte d'Ivoire's claim concerning the allegations brought against Simone Gbagbo at the national level and the stage purportedly reached by the domestic proceedings, the Chamber considers that certain aspects of the Ivorian criminal procedure are of particular significance for the purposes of the present decision. They are succinctly summarised hereunder.

40. An investigation by a *juge d'instruction* ("*instruction préparatoire*") is mandatory for certain offences, including those of the nature alleged against Simone Gbagbo, ("*crimes*"), while for certain others ("*délits*") such an investigation is, in ordinary circumstances, discretionary.⁶⁹ The *juge d'instruction* may open an investigation only when the facts are referred to him or her by a request ("*réquisitoire introductif*") from the *Procureur de la République*,⁷⁰ which also sets the factual scope of the investigation. The *juge d'instruction* cannot expand the investigation unless another request, adding

⁶⁸ Annex 17 to the Admissibility Challenge.

⁶⁹ Article 77 of the *Code de procédure pénale*.

⁷⁰ Article 78-1 of the *Code de procédure pénale*; the *juge d'instruction* may also open an investigation at the request of a victim in accordance with articles 78-6, 85 and 86 of the *Code de procédure pénale*.

additional facts, (*“réquisitoire supplétif”*) is submitted by the *Procureur* to the *juge d’instruction*.⁷¹ The *juge d’instruction* is in charge of the investigation and may perform all investigative activities that he or she deems useful for the determination of the truth.⁷² Also, the *juge d’instruction* may make a request (*“commission rogatoire”*) for another *juge d’instruction* or an *officier de police judiciaire* to proceed with those acts subject of the jurisdiction of the latter that are necessary to progress with the investigation of the facts mentioned in either the *réquisitoire introductif* or the *réquisitoire supplétif*.⁷³

41. When appearing before the *juge d’instruction* for the first time (*“première comparution”*), the *juge d’instruction* notes the identity of the suspect, informs him or her of the facts alleged against him or her and receives his or her *“déclarations”*.⁷⁴ As the case may be, the *juge d’instruction* can issue a warrant ordering that the suspect be placed under detention (*“mandat de dépôt”*).⁷⁵

42. Upon completion of the investigation, and on the basis of its results, the *juge d’instruction* may discontinue the proceedings (*“ordonnance de non-lieu”*),⁷⁶ or refer the case to the *Procureur Général* of the *Cour d’Appel*, when offences qualified as “crimes” are alleged to have been committed, in order for him or her to seize the *Chambre d’Accusation*.⁷⁷ The *Chambre d’Accusation*, together with its other functions related to the review of decisions of the *juge d’instruction*, determines whether there is sufficient evidence for the case to

⁷¹ Article 78-5 of the *Code de procédure pénale*.

⁷² Article 79-1 of the *Code de procédure pénale*.

⁷³ Article 151-1 and 151-3 of the *Code de procédure pénale*.

⁷⁴ Article 112-1 of the *Code de procédure pénale*.

⁷⁵ Article 120-1 and 120-4 of the *Code de procédure pénale*.

⁷⁶ Article 177-1 of the *Code de procédure pénale*.

⁷⁷ Article 181-1 of the *Code de procédure pénale*.

proceed to trial.⁷⁸ It may either discontinue the case⁷⁹ or refer the case to the *Cour d'Assises* in order for it to conduct a trial.⁸⁰

C. Whether the same case against Simone Gbagbo that is before the Court is being investigated or prosecuted by Côte d'Ivoire

43. As recalled above, the first step in entertaining the Admissibility Challenge is to determine whether Côte d'Ivoire has sufficiently demonstrated that its domestic authorities are currently investigating or prosecuting Simone Gbagbo for the same case that is before the Court.

44. As already clarified in the Decision of 28 August 2014, the conduct alleged in the case against Simone Gbagbo before the Court is set out in the Warrant of Arrest, read with the Article 58 Decision and, by way of incorporation into the latter, the relevant parts of the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo".⁸¹ More specifically, the present case concerns the individual criminal responsibility of Simone Gbagbo for the commission, jointly with Laurent Gbagbo and his inner circle and through the Ivorian Defence and Security Forces (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. This is the relevant conduct alleged in the proceedings before the Court that must be covered by

⁷⁸ Article 211-1 of the *Code de procédure pénale*

⁷⁹ Article 212-1 of the *Code de procédure pénale*.

⁸⁰ Article 214-1 of the *Code de procédure pénale*.

⁸¹ Pre-Trial Chamber III, "[Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo](#)", 30 November 2011, ICC-02/11-01/11-9-Red.

the ongoing purported domestic proceedings in Côte d'Ivoire in order for the Admissibility Challenge to succeed.

45. At this juncture, the Chamber will proceed to analyse the national proceedings instituted against Simone Gbagbo, on the basis of the documentation made available by Côte d'Ivoire; it, thereafter, will provide its determination as to whether this documentation sufficiently demonstrates that the same case against Simone Gbagbo that is before the Court is currently being investigated or prosecuted by the competent Ivorian authorities.

1. The national proceedings against Simone Gbagbo according to the documents provided to the Chamber

46. The documentation provided by Côte d'Ivoire indicates that, after Simone Gbagbo's arrest in April 2011, several proceedings were instituted against her before the *juges d'instruction* of the 8ème, 9ème and 10ème Cabinet d'Instruction of the Tribunal de Première Instance d'Abidjan-Plateau. In particular, it appears that three sets of proceedings, running in parallel, were opened before these *juges d'instructions*.

47. First, in a set of proceedings Simone Gbagbo is accused of having committed economic crimes,⁸² namely the proceedings referred to as RI-09/2012, RI-33/2012 and RI-04/2012. The conduct alleged against Simone 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, as they are unable to substantiate that the

⁸² More specifically, Simone Gbagbo is accused of [REDACTED]
[REDACTED]
[REDACTED] "s" as well as [REDACTED]
[REDACTED]
[REDACTED]" (See Annex 8 to the Admissibility Challenge, p. 8).

case against Simone Gbagbo is “being investigated or prosecuted” at the national level within the meaning of article 17(1)(a) of the Statute.

48. Second, proceedings have also been opened for alleged crimes against the State, in particular, in case RI-01/2011 instituted before the *juge d’instruction du 10ème Cabinet d’Instruction*.⁸³ The proceedings in this case have reached the *Chambre d’Accusation* which, on 10 July 2013, confirmed certain charges against Simone Gbagbo and other 89 individuals and referred the case for trial to the *Cour d’Assises d’Abidjan*.⁸⁴ As indicated in the decision of the *Chambre d’Accusation*, Simone Gbagbo is essentially accused, and committed to trial, for [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁸⁵ There are also references to, *inter alia*, the allegations of [REDACTED]

[REDACTED].⁸⁶

49. The Chamber notes that the provisions criminalising this alleged conduct, as mentioned in the decision of the *Chambre d’Accusation*, fall within the “*Livre II, Titre I, Chapitre 2*” of the Ivorian Criminal Code entitled “*Crimes et délits contre la sûreté de l’Etat, la défense nationale et la sécurité publique*”. The factual description of the allegations against Simone Gbagbo as well as their legal characterisation⁸⁷ make clear that the scope of the alleged conduct covers

⁸³ In this case, Simone Gbagbo is accused of “[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]” (See Annexes 5, p. 9, and 10, p. 17, to the Admissibility Challenge).

⁸⁴ Annex 10 the Admissibility Challenge.

⁸⁵ *Ibid.*, pp. 47-50.

⁸⁶ *Ibid.*, pp. 67-69 and 77.

⁸⁷ The Chamber considers that, while the assessment of the subject-matter of the domestic proceedings in the context of an admissibility challenge must focus on the alleged conduct and not on its legal characterisation (see Pre-Trial Chamber I, “[Decision on the admissibility](#)”

only [REDACTED]. Killings, rapes or acts causing great suffering or serious injury to individuals, as alleged in the case before the Court, are not covered by these proceedings. Accordingly, these proceedings – in which a determination could only be made on whether Simone Gbagbo's actions [REDACTED] – do not cover the same conduct that is alleged in the case before the Court and, as such, do not give rise to a conflict of jurisdictions between the Court and Côte d'Ivoire under article 17(1)(a) of the Statute.

50. Finally, a third set of proceedings instituted against Simone Gbagbo concern crimes against individuals. Since these are crimes of the same nature as those alleged in the case before the Court, this set of proceedings must be considered in further detail. The documentation that Côte d'Ivoire made available to the Chamber indicates that in these proceedings the competent domestic authorities undertook a number of activities, of both a procedural and investigative nature.

51. On 6 February 2012, the *Procureur de la République* transmitted three *réquisitoires introductifs* to the *juges d'instruction* of the 8^{ème}, 9^{ème} and 10^{ème} *Cabinet d'Instruction* of the *Tribunal de Première Instance d'Abidjan-Plateau*, competent for the areas of [REDACTED], respectively.⁸⁸ The three *réquisitoires introductifs* describe the relevant allegations against Simone Gbagbo (and at least another 16 individuals, including [REDACTED]) as follows: “*présomptions graves de* [REDACTED]

[of the case against Saif Al-Islam Gaddafi](#)”, 31 May 2013, ICC-01/11-01/11-344-Red, para. 85), in the present instance the legal characterisation of the acts alleged against Simone Gbagbo constitutes a significant indicator of the actual subject-matter of the domestic proceedings under consideration.

⁸⁸ Annex 2 to the Admissibility Challenge.

[REDACTED]
 [REDACTED]".
 As a result, three proceedings were opened against Simone Gbagbo (and others) on these allegations: proceedings RI-08/2012 before the *juge d'instruction* of the 8^{ème} Cabinet; proceedings RI-32/2012 before the *juge d'instruction* of the 9^{ème} Cabinet; and proceedings RI-03/2012 before the *juge d'instruction* of the 10^{ème} Cabinet. Also, on 16 May 2012, the Prosecutor transmitted to the *juge d'instruction* of the 10^{ème} Cabinet a *réquisitoire supplétif*, which was registered in the case RI-03/2012, and by which additional allegations against Simone Gbagbo (namely "*chefs de* [REDACTED]
 [REDACTED]
 [REDACTED]") were added to those identified in the original *réquisitoire introductif* of 6 February 2012.⁸⁹

52. After the opening of the respective proceedings, Simone Gbagbo appeared on at least four occasions at *premières comparutions* before the *juge d'instruction* of the *Section de Tribunal d'Odienné* acting in execution of *commissions rogatoires* issued by the competent *juge d'instruction*.⁹⁰ In particular, first appearances took place: (i) on 29 February 2012, in the case RI-08/2012, in execution of a request by the *juge d'instruction* of the 8^{ème} Cabinet;⁹¹ (ii) on 20 April 2012, in the case RI-32/2012, in execution of a request by the

⁸⁹ Annex 4 to the Admissibility Challenge. The Chamber notes that the official minutes of the *première comparution* of 3 December 2012 in the case RI-32/2012 before the *juge d'instruction* of the 9^{ème} Cabinet, make reference to allegations of [REDACTED] (ICC-02/11-01/12-37-Conf-Anx14). It is therefore likely that, between 20 April 2012 and 3 December 2012, there was a *réquisitoire supplétif* adding these additional allegations also in case RI-32/2012. No such document was however provided to the Chamber.

⁹⁰ The Chamber notes that the *juge d'instruction* had to conduct the *première comparution* of Simone Gbagbo given that the *Procureur de la République* had presented a *réquisitoire introductif* against identified persons ("*réquisitoire introductif contre personne dénommée*", within the meaning of article 78-3 of the *Code de procédure pénale*), including Simone Gbagbo. The only other option for the *juge d'instruction* would have been to take a decision declining to open an investigation against her.

⁹¹ ICC-02/11-01/12-37-Conf-Anx12.

juge d'instruction of the 9ème Cabinet;⁹² (iii) on 13 November 2012, in the case RI-03/2012, in execution of a request by the *juge d'instruction* of the 10ème Cabinet;⁹³ and (iv) on 3 December 2012, again in the case RI-32/2012, pursuant to another request by the *juge d'instruction* of the 9ème Cabinet.⁹⁴

53. The official minutes (*procès-verbaux*) of these first appearances indicate that Simone Gbagbo was informed of the allegations against her in the respective proceedings, that are essentially of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁵ as well as [REDACTED].⁹⁶

The timeframe of the alleged crimes is indicated as “*courant années 2010 et 2011*”, and the location as Abidjan.⁹⁷

54. The *mandats de dépôt* for the allegations indicated at these first appearances that are available to the Chamber were issued by the competent *juges d'instruction* on 20 April 2012,⁹⁸ 13 November 2012⁹⁹ and 3 December

⁹² Annex 6 to the Admissibility Challenge.

⁹³ ICC-02/11-01/12-37-Conf-Anx13. The *commission rogatoire* by the *juge d'instruction* of the 10ème Cabinet dated 8 November 2012 is also available to the Chamber as included at Annex 5 to the Admissibility Challenge, pp. 11-12.

⁹⁴ ICC-02/11-01/12-37-Conf-Anx14.

⁹⁵ ICC-02/11-01/12-37-Conf-Anx12; Annex 6 to the Admissibility Challenge; ICC-02/11-01/12-37-Conf-Anx13.

⁹⁶ ICC-02/11-01/12-37-Conf-Anx13; ICC-02/11-01/12-37-Conf-Anx14.

⁹⁷ In case RI-08/2012 before the *juge d'instruction* of the 8ème Cabinet, reference is made more specifically to [REDACTED].

⁹⁸ Annex 7 to the Admissibility Challenge. The detention of Simone Gbagbo pursuant to this *mandat de dépôt* was subsequently extended on 14 August 2012 (ICC-02/11-01/12-37-Conf-Anx7), 26 November 2012 (ICC-02/11-01/12-37-Conf-Anx9) and 18 March 2013 (ICC-02/11-01/12-37-Conf-Anx11).

⁹⁹ ICC-02/11-01/12-37-Conf-Anx2.

2012,¹⁰⁰ respectively. They all refer to the same alleged crimes and the same incriminating provisions mentioned in the respective initial appearances.

55. The different dossiers opened for crimes against individuals before the three *juges d'instruction* were subsequently reassigned to the *juge d'instruction* of the *8ème Cabinet* by virtue of a decision of the *Chambre d'Accusation* of the Court of Appeal of Abidjan dated 13 February 2013, which recognised the inextricable links between the alleged facts.¹⁰¹

56. Together with these activities of a procedural nature, the documentation provided by Côte d'Ivoire indicates that the competent domestic authorities undertook also certain investigative activities with a view to collecting information relevant to determine Simone Gbagbo's responsibility for the alleged crimes. These investigative steps are summarised hereunder.

57. On 11 May 2012, the *juge d'instruction* of the *8ème Cabinet* ordered a site visit [REDACTED]

[REDACTED].¹⁰² The Prosecutor of the Court contends that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].¹⁰³

58. On 12 November 2012, the *juge d'instruction* of the *9ème Cabinet*

[REDACTED]
[REDACTED]
[REDACTED]

¹⁰⁰ ICC-02/11-01/12-37-Conf-Anx4.

¹⁰¹ Annex 8 to the Admissibility Challenge.

¹⁰² ICC-02/11-01/12-37-Conf-Anx20. See also ICC-02/11-01/12-37-Conf-Anx21.

¹⁰³ ICC-02/11-01/12-41-Conf, para. 53.

[REDACTED].¹⁰⁴ [REDACTED]

[REDACTED]

[REDACTED].¹⁰⁵

59. On 7 December 2012, Simone Gbagbo appeared before the *juge d'instruction* of the 9^{ème} Cabinet for the purposes of being questioned on the merits (*interrogatoire au fond*) in case RI-32/2012.¹⁰⁶ As [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the planned questioning did not take place on this occasion.

60. On 23 January 2013, a *partie civile* was heard by the *juge d'instruction* of the 9^{ème} Cabinet in relation to certain discrete events that had occurred on [REDACTED] and that allegedly involved Simone Gbagbo.¹⁰⁷ While certain discrete aspects referred to by the *partie civile* may be relevant to determine Simone Gbagbo's conduct in the context of the 2010-2011 post-electoral crisis, these specific events are not, in themselves, covered by the case against Simone Gbagbo before the Court. Also, this interview is recorded as having taken place in proceedings RI-38/2012, which, in light of the information available to the Chamber, does not appear to be one of those proceedings instituted against Simone Gbagbo. Nevertheless, the Chamber cannot exclude that information gathered for the purposes of one case may be taken into consideration and relied on in another case. Indeed, in an interview dated 9 September 2014, Simone Gbagbo [REDACTED]

[REDACTED].¹⁰⁸

¹⁰⁴ Annex 5 to the Admissibility Challenge, at pp. 2-3.

¹⁰⁵ *Ibid.*, at p. 5.

¹⁰⁶ ICC-02/11-01/12-37-Conf-Anx15.

¹⁰⁷ ICC-02/11-01/12-37-Conf-Anx18.

¹⁰⁸ ICC-02/11-01/12-45-Conf-Anx1, pp. 11-12.

61. The available documentation does not indicate any investigative step of potential relevance to the allegations of crimes against individuals from January 2013 up until, at least, February 2014. Similarly, and as recalled above, the only procedural steps taken in this period are the issuance, in February 2013, of the decision by the *Chambre d'Accusation* reassigning the different *dossiers* to a single *juge d'instruction*,¹⁰⁹ and the prolongation, on 18 March 2013, of Simone Gbagbo's state of detention originally ordered pursuant to the *mandat de dépôt* of 20 April 2012.¹¹⁰

62. On 4 and 5 February 2014, Simone Gbagbo appeared before the *juge d'instruction* of the *8ème Cabinet*, in order for the judge to conduct a questioning on the merits for the purposes of proceedings RI-03/2012, RI-08/2012 and RI-32/2012.¹¹¹ Also on this occasion, Simone Gbagbo's appearance was finally limited to mere procedural aspects [REDACTED]

63. The questioning on the merits in case RI-08/2012 eventually took place on 9 and 10 September 2014,¹¹² and 2¹¹³ and 3 October 2014.¹¹⁴ During these appearances before the *juge d'instruction*, Simone Gbagbo was asked, and she briefly responded to, broad questions in relation to, *inter alia*, her activities [REDACTED]

¹⁰⁹ Annex 8 to the Admissibility Challenge.

¹¹⁰ See ICC-02/11-01/12-37-Conf-Anx11.

¹¹¹ ICC-02/11-01/12-37-Conf-Anx16 and ICC-02/11-01/12-37-Conf-Anx17.

¹¹² ICC-02/11-01/12-45-Conf-Anx1 and ICC-02/11-01/12-45-Conf-Anx2, respectively. This particular questioning was held also for proceedings RI-03/2011, for which the Chamber is unable to determine whether they concern allegations of economic crimes or of crimes against individuals.

¹¹³ ICC-02/11-01/12-45-Conf-Anx3.

¹¹⁴ ICC-02/11-01/12-45-Conf-Anx4.

[REDACTED]

[REDACTED],¹¹⁵ as well as her knowledge of: (i) [REDACTED]

[REDACTED];¹¹⁶ (ii) [REDACTED]

[REDACTED],¹¹⁷ (iii) [REDACTED]

[REDACTED];¹¹⁸ and (iv) [REDACTED]

[REDACTED].¹¹⁹ During the interview of 10 September 2014, she was also asked whether she knew about [REDACTED]

[REDACTED] and what her reaction to this event had been at that time.¹²⁰ No answer on the merits was, however, given by Simone Gbagbo on this particular issue, which was not addressed any further by the *juge d'instruction*.

64. Finally, the Chamber notes that, among the documents provided by Côte d'Ivoire, there is also a *constitution de partie civile* that was received by the office of the *juge d'instruction* of the *8ème Cabinet* on 24 April 2012.¹²¹ The list of

[REDACTED]

[REDACTED]. However, this document is a claim by individuals who assert themselves as victims of certain crimes and who

¹¹⁵ ICC-02/11-01/12-45-Conf-Anx1, pp. 8, 9; 11, ICC-02/11-01/12-45-Conf-Anx2, pp. 7, 8, ICC-02/11-01/12-45-Conf-Anx3, pp. 4, 5, 6 and 7; ICC-02/11-01/12-45-Conf-Anx4, p. 6, 7, 8.

¹¹⁶ ICC-02/11-01/12-45-Conf-Anx2, pp. 3-5, 7.

¹¹⁷ ICC-02/11-01/12-45-Conf-Anx2, pp. 5-7; ICC-02/11-01/12-45-Conf-Anx4, pp. 7-8.

¹¹⁸ ICC-02/11-01/12-45-Conf-Anx3, pp. 4-6, 9-10.

¹¹⁹ ICC-02/11-01/12-45-Conf-Anx2, pp. 10-11.

¹²⁰ ICC-02/11-01/12-45-Conf-Anx2, p. 9.

¹²¹ ICC-02/11-01/12-37-Conf-Anx19.

exercise their procedural rights under article 87 of the *Code de procédure pénale*.¹²² In itself, it neither indicates any procedural step on the part of the national authorities nor does it demonstrate that the competent authorities are actually investigating these alleged crimes. Equally this document provides no concrete information as to the actual subject-matter of the domestic investigations.

2. The Chamber's determination on the admissibility of the case against Simone Gbagbo

65. The available documentation shows that national proceedings in which Simone Gbagbo is accused of crimes against individuals have been initiated in Côte d'Ivoire in 2012 and, to date, remain before the competent *juge d'instruction*, who is yet to make a determination on whether to dismiss the case or refer it to the *Procureur Général* for seizing the *Chambre d'Accusation*. However, the initiation of these proceedings, still formally opened, and the fact that Simone Gbagbo was placed and maintained in detention and informed of the accusations against her are not sufficient *per se* to demonstrate that the case against her "is being investigated" within the meaning of article 17(1)(a) of the Statute. Indeed, for the Admissibility Challenge to succeed, it must be established that tangible, concrete and progressive investigative steps are being undertaken in order to ascertain whether Simone Gbagbo is criminally responsible for the conduct alleged in the proceedings before the Court.¹²³ Yet, from the documentation provided by Côte d'Ivoire, it appears that the investigative activities undertaken by the domestic authorities are not tangible, concrete and progressive, but, on the contrary, sparse and disparate.

¹²² Article 85 of the Ivorian *Code de Procédure Pénale* reads: "Toute personne qui se prétend lésée par un crime ou un délit peut en portant plainte se constituer partie civile devant le juge d'Instruction compétent" (Annex 17 to the Admissibility Challenge).

¹²³ See para. 30 above.

66. In the 32 months between the *réquisitoires introductifs* of 6 February 2012 and Côte d’Ivoire’s most recent filing of 10 October 2014, the relevant investigative activities conducted by the national authorities appear, from the documentation available to the Chamber,¹²⁴ to have been limited to: (i) [REDACTED] [REDACTED],¹²⁵ (ii) the [REDACTED] in November 2012;¹²⁶ (iii) the hearing of a *partie civile* of 23 January 2013,¹²⁷ and (iv) the questioning of Simone Gbagbo.¹²⁸

67. The “*Inventaire des pièces des procédure instruites à la requête du Ministère public*” submitted by Côte d’Ivoire together with the Admissibility Challenge on 30 September 2013¹²⁹ which covers both the allegations of crimes against individuals and economic crimes indicates no further activity taken by the competent authorities in the proceedings against Simone Gbagbo in addition to those recalled in the present decision. More specifically, the section “*cote information*” – which in a case of the breadth as that of the purported domestic case against Simone Gbagbo would reasonably be expected to be extensive – essentially lists only Simone Gbagbo’s appearance at several *premières comparutions* and at the questioning of 7 December 2012, and [REDACTED] [REDACTED] in November 2012.¹³⁰ In this regard, the Chamber notes that, while the *juge d’instruction* may proceed to any

¹²⁴ The Chamber notes that the *commission rogatoire* of 8 November 2012 contains the sentence “[REDACTED] [REDACTED]” (Annex 5 to the Admissibility Challenge, p. 12). In the absence of any further information or documentation in this respect, the Chamber is, however, unable to make any use of this reference for the purpose of the present decision.

¹²⁵ ICC-02/11-01/12-37-Conf-Anx20 and ICC-02/11-01/12-37-Conf-Anx21.

¹²⁶ Annex 5 to the Admissibility Challenge, pp. 2 to 6.

¹²⁷ ICC-02/11-01/12-37-Conf-Anx18.

¹²⁸ ICC-02/11-01/12-37-Conf-Anx15; ICC-02/11-01/12-37-Conf-Anx16; ICC-02/11-01/12-37-Conf-Anx17; ICC-02/11-01/12-45-Conf-Anx1; ICC-02/11-01/12-45-Conf-Anx2; ICC-02/11-01/12-45-Conf-Anx3; ICC-02/11-01/12-45-Conf-Anx4.

¹²⁹ Annex 9 to the Admissibility Challenge.

¹³⁰ *Ibid.*, p. 2.

investigative activity which he or she finds useful to determine the truth, including taking of witness testimonies,¹³¹ ordering confrontations between the suspect and the witnesses or between the suspect and the *parties civiles*,¹³² or ordering any necessary forensic or other expertise concerning the crimes committed,¹³³ the documentation available to the Chamber does not show that any investigative step of these kinds was ordered by the *juge d'instruction*, whether on his own motion or at the request of the *Procureur de la République*, in the proceedings against Simone Gbagbo. This is so despite the fact that the national investigative authorities have direct access to any relevant evidence on their territory.

68. Furthermore, the Chamber considers significant that no investigative (or procedural) step in the proceedings for allegations of crimes against individuals appears to have been undertaken since several months before the filing of the Admissibility Challenge on 30 September 2013. In particular, at that time, no activity to collect relevant evidence had been undertaken by the domestic authorities since at least 23 January 2013, and would not be attempted until at least 4 February 2014

69. Also, the Chamber observes that in the last 20 months of investigations, between 23 January 2013 and 10 October 2014, the steps directed at determining Simone Gbagbo's responsibility for the alleged crimes appear to be limited to one single activity: the questioning of Simone Gbagbo. The Chamber also notes that the interviews of 9 and 10 September 2014¹³⁴ and 2 and 3 October 2014¹³⁵ (the only questioning during which the *juge d'instruction*

¹³¹ Article 101 of the *Code de procédure pénale*. The *juge d'instruction* could also delegate, in accordance with article 151 of the *Code de procédure pénale*, by way of a *commission rogatoire* the taking of witness testimonies to an *officier de police judiciaire*.

¹³² Article 115 of the *Code de procédure pénale*.

¹³³ Article 156 of the *Code de procédure pénale*.

¹³⁴ ICC-02/11-01/12-45-Conf-Anx1 and ICC-02/11-01/12-45-Conf-Anx2.

¹³⁵ ICC-02/11-01/12-45-Conf-Anx3 and ICC-02/11-01/12-45-Conf-Anx4.

achieved to elicit from Simone Gbagbo some limited information after the failed attempts of December 2012¹³⁶ and February 2014¹³⁷) were conducted after the Chamber's Decision of 28 August 2014 authorising Côte d'Ivoire to provide, by 10 October 2014, further evidence in support of the Admissibility Challenge.

70. The investigative steps into Simone Gbagbo's criminal responsibility are not only scarce in quantity and lacking in progression. They also appear disparate in nature and purpose to the extent that the overall factual contours of the alleged domestic investigations (as part of which these individual investigative steps were undertaken) remain indiscernible. In this sense, the Chamber is unable to establish whether these limited steps undertaken at the national level are together directed at ascertaining Simone Gbagbo's criminal responsibility for the same conduct as that alleged in the proceedings before the Court.

71. Indeed, the documentation available to the Chamber only contains generic descriptions of the crimes alleged and provides extremely vague information as to the factual parameters of the purported investigations. In essence, the only information available to the Chamber is that the opened investigations concern crimes against individuals allegedly committed by Simone 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.

72. The documents related to the discrete investigative activities undertaken in the domestic proceedings indeed do not assist in identifying

¹³⁶ ICC-02/11-01/12-37-Conf-Anx15.

¹³⁷ ICC-02/11-01/12-37-Conf-Anx16 and ICC-02/11-01/12-37-Conf-Anx17.

the defining parameters of the national investigations. More specifically, the “*Ordonnance de Transport sur le lieux*”¹³⁸ and the subsequent *procès-verbal* of the [REDACTED]¹³⁹ reveal an attempt to collect [REDACTED] [REDACTED] evidence relevant to the alleged economic crimes and crimes against individuals, but contain no further information, including on the factual allegations brought against Simone Gbagbo that are subject to the investigations; the *procès-verbal* of the hearing of the *partie civile* indicates that a purported victim was heard with respect to discrete, distinct events that allegedly occurred on [REDACTED] (in any case not forming part of the case before the Court), without revealing the general breadth of the factual case against Simone Gbagbo that is allegedly being investigated in Côte d’Ivoire; and [REDACTED]

[REDACTED], does not provide any information as to the factual scope of the domestic case against Simone Gbagbo.

73. In relation to the official minutes of the questioning of September and October 2014, the Chamber recognizes that the questioning did address some relevant aspects of the factual case against Simone Gbagbo that is before the Court and that the questions posed indicate an attempt by the domestic authorities to elicit relevant information on the events occurred between the second round of the presidential elections on 28 November 2010 and Laurent Gbagbo’s arrest on 11 April 2011. However, as far as the subject-matter of the proceedings against Simone Gbagbo is concerned, the minutes do not provide real assistance in discerning the factual criminal conduct attributed to her or the facts underlying the accusations that are purportedly being investigated.

¹³⁸ ICC-02/11-01/12-37-Conf-Anx20.

¹³⁹ ICC-02/11-01/12-37-Conf-Anx21.

Rather, the broad and generic questions posed to her largely relate to [REDACTED]
 [REDACTED]
 [REDACTED]. In this sense, these *procès-verbaux* merely indicate that the purported domestic proceedings concern the alleged commission by Simone Gbagbo (and others) of crimes against individuals in the context of the 2010-2011 post-electoral violence in Abidjan.

74. The documents that refer to procedural activities by the domestic authorities do not provide any further information as to the defining factual parameters of the domestic investigations. Indeed, they essentially list, or quote in full, the relevant provisions of the Ivorian Criminal Code: in particular, this is the case of the *réquisitoires introductifs*¹⁴⁰ and *supplétif*,¹⁴¹ the different *procès-verbaux de première comparution*,¹⁴² the *mandats de dépôt* and the *ordonnances de détention préventive*,¹⁴³ and the decision of the *Chambre d'Accusation* reassigning the different proceedings to a single *juge d'instruction*.¹⁴⁴

75. In addition, the information available to the Chamber on the scope of the national proceedings against Simone Gbagbo is also unclear with respect to the crimes that are allegedly being pursued. For example, the decision of the *Chambre d'Accusation* of February 2013 reassigning the dossiers to a single *juge d'instruction* lists the allegations against Simone Gbagbo in the different

¹⁴⁰ Annex 2 to the Admissibility Challenge.

¹⁴¹ Annex 4 to the Admissibility Challenge.

¹⁴² Annex 6 to the Admissibility Challenge; ICC-02/11-01/12-37-Conf-Anx12; ICC-02/11-01/12-37-Conf-Anx13; ICC-02/11-01/12-37-Conf-Anx14.

¹⁴³ Annex 7 to the Admissibility Challenge; ICC-02/11-01/12-37-Conf-Anx3; ICC-02/11-01/12-37-Conf-Anx3; ICC-02/11-01/12-37-Conf-Anx4; ICC-02/11-01/12-37-Conf-Anx6; ICC-02/11-01/12-37-Conf-Anx7; ICC-02/11-01/12-37-Conf-Anx8; ICC-02/11-01/12-37-Conf-Anx9; ICC-02/11-01/12-37-Conf-Anx10; ICC-02/11-01/12-37-Conf-Anx11.

¹⁴⁴ Annex 8 to the Admissibility Challenge.

proceedings,¹⁴⁵ but makes no reference to the allegations of [REDACTED] [REDACTED] which had been the object of the *réquisitoire supplétif* of May 2012¹⁴⁶ and were mentioned at the *premières comparutions* of 13 November¹⁴⁷ and 3 December 2012¹⁴⁸ in the proceedings before both the *juge d'instruction* of the *9ème Cabinet* and the *juge d'instruction* of the *10ème Cabinet*. It is therefore unclear whether these allegations were still being pursued when the *Chambre d'Accusation* issued its decision on 13 February 2013.

76. Therefore, even considering the different documents altogether, the Chamber 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. In this regard, the Chamber recalls that, according to the jurisprudence of the Appeals Chamber, the State challenging the admissibility of a case, even when the alleged domestic proceedings are still at an early stage of investigation, must be able to show the contours or parameters of that investigation in order to determine the subject-matter of the national investigation. If a State is unable to clearly indicate the contours of its national investigation, the State cannot assert that there exists a conflict of jurisdictions with the Court.¹⁴⁹

77. The Chamber also recalls that it is for the State challenging admissibility to provide, together with its challenge, sufficient evidence to substantiate that the case before the Court is being investigated or prosecuted

¹⁴⁵ Annex 8 to the Admissibility Challenge, p. 8.

¹⁴⁶ Annex 4 to the Admissibility Challenge.

¹⁴⁷ ICC-02/11-01/12-37-Conf-Anx13.

¹⁴⁸ ICC-02/11-01/12-37-Conf-Anx14.

¹⁴⁹ Appeals Chamber, "[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'](#)", 21 May 2014, ICC-01/11-01/11-547-Red, paras 83-84.

at the national level.¹⁵⁰ In the view of the Chamber, Côte d'Ivoire has been accorded sufficient opportunities to substantiate its claim that the competent national authorities are investigating Simone Gbagbo for the same conduct that is alleged in the proceedings before the Court. In particular, on 28 August 2014, upon review of the documentation initially submitted by Cote d'Ivoire, the Chamber drew its attention to the need to: (i) substantiate that domestic proceedings against Simone Gbagbo were in progress; and (ii) provide further evidence indicating the defining factual parameters of such proceedings, including in relation to Simone Gbagbo's conduct allegedly being investigated by the domestic authorities and on whether, and to what extent, the anticipated case at the national level covered fully or in part Simone Gbagbo's responsibility for acts of murder, rape and other forms of sexual violence inhumane acts and persecution committed within the context of the march on the RTI building on 16 December 2010, the women's march in Abobo on 3 March 2011, the Abobo market shelling on 17 March 2011, and the Yopougon massacre on 12 April 2011. The Chamber granted Côte d'Ivoire an additional opportunity to complement its Admissibility Challenge in particular in respect of these issues.¹⁵¹

78. However, the documentation provided as part of, and in addition to, the Admissibility Challenge does not demonstrate that concrete, tangible and progressive investigative steps are being undertaken by the domestic authorities of Côte d'Ivoire in order to ascertain Simone Gbagbo's criminal responsibility for the same conduct as that alleged in the proceedings before

¹⁵⁰ See e.g., Appeals Chamber, "[Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute'](#)", 30 August 2011, ICC-01/09-02/11-274, para. 98; and *id.*, "[Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'](#)", 21 May 2014, ICC-01/11-01/11-547-Red, para. 198.

¹⁵¹ Pre-Trial Chamber I, "[Decision on further submissions on issues related to the admissibility of the case against Simone Gbagbo](#)", 28 August 2014, ICC-02/11-01/12-44.

the Court. Nor does this documentation indicate that Simone Gbagbo is currently being prosecuted by Côte d'Ivoire for the same conduct attributed to her in the case before the Court.

V. CONCLUSION

79. In light of the above, the Chamber concludes that Côte d'Ivoire has not demonstrated that the case against Simone Gbagbo alleged in the proceedings before the Court is currently subject to domestic proceedings within the meaning of article 17(1)(a) of the Statute. Accordingly, the Chamber finds that the present case is admissible before the Court.

80. The present decision disposing of the Admissibility Challenge results in the termination of the effects of article 95 of the Statute, which, as of the filing of the Admissibility Challenge on 30 September 2013, had allowed Côte d'Ivoire to postpone the execution of the request for the surrender of Simone Gbagbo to the Court.¹⁵² Côte d'Ivoire shall therefore proceed to surrender Simone Gbagbo to the Court without delay.

FOR THESE REASONS, THE CHAMBER

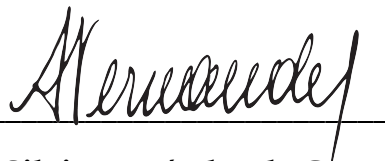
REJECTS the Prosecutor's request for leave to respond;

REJECTS Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo before the Court; and

REMINDS Côte d'Ivoire of its obligation to surrender Simone Gbagbo to the Court without delay.

¹⁵² See Pre-Trial Chamber I, "[Decision on the conduct of the proceedings following Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo](#)", 15 November 2013, ICC-02/11-01/12-15.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Ekaterina Trendafilova



Judge Christine Van den Wyngaert

Dated this 11 December 2014

At The Hague, The Netherlands