

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 5 March 2015

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**IN THE CASE OF
THE PROSECUTOR v. SIMONE GBAGBO**

PUBLIC

RESPONSE to 'OBSERVATIONS des Victimes sur l'appel de la République de Côte d'Ivoire contre la « Décision relative à l'exception d'irrecevabilité soulevée par la Côte d'Ivoire s'agissant de l'affaire concernant SIMONE GBAGBO » '

Source: DEFENCE

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

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**

Paolina Massidda

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

States' Representatives

Jean-Pierre Mignard

Jean-Paul Benoit

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Other

1. INTRODUCTION

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

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

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

4. On 9 January 2015, having been granted an extension of time,⁶ Côte d'Ivoire filed a confidential Document in support of Appeal⁷ of the Decision of Pre-Trial Chamber I.⁸

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

6. On 6 February 2015, having been granted an extension of time in which to do so¹⁰, the Defence filed a Response pursuant to Regulation 64(4) of the Regulations of the Court.¹¹ Subject to the reservations therein expressed,¹² the Defence fully supported the Appeal of Côte d'Ivoire.

¹ ICC -02/11-01/12-47.

² Ibidem /12-48.

³ Ibid., p 8 -Conclusion.

⁴ ICC-02/11-01/12 OA. 22-12-2014.

⁵ ICC-02/11-01/12 OA, 18-12-2014, p3.

⁶ ICC-02/11-01/12 OA-53, 23-12-2014.

⁷ Ibid.,-54-Conf, 09-01-2015.

⁸ Ibid.,-47-Red, 11-12-2014.

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

¹⁰ ICC-02/11-01/12-60, 28-01-2015 OA.

¹¹ ICC-02/11-01/12-62, 06-02-2015 OA.

¹² Ibid., at para 6, 19, 58.

7. On 19 February 2015, Principal Counsel for victims filed confidential ‘Observations des victimes sur l’appel de la République de Côte d’Ivoire contre la < Décision relative à l’exception d’irrecevabilité soulevée par la Côte d’Ivoire s’agissant de l’affaire concernant Simone Gbagbo >.’¹³

8. The Defence files this Response to the victims’ Observations pursuant to Decision dated 28 January 2015.¹⁴

2. **PROCEDURAL HISTORY**

9. By Decision of 3 October 2011, Pre-Trial Chamber III, pursuant to Article 15 of the Rome Statute, authorised an investigation in the National Jurisdiction¹⁵ “*[d]ue to the absence of national proceedings against those appearing to be most responsible for the crimes committed during the post-election violence, and in light of the gravity of the acts committed, the Chamber is satisfied that there are potential cases that would be admissible in the situation in the Republic of Côte d’Ivoire*”.¹⁶

10. By Application of 8 February 2012, the Prosecutor sought a warrant of arrest against Simone Gbagbo for her alleged individual responsibility for crimes against humanity.¹⁷

11. On 29 February 2012, Pre-Trial Chamber III issued a Warrant of Arrest¹⁸ under seal against Simone Gbagbo, for her alleged criminal responsibility within the meaning of Article 25(3) (a) of the Statute for the crimes against humanity of (1) murder under Article 7(1) (a); (2) rape and other forms of sexual violence under Article 7(1)(g); (3) other inhumane acts under Article 7(1)(k); and (4) persecution under Article 7(1)(h) of the Statute committed in the territory of Côte d’Ivoire during the period between 16 December 2010 and 12 April 2011.

¹³ ICC-02/11-01/12-63 OA. (self-translated by Defence Counsel)

¹⁴ ICC-02/11-01/12 ‘Decision on Ms. Simone Gbagbo’s request for extension of time for the filing of a response to the document in support of the appeal’, p 3, para 2.

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

¹⁶ Ibid., para 16.

¹⁷ Prosecutor’s Application pursuant to Article 58 as to Simone Gbagbo, 8 February, ICC-02/11-35-US-Exp. (The Defence has not been provided with a copy of this document, classified as ex parte).

¹⁸ Pre-Trial Chamber III, Under Seal, Warrant of Arrest for Simone Gbagbo, 29 February 2012, ICC-02/11-01/12, p. 8.

12. On 2 March 2012, Pre-Trial Chamber III, rendered its written ‘Decision on the Prosecutor’s Application Pursuant to Article 58 for a Warrant of arrest against Simone Gbagbo’¹⁹ stating “*The Prosecutor contends that there is a considerable degree of overlap between the [Laurent] Gbagbo Application and the present Application and he has incorporated references to the relevant portions of the [Laurent] Gbagbo Application but not having ‘examined further the admissibility of the case against Mrs Gbagbo at this stage.’*²⁰ (viz paras 5-73, 76-92, 94-131, 149-159, and 158 together with the underlying /supporting material) (emphasis added)

13. On 19 March 2012, the Prosecutor filed a ‘Demande d’arrestation et de remise de Simone Gbagbo.’²¹

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

15. Dated 30 September 2013, Côte d’Ivoire filed an Admissibility Challenge pursuant to Articles 19, 17 and 95 of the Rome Statute²² with confidential annexes.

16. On 15 November 2013, Pre-Trial Chamber I rendered its ‘Decision on the conduct of the proceedings following Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo,’ inviting observations from *inter alia*, the Defence.²³

17. On 14 February 2014, Côte d’Ivoire requested authorisation to provide additional documents in support of its admissibility challenge,²⁴ which was duly granted.²⁵

¹⁹ Public redacted version, Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 2 March 2012, p. 5, para. 6.

²⁰ ICC-02/11-01/12-2-Red, 2 March 2012, para 12.

²¹ La Chambre Préliminaire I, (Original: français) ICC-02/11-01/12, 19 March 2012.

²² ‘Requête de la République de Côte d’Ivoire sur la Recevabilité de l’affaire Le Procureur c. Simone Gbagbo et demande de sursis à exécution en vertu des Articles 17, 19 et 95 du Statut de Rome’, 30 Septembre 2013, No. ICC-02/11-01/12; Conf. 17 Annex.

²³ 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.

²⁴ ICC-02/11-01/12-30.

²⁵ ICC-02/11-01/12-35. Decision, Pre-Trial Chamber 1; 20/2/14.

18. On 25 February 2014, Côte d'Ivoire filed additional documentation²⁶ to which all-party observations were filed.²⁷

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

20. In response, on 10 October 2014, Côte d'Ivoire filed a 'Second dépôt de documents complémentaires à l'appui de la Requête de la République de Côte d'Ivoire sur la Recevabilité de l'affaire Le Procureur c. Simone Gbagbo et, Demande de sursis à Exécution en vertu des Articles 17, 19, et 95 du Statut de Rome.'²⁹

3. RESPONSE TO VICTIMS OBSERVATIONS

21. The Defence has submitted a Response to the Document in support of Appeal filed by Côte d'Ivoire.³⁰ In so doing, Counsel has treated, individually, the issues which, for the most part, have been raised by Principal Counsel for victims, obviating the need for repetition. Accordingly, Counsel proposes to respond below, to certain key issues as raised.

22. Principal Counsel for victims (hereinafter 'victims Counsel') has set out her observations under three main headings. Defence will respond as follows; Part 1: Criteria governing intervention by Appeals Chamber: Part 2: Interpretation and Application of Article 17 (1) of the Statute: Part 3: Appreciation of the Investigations or Prosecution.

Part 1.

Criteria governing intervention by Appeals Chamber

-(a) re: errors of fact

23. Victims Counsel sets out the role of the Appeals Chamber in treating a manifest error in the *appreciation of the facts* (*'En ce qui concerne l'erreur manifeste dans l'appréciation des*

²⁶ ICC-02/11-01/12-37-Conf, 21 Annex.

²⁷ ICC-02/11-01/12-39. Defence.

²⁸ ICC-02/11-01/12-44. Pre-Trial Chamber 1.

²⁹ ICC-02/11-01/12 -45-Conf. 4 Annex.

³⁰ ICC-02/11-01/12-62. 06-02-2015 OA.

faits').³¹ However, Defence Counsel most respectfully submits that victims Counsel cites as a general finding for *appreciation* of the facts, the finding which the Appeals Chamber applied specifically and only, to the *misappreciation* of the facts.

24. The Defence submits that, in both the Al-Sennusi³² and Gaddafi³³ judgments, the Appeals Chamber held that it will not interfere with factual findings of a first-instance Chamber unless it is shown that that Chamber committed a clear error; and it goes on to set out *three* distinct types of errors namely; *misappreciation* of the facts; *took into account irrelevant* facts; or *failed to take into account relevant* facts. It then goes on to single out and treat *misappreciation* of the facts, only - 'Regarding the *misappreciation* of the facts...' it 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.' The Defence respectfully submit that this finding clearly does not preclude the Appeals Chamber from interfering when a clear error has been committed by the Chamber *taking into account* irrelevant facts or *failing to take into account relevant* facts.

-(b) re: errors of law.

25. The Appeals Chamber has held that it 'will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.'³⁴

³¹ ICC-02/11-01/12-63. 19-02-2015, p6, para 11

³² Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber 1 of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'. ICC-01/11-01/11-565 OA 6, 24-07-2014, p92, para241

³³ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber 1 of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'. ICC-01/11-01/11-547-Red OA 4, 21-05-2014, p43, para93.

³⁴ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber 1 of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'. ICC-01/11-01/11-547-Red OA 4, 21-05-2014, p21, para49.

Part 2.

Errors of Law in the Interpretation/Application of Article 17 (1) of the Statute

26. For ease of reference, paragraph 1 is hereunder set out;

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

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

27. Victims Counsel submits *inter alia*, that in its Document in support of appeal, Côte d’Ivoire has not identified any error of fact or of law committed by Pre-Trial Chamber I (‘the Chamber’) in arriving at the conclusion in the impugned decision and as a consequence, the Appeal should be rejected.³⁵

28. Victims Counsel further submits that, in its analysis of the criteria set out in Article 17 (1) of the Statute, Côte d’Ivoire appears to have confused the principle of *complementarity* with the burden of proof applicable to enable the Chamber to determine the existence of investigations and proceedings at national level.³⁶

29. The Defence does not support the above submissions and sets out the reasons below.

30. Victims Counsel sets out and treats³⁷ the errors alleged by Côte d’Ivoire to have been committed by the Chamber in its interpretation and application of Article 17 (1) namely,
 (i) *excessively rigorous conditions* applied by the Chamber to determine the existence of investigations against Mme. Gbagbo for crimes parallel to those before the Court;
 (ii) erroneous interpretation of the criteria to determine ‘*inaction*’ and (iii) the failure to examine the *willingness* or ability of Côte d’Ivoire to judge Mme. Gbagbo, consequentially overturning the principle of *complementarity*.

³⁵ Ibid., p7, para 12

³⁶ Ibid., para 14.

³⁷ Ibid., p7-17, paras 13-41.

Complementarity

31. The Defence submit that an analysis of Article 17 (1) demonstrates that, the pre-eminent position, excelling all others, is given to the right and *duty* of sovereign States to exercise their criminal jurisdiction over those responsible for international crimes and emphasises that, the role of the International Criminal Court *shall* be complementary to national criminal jurisdictions.

32. In addition, Article 21 of the Statute copper-fastens this pre-eminence. In the ‘hierarchy’ of applicable law, the jurisprudence of the Court ranks in fourth place, after (i) the Statute; (ii) Treaties, principles and rules of international law and (iii) principles of law derived from national laws of legal systems of the world, including the *national laws of the State that would normally exercise jurisdiction over the crime*, provided those principles are not inconsistent with *this Statute* and with international law and *internationally recognised norms and standards*. (emphasis added)

33. At no time has it been alleged that the national laws or legal norms of Côte d’Ivoire are inconsistent with this Statute or international legal norms.

34. Furthermore, it has been stressed that the standards set by the [International Law] Commission were not intended to establish a hierarchy between the International Criminal Court and National courts, nor to allow the International Criminal Court to pass judgment on the operation of national courts in general, nor on the penal system of a State.³⁸

35. It is therefore submitted, there is a mandatory obligation on the Court, *ab origine*, to scrupulously abide by the tenets of the Statute. Abiding by the spirit of the Statute is a *sine qua non*.

³⁸ Ibid., Report on the Ad Hoc Committee on the Establishment of the International Criminal Court, 6 September 1995. (‘Report of Ad Hoc Committee’), para 43. Also see Defence prior submissions in ICC-02/11-01/12-62. 06-02-2015 OA.p8,9: paras 23-26 incl.

36. The Defence is cognizant of the fact that although Article 17 (1) does indeed favour national jurisdictions, it does so, only to the extent that there actually are investigations or prosecutions at the national level.³⁹

37. Given the critical importance of this proviso, it is submitted that, the continuous refining of the definition of the key elements of Article 17 (1) of -‘*the case*’ and of -‘*is being investigated or prosecuted*’- while it may lead to legal purity, is raising the threshold so high, that only in rare and exceptional circumstances, will the principal of *complementarity* be honoured in favour of any State.

38. The Defence submits that, to so proceed, is to run the risk of impinging on the sovereignty of national legal systems and to engender a loss of ‘*respect for and the enforcement of international justice*’, contrary to the guarantee of the State Parties as **Resolved** at paragraph 11 of the Preamble to the Statute.⁴⁰

39. The preparatory works to the Statute (travaux préparatoires) clearly demonstrate that this was never the intention of the State Parties.⁴¹

40. The sovereign State of Côte d’Ivoire has submitted it has demonstrated that; (i) at the time of the admissibility proceedings, it was and continues to, genuinely investigate or prosecute Mme. Gbagbo and that (ii) it has submitted forty pieces of documentation together with extensive written submissions which combined, it believes provides ‘*tangible*’ *proof*’ of ‘*active*’ ‘*ongoing*’ steps being taken in accordance with its *own norms and principles*, which are *not inconsistent with this Statute and internationally recognised norms and standards*.

Therefore, the Defence submits, given that there has been no allegation by the Chamber or the Prosecution of absence of good faith; and given that there has been an acceptance by the Prosecution in the overlapping case⁴² that there is no unwillingness or inability to prosecute

³⁹ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber 1 of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’. ICC-01/11-01/11-547-Red OA 4, 21-05-2014, p36, para78.

⁴⁰ Rome Statute of the International Criminal Court. Preamble, at para 11 ‘**Resolved** to guarantee lasting *respect for and the enforcement of international justice*, **Have agreed as follows:**’

⁴¹ J. T. Holmes, The Principle of complementarity’, in The International Criminal Court –The making of the Rome Statute, R. Lee (ed), Kluwer Law International, 1999. [Mr. Holmes was the co-ordinator of consultations on complementarity during the Preparatory committee]

⁴² The Prosecutor v Laurent Gbagbo: Decision on the ‘Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut’: ICC-02/11-01/11-436. 11-06-2013, p7, at para 15 “The Prosecutor argues that the

on the part of the State; the Defence submit that, a rowing back on the principle of *complementarity* to such an extent, as to supplant the domestic enforcement of international norms in the State of Côte d'Ivoire, is a misinterpretation of the law by the Chamber, materially affecting the impugned decision and should be reversed by the Appeals Chamber.

'Inactivity'

41. On the critical issue of *'inactivity'*,⁴³ the Defence would merely add to the submissions already made (see para 21 above) that, as regards the pace of *investigation or prosecution* of Mme. Gbagbo, the Chamber concluded there had been but one activity between 23 January 2013 and 10 October 2014 -that of the interrogation of Mme. Gbagbo.⁴⁴ The Defence submits that while this may have been so, the *activity* which did take place was that of four separate interrogations of Mme. Gbagbo, over four days, in Odienné, a remote area, approximately 1,000 klms north-west of Abidjan, remotely distant from the concerned judicial authorities and Ivorienne Counsel of Mme. Gbagbo.

42. The Defence further submits that, in any event, there is no legal basis for concluding a lack of expedition. No statutory obligation exists for completeness or even partial completeness, of investigations either before or during the admissibility challenge. Possibly appreciating the inherent dangers in a 'rush to the finish', the jurisprudence of the Court merely requires that the *investigation or prosecution* should be *'ongoing'*.⁴⁵ Côte d'Ivoire has submitted and the Chamber has accepted that, after Mme. Gbagbo's arrest on 11 April 2011, *'several proceedings were instituted against her....'*⁴⁶ and that such investigations or prosecutions were *'ongoing'* until 4th October 2014, prior to making its last filing of documents in support of admissibility appeal on 10th October 2014, pending issuing of the Decision.⁴⁷ To the reasonable examiner, this does not resonate of *'inactivity'*.

Côte d'Ivoire has *clearly demonstrated its will* to prosecute the perpetrators of crimes committed during the post-electoral crisis..." (emphasis added)

⁴³ ICC-02-11-01/12-63. 19-02-2015,p9, para 19. Observations of victims.

⁴⁴ Ibid., p32,33, para 68,69 and also see p28, para 61.

⁴⁵ The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Appeals Chamber, Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber 11 of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 (OA 8) para 56.

⁴⁶ Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo; ICC-02/11-01/12-47-Red. 11-12-2014. p21, para 46.

⁴⁷ Ibid., p28, para 63.

43. Defence Counsel can confirm that the prosecution of Mme. Gbagbo is most certainly ‘ongoing’. She is presently on trial, in public, in Abidjan, Côte d’Ivoire, on charges the same or substantially the same as those before the Court.⁴⁸ Counsel briefly attended the trial.

44. As regards ‘*same case/substantially same conduct*’⁴⁹ discussed by Victims Counsel, the Defence has already treated this issue at some length (see para 21 above).

Part 3.

Errors of Fact and of Law in Appreciation of the Investigations or Prosecution

45. Victims Counsel highlights in particular ‘*economic crimes*’ and crimes against the State (‘*crimes contre l’État*’) and submits that, based on the elements of proof presented by Côte d’Ivoire, no Chamber could reasonably conclude that they comprise of the same conduct, as that alleged before the Court.⁵⁰

46. The Defence does not support this submission.

47. In response, the Defence again submits that, the Chamber failed to take into account certain relevant facts, as follows;

48. The Chamber concluded that this case was admissible, due in sum, to the absence of discernible factual ‘*contours*’ of the domestic investigations.⁵¹

49. The Defence agree with the submission of Côte d’Ivoire that, the Chamber could only have arrived at this conclusion because it failed to take into account, relevant facts contained in certain of its documentation. The Defence submit that, in particular, an in-depth examination of Annex 10 and also the documentation to which the Chamber refers as the ‘third set of proceedings’ (crimes against individuals), would have delineated the factual

⁴⁸ See ICC-02/11-01/12-62. 06-02-2015 OA, p14-16 incl; paras 43-54 incl (Defence Response to Admissibility Appeal of Côte d’Ivoire)

⁴⁹ Ibid., p11, para 25.

⁵⁰ ICC-02/11-01/12-63-Red; 19-02-2015.OA. p18,19; para 43; (Observations des Victimes).

⁵¹ Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo. ICC-02/11-01/12-47. 11-12-2014, p 33, para 70.

contours of the domestic investigation or prosecution.⁵² Even then, if the contours were not pristine in their precision, instead of dismissing out of hand and /or minimising the probative value of the documentation, it could have sought that final clarification it believed it required to bring the contours into sharper focus.

50. In dismissing the ‘*crimes contre l’État*’ and although having specifically referenced document RI-01/2011 and noted that charges were confirmed against Mme. Gbagbo by the *Chambre d’Accusation* on 10 July 2012 and that the case was referred for Trial to the *Cour d’Assises d’Abidjan*⁵³ (now underway), the Chamber failed to take into account the very relevant facts contained therein, which demonstrated that, albeit more extensive in scope, inherent in the State’s generic charge of ‘*crimes contre l’État*’ were crimes against the civil population (*des tueries massive*) and that, they broadly mirrored those before the Court.

51. It also failed to take into account the very relevant facts contained in the ‘third set of proceedings’ instituted against Mme. Gbagbo, despite having accepted they did concern crimes against individuals⁵⁴ of the *same nature* as those alleged in the case before the Court and that the national authorities did undertake ‘*a number of activities, of both a procedural and investigative nature*’⁵⁵

And significantly,

52. It accepted that those latter proceedings ‘*remain before the competent ’juge d’instruction’ who is yet to make a determination...*’⁵⁶ (id est. ‘*ongoing proceedings*’).

53. The Chamber failed to take into account those very relevant facts, despite having accepted that the series of four separate questioning (*les interrogatoires*) of Mme. Gbagbo in September and October 2014, were pertinent to the proceedings before the Court. Côte d’Ivoire submits they related to crimes *identical* to those alleged before the Court.⁵⁷

⁵² See also, ICC-02/11-01/12-62; 06-02-2015.p8-11, paras 23-35; p13-17, paras40-54 (Defence Response to Cote d’Ivoire’s Appeal against admissibility)

⁵³ ICC-02/11-01/12-47-Red, p22, para 48.

⁵⁴ ICC-02/11-01/12-47-Red, p23 et seq. para 50 et seq.

⁵⁵ Decision on Côte d’Ivoire’s challenge to admissibility of the case against Simone Gbagbo. ICC-02/11-01/12-47. 11 -12-2014, p23, para 50.

⁵⁶ Ibid.,p30, para 65.

⁵⁷ ICC-02/11-01/12-54-Conf, p33, para 118.

54. It also failed to take into account those very relevant facts, despite having accepted that Côte d'Ivoire did carry out both investigations and proceedings, including four *premières comparutions* by Mme. Gbagbo;

55. Again, it failed to take into account those very relevant facts, despite having accepted that, together with these ongoing procedural steps, Côte d'Ivoire *also undertook certain investigative activities with a view to collecting information relevant to determine Simone Gbagbo's responsibility for the alleged crimes*,⁵⁸

56. The Chamber failed to take into account those very relevant facts, despite having accepted it could *not exclude that information gathered for the purpose of one case may be taken into consideration and relied on in another case*.⁵⁹

57. It went on to conclude 'However, the initiation of these proceedings, still formally opened (sic) 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) of the Statute." ' (emphasis added)

58. The Defence submit that, by the application of an unduly high evidentiary standard to the constituent parts of Article 17 (1) (a) as referred to above at para 30, coupled with a failure to carry out an in-depth examination of *inter alia*, the documentation supporting the 'crimes contre l'État' and the 'third set of proceedings', the Chamber to failed to take into account the relevant facts contained therein which would have shown that *substantially the same conduct/case* as that alleged before the Court was '*being investigated*' or proceeded with at domestic level and as such, the contours of the domestic case against Simone Gbagbo were discernible.

59. The Defence further submits that those errors of law and of fact are susceptible to interference by the Appeals Chamber, as outlined at paragraphs 24, 25 above.

⁵⁸ ICC-02/11-01/12-47-Red, p26, para 56.

⁵⁹ Ibid., p27, para 60.

60. The Defence agrees with the submissions of Côte d'Ivoire that, in its analysis and interpretation of Article 17 (1) the Chamber erred in applying (i) excessively rigorous conditions to determine the existence of investigations against Mme. Gbagbo for crimes parallel to those before the Court; it (ii) erred in its interpretation of the criteria to determine 'inaction' and it (iii) failed to take into account relevant facts which would have been discernible on an in-depth examination of the documentation and it failed to consider the willingness or ability of Côte d'Ivoire to judge Mme. Gbagbo and in so doing, overturned the principle of *complementarity*.

61. For the above reasons the Defence does not waiver from fully supporting Côte d'Ivoire on this ground of Appeal and, contrary to the submission of victims Counsel, sees no confusion on the issue of complementarity, as suggested.

62. The Defence submits that, overall, in balancing the interests at stake, the Chamber gave insufficient weight to the sovereign rights of Côte d'Ivoire.

63. Finally, the Defence submits that, contrary to Article 67 (g) of the Statute and contrary to all principles and rules of international law, a clear negative innuendo against Mme. Gbagbo is inherent in the repeated highlighting by the Chamber of the lack of response or the brief responses of Mme. Gbagbo to questions put to her during interrogations.⁶⁰ It is a basic tenet of the rights of an accused that, no adverse inference can be drawn from his/her silence or refusal to answer and in so doing, the Chamber erred.

64. This error, is all the more egregious because, in declining to answer at, for example, the planned questioning on 7 December 2012,⁶¹ Mme. Gbagbo did so, in full exercise of her rights, in which she was fully vindicated by the Decision of the *Chambre d'Accusation*, d'Abidjan on 13th February 2013.⁶²

⁶⁰ - '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'(p29, para63)

- 'During these appearances before the juge d'instruction, Simone Gbagbo was asked and she briefly responded...' (p28, para63):

- 'Also on this occasion, Simone Gbagbo's appearance was finally limited to mere procedural aspects..'(p28, para62 (emphasis added))

- '...the planned questioning did not take place on this occasion.'(p27, para59)

⁶¹ Ibid., p27, para59

⁶² Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo; ICC-02/11-01/12-47-Red. 11-12-2014. p28, para 61

65. Accordingly, the Defence fully supports submissions of Côte d'Ivoire⁶³ that the domestic proceedings do cover *substantially the same conduct /case* as that alleged before the Court and as such, do give rise to a conflict of jurisdictions between the Court and Côte d'Ivoire, pursuant to Article 17 (1) (a) of the Statute, rendering the case inadmissible.

4. In Conclusion

66. Given that the Appeals Chamber will intervene with a Decision of a Pre-Trial or Trial Chamber when a clear error of fact has been committed by the Chamber's failure *to take into account relevant facts* and as to alleged errors of law, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber has misinterpreted the law and in so finding, will intervene if the error materially affected the Impugned Decision.

67. Mme. Gbagbo has already suffered almost four years in near-solitary isolation in remotest Odienné, far removed from her family, medical attendant and Counsel. In early December 2014, she was relocated back to Abidjan for the commencement of her trial. Although still kept in near-solitary isolation, she finds some solace in knowing her family live in and around Abidjan.

68. The Defence submit that the errors of law and of fact set out above, do materially affect the impugned decision in that, at least, by declaring this case admissible, thereby rendering Mme. Gbagbo liable to prosecution before the Court, such upheaval would further exacerbate her great suffering.

69. In the interests of peace and reconciliation, she wishes to continue with her trial, being held in public, in full transparency and in close proximity to the people of Côte d'Ivoire.

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

65. Judgment on Appeal in the matter of ICC—01/09-01/11-307-tFRA OA 30 August 2011, para 56

70. Given all of the circumstances as set out above and also in the earlier Response filed herein⁶⁴, the Defence reiterates its support for the request of Côte d'Ivoire that, the Appeals Chamber intervene in this instance to

-Reverse the Decision taken by Pre-Trial Chamber I, on 11 December 2014

and

-Declare the case *The Prosecutor v. Simone Gbagbo* inadmissible before the International Criminal Court.


Sylvia Geraghty

Lead Counsel to Mme. Simone GBAGBO

Dated this 5th day of March 2015

At Dublin, Ireland.

⁶⁴ ICC-02/11-01/12-62. 06-02-2015 OA.