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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. SIMONE GBAGBO

**Public
With Confidential Annex 1**

Public redacted version of "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, 9 April 2014

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Eric MacDonald

Counsel for the Defence

Ms Sylvia Geraghty

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Mr Jean-Pierre Mignard

Mr Jean-Paul Benoit

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Section**

Introduction

1. The Prosecution submits that the Admissibility Challenge lodged by the Republic of Côte d'Ivoire ("the Applicant"), together with the additional supporting documentation provided, does not provide sufficient information to establish that the conduct which is the subject of national proceedings against Simone Gbagbo in Côte d'Ivoire is substantially the same as that which forms the basis of the proceedings before the ICC. Nor has the Applicant provided the Court with evidence of a sufficient degree of specificity and probative value to demonstrate that it is indeed investigating the case. In particular, although it appears from the materials provided that some concrete steps may have been taken, such as the conduct of police interviews, these are not furnished in any appropriate form. Since it is not disputed that Ms Gbagbo is being held in detention in Côte d'Ivoire on the basis of serious crimes, the Prosecution does not oppose granting the Applicant a final opportunity to substantiate its claim without delay. This might reasonably occur, for example, in the context of any final reply that the Applicant may be granted leave to file. Absent such substantiation, the challenge should be dismissed and the case declared admissible.

Confidentiality

2. This submission is filed as confidential as it refers to documents attached to the Admissibility Challenge which have this same level of confidentiality.¹

¹ A public redacted version of the Admissibility Challenge is available: ICC-02/11-01/12-11-Red; additionally, the Applicant's submission of supplemental documents is also filed as confidential: ICC-02/11-01/12-37-Conf, with a public redacted version available: ICC-02/11-01/12-37-Red; however the originals of both filings and their annexes remain confidential.

Procedural Background

3. On 7 February 2012, the Prosecution filed the “Prosecutor’s Application Pursuant to Article 58 as to Simone Gbagbo”² seeking a warrant of arrest against the suspect.
4. On 29 February 2012, Pre-Trial Chamber III issued the Warrant of Arrest for Simone Gbagbo.³
5. On 2 March 2012, Pre-Trial Chamber III issued its Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo (the “Article 58 Decision”).⁴
6. On 1 October 2013, Côte d’Ivoire filed its “*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*” (the “Admissibility Challenge”).⁵
7. On 24 October 2013, the Prosecution filed its “*Requête de l’Accusation pour l’émission d’une ordonnance aux fins de divulgation de documents essentiels à l’analyse de la question de la recevabilité de l’affaire menée contre Madame Gbagbo*” (“Preliminary Request”).⁶
8. On 15 November 2013, the Chamber issued its “Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” (“Decision of 15 November 2013”), providing

² ICC-02/11-35-US-Exp.

³ ICC-02/11-01/12-1; originally issued Under Seal *Ex parte* but reclassified as Public on 22 November 2012.

⁴ ICC-02/11-01/12-2-US-Exp. A public redacted version is also available (ICC-02/11-01/12-2-Red).

⁵ ICC-02/11-01/12-11-Conf. A public redacted version is also available (ICC-02/11-01/12-11-Red).

⁶ ICC-02/11-01/12-13-Conf.

instructions on the procedure to be followed and rejecting the Prosecution's Preliminary Request.⁷

9. On 18 December 2013, the Prosecution filed a request seeking an extension of time until 24 February 2014 to submit its observations on the Admissibility Challenge.⁸ On 19 December 2013, the Chamber, *inter alia*, granted this request.⁹
10. On 17 February 2014, the Applicant filed a request to submit additional documents.¹⁰ On 20 February 2014, the Chamber granted the Applicant's request to submit additional documents and, *inter alia*, rescheduled the time limit for the submission of this response to 9 April 2014.¹¹ On 26 February 2014, the Applicant submitted its additional documents.¹²

Submissions

11. As observed by the Appeals Chamber, an admissibility determination follows a two-step inquiry, namely, (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there exists an on-going investigation or prosecution of the case at the national level (first limb), and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution (second limb).¹³ The submissions below are divided into the following sets of inquiries: (1) whether the case against Ms Gbagbo at the national level corresponds to that which is before the Court; (2) whether the national authorities have taken concrete steps to investigate Ms Gbagbo in this regard; and (3) the ability or willingness of Côte d'Ivoire genuinely to carry out the investigation.

⁷ ICC-02/11-01/12-15.

⁸ ICC-02/11-01/12-26.

⁹ ICC-02/11-01/12-29.

¹⁰ ICC-02/11-01/12-30.

¹¹ ICC-02/11-01/12-35.

¹² ICC-02/11-01/12-37-Conf. A public redacted version is also available (ICC-02/11-01/12-37-Red).

¹³ ICC-01/04-01/07-1497 OA8, paras.1, 75-79. See also ICC-01/11-01/11-344-Red, para.58; ICC-01/11-01/11-466-Red, para.26.

12. The Prosecution recalls the finding of the Appeals Chamber that the party lodging the admissibility challenge bears the burden to substantiate its claim of inadmissibility, stating that “a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible”.¹⁴ This burden refers to both limbs of the admissibility inquiry, and the Applicant is required to substantiate all aspects of its submissions to the extent required by the concrete circumstances of the case.¹⁵

1. The contours of the case

A. The case against Ms Gbagbo before the Court

13. A determination of admissibility is case-specific, the constituent elements being the “person” and the alleged “conduct”.¹⁶ For a domestic investigation to cover the same “case” as that before the ICC, it must be demonstrated that: (a) the person subject to the domestic proceedings is the same person against whom the proceedings before the ICC are being conducted; and (b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the ICC.¹⁷

14. The first part of the test has been met in the present case insofar as the national proceedings in Côte d’Ivoire relate to the same person, Simone Gbagbo, who is sought by the Court.

15. In relation to conduct, this requires the successive identification of: (i) the conduct of Ms Gbagbo that is the subject of the proceedings before the Court; and (ii) the conduct of Ms Gbagbo that is allegedly the subject of Côte d’Ivoire’s

¹⁴ ICC-01/09-01/11-307 OA, para.62. Rule 58 indicates that the challenge must be in writing and contain the basis for it, which suggests that the challenge must be substantiated.

¹⁵ ICC-01/11-01/11-344-Red, para.52; ICC-01/11-01/11-466-Red, paras.27, 208.

¹⁶ ICC- 01/09-02/11-274 OA, paras.39-40 cited in ICC-01/11-01/11-466-Red, para.66(i).

¹⁷ ICC-01/04-01/06-8-Corr, para.31. See also, ICC-02/05-01/07-1-Corr, para.24; ICC-01/04-01/07-4, para.20; ICC-01/04-01/07-262, para.21; ICC-02/04-01/05-377, paras.17-18; ICC-01/09-01/11-101, para.54; ICC-01/09-02/11-96, para.48; ICC-01/09-02/11-274, para.39. See ICC-01/11-01/11-466-Red, para.66(i).

national proceedings, as emerging from the evidence presented by the Applicant in support of its claim. The identification of the relevant conduct in the two proceedings frames the terms of reference for relevant comparison.¹⁸

16. In terms of the specificity of proceedings before the Court relative to particular incidents or events, this Chamber has previously held that cases may differ in terms of how broad or narrow the relevant conduct is construed.¹⁹ This means that while in some cases one or more discrete incidents or events, having narrow factual parameters, may be identified which overlap fully with the alleged conduct, in other cases any reference to specific incidents or events may assist in proving the alleged conduct to the requisite threshold without however exhausting it.²⁰ Hence, the determination of the relevant conduct will require a case-by-case analysis.²¹
17. This Chamber has held that the parameters of the “conduct” alleged in the proceedings before the ICC are set out in the document that defines the factual allegations against the person at the phase of the proceedings in question.²² In this case, this is set out by the Warrant of Arrest, read in conjunction with the Article 58 Decision and the relevant parts of the Chamber’s Decision on the Laurent Gbagbo Application that are incorporated into the Article 58 Decision.²³
18. The Warrant of Arrest for Ms Gbagbo has been issued by the Chamber for her alleged criminal responsibility as an indirect co-perpetrator “for the crimes against humanity of (1) murder under Article 7(l)(a); (2) rape and other forms of sexual violence under Article 7(l)(g); (3) other inhumane acts under Article 7(l)(k); and (4) persecution under Article 7(l)(h) of the Statute committed in the

¹⁸ ICC-01/11-01/11-466-Red, para.67.

¹⁹ ICC-01/11-01/11-466-Red, para.75.

²⁰ ICC-01/11-01/11-466-Red, para.75.

²¹ ICC-01/11-01/11-466-Red, para.74.

²² ICC-01/11-01/11-466-Red, paras.66(iii) and 68. See also ICC-01/11-01/11-344-Red, paras.77-78; ICC-01/09-02/11-274 OA, paras.38-40.

²³ ICC-02/11-01/12-2-US-Exp, para.19.

territory of Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011".

19. More specifically, the following relevant facts are alleged in the Warrant of Arrest which, for ease of reference, are accompanied by the paragraph numbering in the Arrest Warrant:

5. [...] in the aftermath of the presidential elections in Côte d'Ivoire pro-Gbagbo forces attacked the civilian population in Abidjan and in the west of the country, from 28 November 2010 onwards. They targeted civilians who they believed were supporters of Alassane Ouattara, and the attacks were often directed at specific ethnic or religious communities.
6. [...] these attacks by pro-Gbagbo forces during the post electoral violence were committed pursuant to an organisational policy. Furthermore, they were widespread and systematic, as demonstrated, inter alia, by the extended time period during which crimes were committed (between 28 November 2010 and May 2011), their geographic spread (many of the neighbourhoods of Abidjan and the west of Côte d'Ivoire), the high number of reported victims and the general pattern of the way in which the offences were committed.
7. [...] the crimes against humanity of murder under Article 7(l)(a), rape and other forms of sexual violence under Article 7(l)(g), other inhumane acts under Article 7(l)(k) and persecution under Article 7(l)(h) of the Statute, were committed in Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011.
8. [...] these acts occurred in the context of a widespread or systematic attack directed against the Côte d'Ivoire civilian population within the meaning of Article 7(1) of the Statute.
9. [...] Ms Gbagbo bears individual criminal responsibility for the crimes charged in this Application, as "an indirect co-perpetrator" pursuant to Article 25(3)(a) of the Statute
10. [...] the plan (and the policy) existed and that Mr Gbagbo's inner circle, to which Ms Gbagbo belonged, met frequently to discuss the implementation and coordination of the plan. Ms Gbagbo was ideologically and professionally very close to her husband, Mr Gbagbo. She participated in all the meetings during the relevant period. Although not elected, Ms Gbagbo acted as an alter ego for her husband, exercising the power to make State decisions. Ms Gbagbo was also close to other members of Mr Gbagbo's inner circle who were involved in the implementation of the Common Plan. Moreover, at meetings or public gatherings during the post-election crisis, Ms Gbagbo expressed her support for the Common Plan, and instructed the pro-Gbagbo forces to commit crimes against individuals who posed a threat to her husband's power.

11. [...] Ms Gbagbo and other members of Mr Gbagbo's inner circle were aware that implementing the common plan would, in the ordinary course of events, lead to the commission of the offences set out above.
12. [...] by implementing the common plan, Ms Gbagbo as a member of Mr Gbagbo's inner circle exercised joint control over the crimes by having the power to control and give instructions directly to the youth militia who were systematically recruited, armed, trained and integrated into the FDS chain of command with a view to supporting the implementation of the common plan. Throughout the post-election crisis, Ms Gbagbo convened frequent meetings with the most senior FDS generals to discuss, in particular, the situation in Abobo. She also instructed other senior FDS officers regarding measures to dissuade anti-Gbagbo demonstrations, and she asked them to put troops at her disposal to provide security for a Minister. Moreover, The Chamber believes that there is sufficient evidence that Ms Gbagbo ensured that the regular FDS forces were given military equipment.
13. [...] given the position of Ms Gbagbo as a member of Mr Gbagbo's inner circle and her role as regards the common plan, that she made a coordinated and essential contribution to its realisation. She attended meetings of Mr Gbagbo's inner circle and participated in making decisions on the implementation of the common plan. During one of those meetings, a pro-Gbagbo youth leader proposed attacking members of Mr Ouattara's political party, the *Rassemblement des houphouëtistes pour la démocratie et la paix* ("RHDP"), and destroying or looting their belongings, so that they would suffer like other Ivorians had suffered because of the actions of Mr Ouattara. During this meeting, Ms Gbagbo openly expressed her agreement with this proposal. Moreover, Ms Gbagbo played a key role in recruiting, arming and integrating thousands of volunteers and enlisting them into the FDS chain of command.
14. [...] the pro-Gbagbo forces that put the common plan into effect did so by almost automatic compliance with the orders they received from Ms Gbagbo and other members of Mr Gbagbo's inner circle.
15. [...] Ms Gbagbo acted with the necessary degree of intent and knowledge by: i) adopting the common plan; ii) being aware of its implementation and the means other members of the inner circle had at their disposal to implement the common plan; iii) meeting with members of Mr Gbagbo's inner circle to discuss and coordinate the implementation of the common plan; iv) playing a key role in recruiting and instructing the *galaxie patriotique*, and integrating them into the FDS; and v) being aware of the contribution of other members of Mr Gbagbo's inner circle to the implementation of the common plan. Furthermore, the Chamber is of the view that Ms Gbagbo was fully conscious of the factual circumstances that enabled her and other members of Mr Gbagbo's inner circle to exercise joint control over the crimes.²⁴

²⁴ ICC-02/11-01/12-1.

20. In the Article 58 Decision, the Chamber identifies the common plan as follows:
- “Mr Gbagbo and his inner circle adopted a policy to launch violent attacks against Mr Gbagbo's political opponent, Mr Ouattara, members of the latter's political group and civilians believed to support him, in order to retain power by all means”.²⁵
21. The Article 58 Decision must also be read in conjunction with the Chamber's Decision on the Laurent Gbagbo Application, due to the extensive similarities between the two cases. In particular, at paragraph 19 of the Article 58 Decision the Chamber finds that, in all the circumstances, its conclusions in its Decision on the Laurent Gbagbo Application are equally applicable as regards the contextual elements of the alleged crimes against humanity, along with the underlying acts it is suggested were committed by the pro-Gbagbo forces.²⁶
22. This close inter-linkage between the Arrest Warrant and the two Article 58 Decisions in the *Simone Gbagbo* and *Laurent Gbagbo* cases is evident by a close reading of each relevant finding. Thus, paragraphs 5, 6, 7 and 8 of the Arrest Warrant correspond respectively to the findings of the Chamber at paragraphs 36, 47, 54, 69 and 70 of the Laurent Gbagbo Article 58 Decision; while paragraphs 9-15 of the Arrest Warrant correspond respectively to the findings of the Chamber at paragraphs 29-35 of the (Simone Gbagbo) Article 58 Decision. As described below, this inter-linkage is relevant to determining the precise factual scope of the conduct which forms the basis of the present case.
23. Specifically, in relation to the underlying acts which form the basis of the Arrest Warrant,²⁷ the Chamber recalls at paragraph 23 of the Article 58 Decision its previous finding in its Decision on the Laurent Gbagbo Application that “on the evidence, there were reasonable grounds to believe that acts of murder, rape and

²⁵ ICC-02/11-01/12-2-US-Exp, para.21, which refers to the conclusions of the Chamber in its Decision on the Application against Laurent Gbagbo.

²⁶ ICC-02/11-01/12-2-US-Exp, para.19.

²⁷ ICC-02/11-01/12-1, para.7.

other forms of sexual violence, other inhumane acts as well as several acts of persecution had been committed, by pro-Gbagbo forces, *during the incidents referred to by the Prosecutor in support of the charges*” (emphasis added). These incidents are identified by the Chamber as:

- (i) The attacks relating to the *Radiodiffusion Télévision Ivoirienne* (the state-sponsored radio-television; 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;
- (iv) The Yopougon massacre on 12 April 2011.²⁸

24. The relevance of these four incidents is further apparent in the Chamber’s Decision on the Laurent Gbagbo Application, wherein the Chamber enters findings of reasonable grounds to believe that specific underlying acts were committed in the context of these incidents. Thus, under Count 1, the Chamber finds reasonable grounds to believe that specific underlying acts were committed “in the context of the march on the RTI station on 16 December 2010”,²⁹ “in the context of the RHDP Women's march on 3 March 2011”,³⁰ “in the context of the Abobo market shelling on 17 March 2011”,³¹ and “in relation to the Yopougon massacre on 12 April 2011”.³² The same logic is applied in Counts 2-4 relating to the four incidents relied on by the Prosecutor in support of the charges.

25. Thus, in the instant case, the relevant factual parameters of the criminal conduct alleged against Ms Gbagbo as defined in the documents described above relate to four incidents occurring in Abidjan between 16 December 2010 and 12 April 2011. The Prosecution submits that it is this statement of facts which provides the

²⁸ ICC-02/11-01/12-2-US-Exp, para.16.

²⁹ ICC-02/11-01/11-9-US-Exp, para.57(i)-(vii). A public redacted version is also available (ICC-02/11-01/11-9-Red).

³⁰ ICC-02/11-01/11-9-US-Exp, para.57(viii)-(ix).

³¹ ICC-02/11-01/11-9-US-Exp, para.57(x).

³² ICC-02/11-01/11-9-US-Exp, para.57(xi).

basis for a comparison of the relevant conduct in the proceedings before the ICC set against those at the national level. A case will be “substantially the same” if any differences in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter.³³

26. In this regard, the Prosecution also recalls the Chamber’s observation in the case against Mr Al-Senussi that the fact that all or some of the incidents or events referred to in an Article 58 Decision are encompassed in the national proceedings may constitute a relevant indicator that the case subject to said proceedings is indeed the same as the one before the Court.³⁴ In the same vein, the Chamber observed that the fact that incidents which are described in the Article 58 Decision as particularly violent or which appear to be significantly representative of the conduct attributed to the suspect, are not covered by the national proceedings may be taken into account in the Chamber’s ultimate determination of whether those proceedings cover the same conduct alleged against the suspect in the proceedings before the Court.³⁵

27. In sum, the present case before the Court concerns the individual criminal responsibility of Ms Gbagbo for murder, rape and other forms of sexual violence, other inhumane acts and acts of persecution carried out against the civilian population, because of their perceived political support of Alassane Ouattara and their ethnic and religious affiliation, allegedly committed directly by the Ivorian Defence and Security Forces, which were reinforced by youth militias and mercenaries loyal to Laurent Gbagbo, during attacks taking place in Abidjan between 16 December 2010 and 12 April 2011 and as part of a policy adopted by

³³ ICC-01/11-01/11-384OA4, paras.51-72; as also recalled in the Prosecution response to the Al-Senussi Admissibility Decision, ICC-01/11-01/11-483-Corr, para.143. In particular, the Prosecution has submitted that the *ne bis in idem* jurisprudence from national and regional courts may be of guidance to determine what “substantially the same conduct” means, given the close interlink between *ne bis in idem* and complementarity provisions, their common function in determining forum allocation and the similarity in the inquiry regarding whether the two cases are indeed “the same”, and what “same” means in this context; ICC-01/11-01/11-384 OA4, paras.57-65.

³⁴ ICC-01/11-01/11-466-Red, para.79.

³⁵ ICC-01/11-01/11-466-Red, para.79.

Mr Gbagbo and his inner circle to launch violent attacks against Mr Gbagbo's political opponent, Mr Ouattara, members of the latter's political group and civilians believed to support him, in order to retain power by all means. This constitutes the relevant conduct alleged in the proceeding before the Court that defines the scope of the criminal case against Ms Gbagbo.

B. The case against Ms Gbagbo in Côte d'Ivoire's national proceedings

Legal parameters

28. This Chamber has previously held in the cases against Mr Gaddafi and Mr Al-Senussi that 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.³⁶ As the Prosecution has previously observed, since the Statute does not set out to regulate how States may choose to incorporate crimes within the jurisdiction of the Court into their national legal system, there may be discrepancies in the way a particular act is criminalised under the Rome Statute and under national law.³⁷
29. Moreover, other provisions of national law may also impact on the admissibility of a particular case. These include the availability of defences or other grounds for excluding criminal responsibility not permissible under the Rome Statute, the existence of significant discrepancies or lacunae in available modes of liability that might fatally affect the theory of the national prosecution, or the existence of immunities or special procedural rules based on official capacity that could impede prosecution. The assessment of complementarity, therefore, cannot be based on a rigid approach that examines only whether the conduct concerned is criminalised as an ordinary or international crime. Instead, the Chamber will need to examine a range of factors, on a case-by-case basis, in order for it to be

³⁶ ICC-01/11-01/11-466-Red, para.66(iv); ICC-01/11-01/11-344-Conf-Exp, paras.85 and 88.

³⁷ ICC-01/11-01/11-167-Red, para.23; ICC-01/11-01/11-483-Corr, para.146.

able to determine how national law would shape the contours of the proceedings at hand.³⁸

30. Thus, the term “substantially” should be understood to denote that the conduct needs to be the same in substance, bearing in mind such factors as those described above. The national authorities are not necessarily required to charge the suspect under the exact same legal qualification.

31. As a preliminary matter, the Prosecution recalls its previous observation in these proceedings concerning the limited body of information provided by the Applicant in support of its challenge to the admissibility of the case, which constrains the ability of the Prosecution to discern the contours of the national case.³⁹

The national proceedings

32. The criminal proceedings against Ms Gbagbo in Côte d’Ivoire appear to be proceeding in two parts. Firstly, there are the charges against her for which she has been committed to trial before the *Cour d’Assises d’Abidjan*, and secondly, there are the matters under investigation before the *Juge d’Instruction du 8^{ème} cabinet du Tribunal de Première Instance d’Abidjan*.

*The Proceedings before the **Cour d’Assises d’Abidjan***

33. The charges for the proceedings before the *Cour d’Assises d’Abidjan* are as identified in the *Arrêt de la Chambre d’Accusation de la Cour d’Appel d’Abidjan du 10 juillet 2013*⁴⁰ [REDACTED]. Although these charges appear to be in the nature of crimes against the state, the underlying facts appear to have a certain degree of similarity with the conduct alleged in the proceedings before the Court.

³⁸ ICC-01/11-01/11-167-Red, para.24; ICC-01/11-01/11-483-Corr, para.147.

³⁹ ICC-02/11-01/12-13-Conf.

⁴⁰ ICC-02/11-01/12-11-Conf-Anx10.

34. In particular, the facts before the *Cour d'Assises d'Abidjan* have certain commonalities with the case before the ICC, such as the location of the offences, namely [REDACTED], and the time frame of [REDACTED].⁴¹ There are also references to [REDACTED].⁴² Other aspects of the national proceedings do not appear to correspond to the case before the Court and are related instead to her [REDACTED]. The general nature of the latter allegations renders it impossible to determine whether they pertain to any aspect of the conduct alleged in the proceedings before this Court. It is also notable that the *Arrêt de la Chambre d'Accusation de la Cour d'Appel d'Abidjan du 10 juillet 2013* includes references to [REDACTED]⁴³ which may have some similarities to the accusation of persecution in the charges before the Court. However, [REDACTED].

The proceedings before the Juge d'Instruction

35. With respect to proceedings before the *Juge d'Instruction du 8^{ème} cabinet du Tribunal de Première Instance d'Abidjan*, the offences appear to be described in a decision that consolidated several proceedings before one examining magistrate (the “consolidation decision”).⁴⁴ At page 5 of that decision,⁴⁵ the offences are described as follows:

[REDACTED]:

-[REDACTED]

-[REDACTED];

-[REDACTED].

⁴¹ ICC-02/11-01/12-11-Conf-Anx10, p.67.

⁴² ICC-02/11-01/12-11-Conf-Anx10, p.68.

⁴³ ICC-02/11-01/12-11-Conf-Anx10, p 69.

⁴⁴ ICC-02/11-01/12-11-Conf-Anx8.

⁴⁵ ICC-02/11-01/12-11-Conf-Anx8, p.6.

36. The facts underpinning these offences, however, are merely referred to in a general and brief manner in the consolidation decision: [REDACTED].⁴⁶
37. It should also be noted that [REDACTED],⁴⁷ [REDACTED].⁴⁸ It is therefore unclear whether [REDACTED] are still being pursued by the national authorities or have been discontinued.
38. A more detailed description of the facts underpinning the national investigation of Ms Gbagbo now before the *Juge d'Instruction du 8^{ème} cabinet du Tribunal de Première Instance d'Abidjan* appears in the various *procès-verbaux d'interrogatoire de première comparution*, [REDACTED],⁴⁹ [REDACTED],⁵⁰ [REDACTED]⁵¹ [REDACTED]⁵². [REDACTED]⁵³ [REDACTED].⁵⁴ The circumstances appear to overlap in general terms with the conduct alleged in the proceedings before the Court. However, they are presented in general terms and lack the precision necessary to determine if the conduct being investigated in Côte d'Ivoire is the same as that which is before the Court, or any part thereof. For example, while it appears that the national proceedings involve the offence of murder, it is unclear which specific acts of murder form the subject of the national investigations.
39. Notably, although each of the *procès-verbaux d'interrogatoire de première comparution* mentions "[REDACTED]" there is a lack of specificity as to the factual or evidentiary basis of the charges. Moreover, [REDACTED]. There is some description of the offences in these documents, including reference to specific sections of the penal code. Nonetheless, the precise offences being investigated remain indeterminate since the *procès-verbaux* are inconsistent with each other as regards the provisions of the penal code relied upon, and are

⁴⁶ ICC-02/11-01/12-11-Conf-Anx8, p.5.

⁴⁷ ICC-02/11-01/12-37-Conf-Anx13 and ICC-02/11-01/12-37-Conf-Anx14.

⁴⁸ ICC-02/11-01/12-11-Conf-Anx8.

⁴⁹ ICC-02/11-01/12-37-Conf-Anx12.

⁵⁰ ICC-02/11-01/12-37-Conf-Anx13.

⁵¹ ICC-02/11-01/12-11-Conf-Anx6.

⁵² ICC-02/11-01/12-37-Conf-Anx14.

⁵³ Although one of them, ICC-02/11-01/12-37-Conf-Anx14, [REDACTED].

⁵⁴ Although one of them, ICC-02/11-01/12-37-Conf-Anx12, [REDACTED].

further inconsistent with the provisions of the penal code listed in the consolidation decision. To assist the Chamber the Prosecution has prepared a chart comparing the provisions of the penal code mentioned in the consolidation decision and each of the *Procès-verbaux d'interrogatoire de première comparution*, as set out in Annex 1, together with extracts of the relevant provisions of the penal code.

The three procès-verbaux d'interrogatoire au fond of Ms Gbagbo

40. In relation to the other supporting material provided by the Applicant, there is little information that identifies the precise facts that form the basis of the national case beyond general assertions. For example, in the three documents related to the questioning of Ms Gbagbo by the examining magistrate, the *P.V. d'interrogatoire au fond de: Ehivet Simone Gbagbo* dated 07/12/12,⁵⁵ 04/02/14⁵⁶ and 05/02/14,⁵⁷ [REDACTED],⁵⁸ which suggests that the national investigations against her appear to relate to the same series of events and time period as those which are the subject of the proceedings before the ICC. However, these documents do not clarify which underlying acts or incidents the national authorities are investigating, or their relationship to any of the underlying acts or incidents identified in the Article 58 decision or those that are incorporated from the Chamber's Decision on the Laurent Gbagbo Application.

The Réquisitoires introductifs et supplétif

41. The supporting material also includes three *Réquisitoires introductifs*⁵⁹ and one *Réquisitoire supplétif*.⁶⁰ These documents confirm the filing of charges by the *Procureur de la République* with the examining magistrates and the dates this

⁵⁵ [REDACTED].

⁵⁶ ICC-02/11-01/12-37-Conf-Anx16.

⁵⁷ ICC-02/11-01/12-37-Conf-Anx17.

⁵⁸ [REDACTED] at ICC-02/11-01/12-37-Conf-Anx17, p.3.

⁵⁹ ICC-02/11-01/12-11-Conf-Anx2.

⁶⁰ ICC-02/11-01/12-11-Conf-Anx4.

occurred.⁶¹ However, they do not identify the factual or evidentiary basis for the listed offences, nor do they identify with any degree of specificity the crimes that are to be further investigated by the examining magistrates.

Documents pertaining to the civil parties

42. One of the supporting documents pertains to a civil party: *P.V. d'audition*.⁶² It provides a record of a civil party's appearance before the examining magistrate. While the acts and crimes described by the civil party do appear to be part of the post electoral violence, again, they do not pertain to any of the underlying acts or incidents identified in the Article 58 decision or those that are incorporated from the Chamber's Decision on the Laurent Gbagbo Application.⁶³
43. The other document pertaining to civil parties is [REDACTED].⁶⁴ [REDACTED].⁶⁵ Although this document appears to provide evidence of some degree of factual overlap between the two cases, the document itself [REDACTED]: it does not by itself demonstrate whether the national authorities are actually investigating the allegations or its relationship to the domestic case against Ms Gbagbo.

Documents that have not been provided

44. The supporting material provided by the Applicant makes reference to various other documents that may have been of assistance in determining the relationship between the national proceedings and the case before the Court, but which are not provided. For example, the *Arrêt de la Chambre d'Accusation de la Cour d'Appel d'Abidjan*, dated 10 July 2013,⁶⁶ contains information about certain charges against Ms Gbagbo, [REDACTED]. However, the information provided

⁶¹ The Prosecution observes that the three *Réquisitoires introductifs* are dated 6 February 2012 and that their existence was unknown to the Prosecution when it filed, on 7 February 2012, its application pursuant to Article 58: ICC-02/11-35-US-Exp.

⁶² ICC-02/11-01/12-37-Conf-Anx18.

⁶³ ICC-02/11-01/12-2-US-Exp, para.16; ICC-02/11-01/12-2-Red.

⁶⁴ ICC-02/11-01/12-37-Conf-Anx19.

⁶⁵ [REDACTED].

⁶⁶ ICC-02/11-01/12-11-Conf-Anx10.

does not assist in determining whether the subject-matter of these charges corresponds to the conduct which forms the basis of proceedings before the Court. The document does, however, refer to other materials which have not been provided and which might have been of assistance in this regard. Notably, on the first page it states: [REDACTED], but which have not been submitted to this Court. On page [REDACTED].

45. The supporting material provided by the Applicant also includes copies of three [REDACTED].⁶⁷ [REDACTED]. No documents from these two volumes of [REDACTED].
46. The *Arrêt de la Chambre d'Accusation de la Cour d'Appel d'Abidjan*, dated 13 February 2013⁶⁸ is a decision of that court consolidating various proceedings against Ms Gbagbo before one examining magistrate. This document makes reference to several other documents that have not been provided, including the following: [REDACTED].

Conclusion regarding the case against Ms Gbagbo in the national proceedings

47. On the basis of the above, it appears that national criminal investigations and court proceedings against Ms Gbagbo have been initiated. Moreover, the national proceedings appear to bear broad similarity to the case before the Court in that (a) some of the offences appear to be similar in nature; (b) the offences relate to the context of the post-electoral violence; and (c) the time frame, while wider than that which frames the case before the ICC, includes the relevant period of 16 December 2010 to 12 April 2011. However, from the information provided, it remains unclear whether the national offences described in the Applicant's submissions and the supporting materials cover all aspects of the offences which are the subject of the case before the Court, such that there

⁶⁷ ICC-02/11-01/12-11-Conf-Anx5, pp.7-12.

⁶⁸ ICC-02/11-01/12-11-Conf-Anx8.

continues to be insufficient information and evidence to demonstrate the actual contours of the case at the national level. Lacking this information, 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. As such, the information is insufficient to establish that the case being investigated in Côte d'Ivoire pertains to the same conduct that is alleged before the ICC.

2. Evidence substantiating the existence of national proceedings

48. The expression “the case is being investigated” must be understood as requiring the taking of “concrete and progressive investigative steps” to ascertain whether the person is responsible for the conduct alleged before the ICC.⁶⁹ A mere assurance that the national on-going investigation covers the same case as that which is before the Court is not sufficient to discharge the burden of proof.⁷⁰ As the Appeals Chamber has held: “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”.⁷¹
49. The evidence that the State is requested to provide in order to demonstrate that it is investigating or prosecuting the case 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 is ongoing”.⁷² The Chamber, however, is not called upon to determine whether the evidence is strong enough to establish the person's

⁶⁹ ICC-01/11-01/11-239, para.11. See ICC-01/11-01/11-466-Red, para.66(ii). These investigative steps may include “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”. See ICC-01/09-02/11-274 OA, paras.1 and 40. Cited in ICC-01/11-01/11-466-Red, para.66(ii).

⁷⁰ ICC-01/11-01/11-239, para.28. Cited in ICC-01/11-01/11-466-Red, para.66(iv).

⁷¹ ICC-01/09-02/11-274 OA, paras.2 and 61. See ICC-01/11-01/11-466-Red, para.66(iv).

⁷² ICC-01/11-01/11-239, paras.10 and 11. This includes, for example, “directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the [domestic] investigation of the case, to the extent that they demonstrate that [the national] authorities are taking concrete and progressive steps to ascertain whether [the person] is responsible for the conduct [alleged in the proceedings before] the Court”.

criminal responsibility.⁷³ Thus, a finding that there exist genuine domestic proceedings is not negated by the fact that the evidence, upon scrutiny, may be found insufficient to support a conviction at the national level.⁷⁴

50. The Appeals Chamber has further held 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.⁷⁵ Therefore, in order to demonstrate the existence of relevant national proceedings, the State needs to substantiate that “an investigation is in progress at this moment”.⁷⁶

51. As the Prosecution has noted previously, many of the documents presented by the Applicant list various procedural steps taken at the national level, including orders of detention.⁷⁷ These documents, while demonstrating the existence of national proceedings against Ms Gbagbo, do not identify whether concrete and progressive investigative steps have been undertaken to ascertain whether the person is responsible for the conduct alleged before the ICC.

52. As noted above, the supporting materials include three *P.V. d’interrogatoire au fond de: Ehivet Simone Gbagbo*, dated 07/12/12,⁷⁸ 04/02/14⁷⁹ and 05/02/14.⁸⁰ [REDACTED].

53. The supporting materials also include an *Ordonnance de transport sur les lieux*⁸¹ and a *Procès-Verbal de transport sur les lieux*⁸². [REDACTED]. The *Ordonnance de transport sur les lieux* and the *Procès-Verbal de transport sur les lieux*, moreover, do not provide any information about the underlying acts or incidents being

⁷³ ICC-01/11-01/11-344-Red, para.122 cited in ICC-01/11-01/11-466-Red, para.66(vii).

⁷⁴ ICC-01/11-01/11-344-Red, para.122 cited in ICC-01/11-01/11-466-Red, para.66(vii).

⁷⁵ ICC-01/04-01/07-1497 OA8, para.56. See also ICC-01/11-01/11-212, para.9 and ICC-01/11-01/11-466-Red, para.66(v).

⁷⁶ ICC-01/11-01/11-239, para.14 cited in ICC-01/11-01/11-466-Red, para.66(v).

⁷⁷ ICC-02/11-01/12-37-Conf-Anx3, ICC-02/11-01/12-37-Conf-Anx7, ICC-02/11-01/12-37-Conf-Anx9 and ICC-02/11-01/12-37-Conf-Anx11.

⁷⁸ ICC-02/11-01/12-37-Conf-Anx15, [REDACTED].

⁷⁹ ICC-02/11-01/12-37-Conf-Anx16.

⁸⁰ ICC-02/11-01/12-37-Conf-Anx17.

⁸¹ ICC-02/11-01/12-37-Conf-Anx20.

⁸² ICC-02/11-01/12-37-Conf-Anx21.

investigated by the national authorities compared to those which are the subject of ICC proceedings.

54. As this Pre-Trial Chamber has stated in the case against Mr Gaddafi, “evidence” within the context of admissibility proceedings refers to “directions, orders and decisions by authorities in charge of the investigation” and other material contained in the case file, but also includes evidence on the merits of the domestic case, such as witness statements.⁸³ Although the challenging State does not need to provide all the evidence, the provision of samples is necessary.⁸⁴ Côte d’Ivoire has not provided any evidence of the latter type. In fact, some of the material submitted appears to indicate that such evidence has not been collected: for example, at paragraph 46 of the Admissibility Challenge Côte d’Ivoire submits: *“Dans le cadre des poursuites visant Mme Gbagbo, la justice ivoirienne a pu notamment se saisir de la personne mise en cause et recueillir des témoignages pertinents.”* Thus asserting that relevant testimonies could be gathered, but none have been provided.

55. Although the Applicant provides enough information to establish that there is one or more national proceedings initiated against Ms Gbagbo in Côte d’Ivoire, that information is clearly insufficient to establish that Ms Gbagbo “is being investigated” within the terms of Article 17(1)(a), namely, that these national proceedings include concrete and progressive investigative steps directed at ascertaining whether Ms Gbagbo is responsible for the alleged conduct.⁸⁵

3. The ability or willingness of Côte d’Ivoire genuinely to carry out the investigation

56. A determination as to the genuineness of the State's “willingness” and “ability” must be conducted in relation to the specific domestic proceedings concerning

⁸³ ICC-01/11-01/11-239, paras.10-11.

⁸⁴ ICC-01/11-01/11-239, para.12.

⁸⁵ ICC-01/09-01/11-307 OA, para.41.

the case that is being prosecuted before the Court.⁸⁶ This must be assessed in light of the relevant law and procedures applicable to domestic proceedings in Côte d'Ivoire.⁸⁷ In this regard, evidence put forward to substantiate the existence of national proceedings may also be relevant to demonstrate their genuineness.⁸⁸

57. The Prosecution recalls that 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.⁸⁹ Since the Applicant has not demonstrated that it is indeed investigating the same case, there is no need to consider at this stage the issue of genuineness. Should the Chamber provide the Applicant a final additional opportunity to supplement its submissions with further evidence of a sufficient degree of specificity and probative value to demonstrate that it is indeed investigating the case, the Prosecution may seek leave to submit observations on the genuineness of national proceedings as appropriate.

58. Much as this Chamber found in the case against Mr Gaddafi, the evidence submitted by Côte d'Ivoire does not permit identification of the actual contours of the national case against Ms Gbagbo such that the scope of the domestic investigation could be said to cover the same case as that which is before the Court. As such, the Admissibility Challenge should be dismissed, and there is no need for the Chamber to examine the second limb of the admissibility inquiry.

⁸⁶ ICC-01/11-01/11-466-Red, para.202.

⁸⁷ ICC-01/11-01/11-466-Red, para.203; ICC-01/11-01/11-344-Red, para.200.

⁸⁸ ICC-01/11-01/11-466-Red, para.210.

⁸⁹ ICC-01/04-01/07-1497 OA8, paras.75, 79.

Relief Sought

59. Although it appears from the materials provided that some concrete steps may have been taken, such as [REDACTED], these are not furnished in any appropriate form as part of the supporting materials. Since it is not disputed that Simone Gbagbo is being held in detention in Côte d'Ivoire on the basis of serious crimes, the Prosecution does not oppose granting the Applicant a final opportunity to substantiate its claim without delay, such as in the context of any final reply that it may be granted leave to file. Absent such substantiation, the challenge should be dismissed and the case declared admissible.



Fatou Bensouda, Prosecutor

Dated this 24th day of June 2014

At The Hague, The Netherlands