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The Situation in Côte d'Ivoire

12.1 REFLECTION: THE SITUATION IN CÔTE D'IVOIRE

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INTRODUCTION

My observations on the contexts relevant here do not start with the alleged crimes in Côte d'Ivoire but the temporalities of feminist rewriting as a critical practice. The first feminist rewritings in international law that marked the audiences concerned old judgments, such as the judgment in the *Lotus* case by the Permanent Court of Justice, decided in 1927.[1] Another important one was the International Court of Justice's decision on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, of 1955.[2] At the time when the original decisions were made, not only the international judges, counsel, and legal experts active on the cases, but almost all scholars, experts, negotiators, and professors – the most visible part of the intellectual and professional community of international lawyers – were men.

What difference does the (historical) context make? Early feminist rewriting could move freely in a realm of possibilities, in a liberty of constraints, a space of reimagination that resembles the often controversial 'what if?' histories, referred to as counterfactual or alternative histories in historiographical research. With the ongoing sex and gender transformation in international law that started in the 1990s, that moment of 'what if there were a woman' or even several women on

[1] C. Chinkin et al., '*Bozkurt Case*, aka the *Lotus Case (France v Turkey)*: Ships that Go Bump in the Night' in L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (Oxford: Hart, 2019) 27–52.

[2] K. McCall-Smith, R. Smith, and E. Yahyaoui Krivenko, 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide' in L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (Oxford: Hart, 2019) 55–82.

the bench – or as counsel – has passed, in some sub-disciplines of international law at least. Amongst these disciplines, international criminal law (ICL) is generally considered the leading example of progress towards more equal sex and gender representation in authoritative and visible roles.

In the first decision concerning the alleged crimes in Côte d'Ivoire addressed here, Pre-Trial Chamber III consisted of three members, two of whom were women, Judge Silvia Fernández de Gurmendi presiding. The second decision was adopted by an all-female panel in Pre-Trial Chamber I. This change in the context of rewriting is brought about by very positive developments which remain aleatory and primarily restricted to ICL.[3] At the same time, the new context accentuates the challenges of rewriting as a creative critical exercise, by underlining the question of the difference between a decision by an all-female panel and a feminist decision. What is feminism(s) today, and who decides on the matter? I will return to this question in the concluding remarks.

I will proceed by giving a brief account of the conflict in Côte d'Ivoire which gave rise to the ICC's intervention before outlining each of the cases concerning Côte d'Ivoire. I will then analyse each rewritten decision separately, concluding with general reflections. I start with Judge Natalie Hodgson's rewritten Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest against Simone Gbagbo and continue with Judge Sarah Easy's rewriting of the Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo.

BACKGROUND TO THE CONFLICT

Côte d'Ivoire experienced post-election violence after the results of the 2010–2011 presidential election were disputed. Mr Laurent Gbagbo claimed victory although the electoral commission stated that his opponent, Mr Alassane Ouattara, had won. It was reported that unrest ensued, with systematic and widespread attacks occurring against the civilian population. Witnesses described instances of raids with excessive force used, while others detailed incidences of rape, murder, disappearances, and mass graves. It was estimated that during the conflict, approximately 1 million people were displaced. The investigation focused on both pro-Gbagbo and pro-Ouattara forces, but so far only pro-Gbagbo personnel have been charged.

BACKGROUND TO THE CASES

Côte d'Ivoire accepted the jurisdiction of the ICC in April 2003 and ratified the Rome Statute on 15 February 2013. On 3 October 2011, the Office of the Prosecutor

[3] H. Charlesworth, 'The Institut de Droit international in Today's World' in M. Kohen and I. van der Heijden (eds.), *150 ans de contributions au développement du droit international: livre du sesquicentenaire de l'Institut de droit international (1873–2023)/150 Years of Contributing to the Development of International Law: Sesquicentenary Book of the Institute of International Law (1873–2023)* (Paris: A. Pedone, 2023) 147–168.

(OTP) was granted permission to open a *proprio motu* investigation in relation to alleged crimes committed since November 2010. On 22 February 2012, this was expanded to include alleged crimes committed since 10 September 2002. On 23 November 2011, a warrant of arrest was issued for Mr Laurent Gbagbo while on 21 December 2011 a warrant was issued for Mr Charles Blé Goudé, a military leader within Mr Gbagbo's party. On 29 February 2012, Ms Simone Gbagbo had a warrant of arrest issued against her for the crimes against humanity of murder, rape and other sexual violence, persecution, and other inhuman acts. While the charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé proceeded to trial (where they were eventually acquitted), the warrant against Ms Simone Gbagbo was vacated on 19 July 2021.

FEMINIST REIMAGININGS

Prosecutor v. Simone Gbagbo, *Decision of the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest against Simone Gbagbo*

Judge Natalie Hodgson's rewriting appears to have two primary objectives, the first less explicit than the second. First, her revisions to the original try to bring order and logic to an ICC decision. She uses titles that structure the corpus text of the decision and organises the questions the court must resolve. Her drafting closely follows the language and order of appearance of the Rome Statute's diverse criteria about what the Court must be convinced of at this stage of the proceedings. Her initiative suggests that feminist rewriting also comprises the general objective of communication and clarity. I welcome the suggestion for clarity, considering how gender, social class, and other structural circumstances and factors have for long restrained access to international law, to its education, its professions, and its intellectual and professional communities. Those less familiar with international law, the general public, civil society activists, students, and others should be provided with more pedagogical and approachable legal instruments, as Hodgson seems to suggest. Substantially, Judge Hodgson's decision reproduces the findings of the Pre-Trial Chamber on jurisdiction and admissibility.

The second objective of this feminist rewriting relates to the qualification of Simone Gbagbo's role in the examination of the 'reasonable grounds' test. The rewritten decision introduces supplementary information on Simone Gbagbo, thereby altering the way in which her personality, political importance, and agency are presented. In contrast to the original decision in which Simone Gbagbo is predominantly and repeatedly represented as the wife of Laurent Gbagbo, as if an auxiliary to 'her husband',[4] the rewritten judgment mentions the circumstance that Simone Gbagbo is married to Laurent Gbagbo only once. At a later part of the

[4] This language is used (three) times as a synonym of Laurent Gbagbo in § 10 of the decision.

decision, Judge Hodgson refers to Simone Gbagbo's 'relationship with Laurent Gbagbo', without specifying it. The fact that Laurent Gbagbo was, at the time of the alleged crimes, the president or the ex-president of Côte d'Ivoire, is noted only once.

In contrast to framing Simone Gbagbo in the Pre-Trial Chamber (para. 10) as the wife who was ideologically and professionally very close to her husband, the rewritten decision presents an inner circle 'comprising individuals occupying formal and informal positions in Mr Gbagbo's government' (para. 24), of which Simone Gbagbo is a member. Under the heading 'Whether There Are Reasonable Grounds to Believe That Ms Gbagbo Is Criminally Responsible for the Crimes Alleged by the Prosecutor', Judge Hodgson's decision introduces specific reasons why Simone Gbagbo should be considered an indirect co-perpetrator under Article 25(3)(a) of the Statute. The image that appears is not that of a wife following the president-husband, who even (mischievously?) 'acted as an alter ego for her husband' (PTC para. 10) but a power-couple of two independent, notable, long-term politicians at the centre of the inner circle of the Côte d'Ivoire government.

The rewritten decision details, for example, that 'Ms Gbagbo had her own cabinet within the presidency with its own staff. In a country where women are significantly underrepresented in political positions, Ms Gbagbo was an active decision maker and possessed significant political power' (para. 34). That power has a history in 'her long political career', including the fact that she was a 'founding member' of the *Front populaire ivorien* (para. 35). Thereafter, Judge Hodgson refers to elements concerning meetings, military equipment, and orders given to militias. These matters were also addressed in the original decision but Judge Hodgson emphasises them differently to suggest that Simone Gbagbo was able to 'exercise joint control over the crimes' (para. 38), 'made a co-ordinated and essential contribution to the crime' (para. 39), and 'acted with the necessary degree of intent and knowledge in performing her role within the common plan' (para. 40).

Judge Hodgson provides a more substantiated analysis of Simone Gbagbo's role than in the original judgment by demonstrating that the legal requirements for issuing a warrant of arrest are independent (of 'the husband'). She explains how Simone Gbagbo's arrest warrant depends, in accordance with Article 58(1) and in addition to the reasonable grounds test addressed above, on whether the arrest is necessary to: (i) ensure her appearance before the Court; (ii) ensure that she does not use her connections and resources to obstruct or endanger the investigation; and (iii) prevent the further commission of crimes within the jurisdiction of the Court. The rewritten decision proceeds to analyse these aspects individually, relying on ICC case law, commenting in paragraph 44 on how:

> A person's past and present political position, international contacts, financial and professional background, their access to necessary networks and financial resources, and the likely length of any potential sentence are factors that might increase the

> risk that an individual will abscond or avoid arrest.[5] Additionally, a person's access to networks and financial status is a relevant factor in determining whether they have the means to interfere with the investigation or safety of witnesses.[6]

The decision then replies to these requirements, stating how Simone Gbagbo has a 'long political history and strong political connections throughout Côte d'Ivoire' and that 'her supporters have called for her release and oppose her transfer to the ICC' (para. 45). On international connections, the decision details that Simone Gbagbo 'has studied abroad in Senegal and France, as well as having completed multiple international training courses' (para. 46). The decision suggests that these connections 'could assist her to abscond' (para. 46). Furthermore, Judge Hodgson's decision notes that 'the Prosecutor has provided evidence that Ms Gbagbo has access to significant financial resources' (para. 46), and that her 'connection to high-profile members of the former government and her relationship with Mr Gbagbo might also assist her to access relevant contacts and resources in order to abscond' (para. 46).

To strengthen the arrest warrant further, Judge Hodgson's decision introduces additional information on the situation in Côte d'Ivoire at the moment of the consideration of the arrest warrant. It refers to allegations about previous concealing of 'crimes committed by members of the inner circle' (para. 55), and provides information on how 'supporters of Ms Gbagbo are currently discussing strategies for regaining political power in Côte d'Ivoire. The pro-Gbagbo forces that remain loyal to Ms Gbagbo and the other members of the inner circle continue to have access to significant material resources, including weapons' (para. 49).

The rewriting culminates in a section entitled 'Concluding Comments' that starts with the following statement: 'Ms Gbagbo is the first woman to be the subject of an application for an arrest warrant before this Court' (para. 51). As such a section is not habitual in ICC or other international criminal court decisions, it somewhat diminishes the impression of reading a 'real' decision of the ICC Pre-Trial Chamber. But it certainly allows Judge Hodgson to be more explicit about her message. After explaining – in a scholarly manner – how women's general underrepresentation in politics and the military has meant the rarity of their qualification as suspects or accused in international criminal trials, the rewriting returns to a more judge-like voice: 'The issue before this Court is not whether Ms Gbagbo's conduct

[5] Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. John-Pierre Bemba Gombo* (ICC-01/05-01/08-14-tENG), Pre-Trial Chamber III, 10 June 2008, § 87; Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v. John-Pierre Bemba Gombo* (ICC-01/05-01/08-631-Red), Appeals Chamber, 2 December 2009, § 70.

[6] Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's Decision, *supra* note 5, §§ 44, 74.

adhered to the traditional gender roles that woman are expected to perform, or whether Ms Gbagbo should be punished for her relationship with her husband, but rather the extent to which Ms Gbagbo herself is or is not guilty of perpetrating international crimes' (para. 53, footnote omitted).

The Female Perpetrator of International Crimes as a Hard Case for Feminism(s)

An astute academic article authored by Natalie Hodgson that precedes the rewriting project by several years helpfully adds background and nuances to her reimagined judgment.[7] In her article, stereotypes regarding gender, femininity, violence, and conflict that shape legal discourses are analysed and deconstructed in the cases of six defendants in international criminal courts. Hodgson identifies three narratives used in international criminal courts to frame women defendants: mother, monster, and wife,[8] and localises them via discourse analysis in the case materials. Regarding the ICC case of Simone Gbagbo, one of the six analysed in the article, Hodgson suggests that motherly characteristics of Gbagbo are referred to by the defence. The article quotes Côte d'Ivoire's challenge to the admissibility of Simone Gbagbo's case: 'She has devoted most of her adult life, striving to advance the education of the people of Côte d'Ivoire in so far as they came under her sphere of influence in general and the women and children of Abidjan in particular.'[9]

For Hodgson, 'the use of motherly attributes' in the case of Simone Gbagbo 'suggests that the themes of domesticity and motherhood pervade all stages of a female defendant's case, and that females are analysed with respect to these themes even when the defendant's character or conduct is not the main issue before the court'.[10] Pertinently, she gives primary importance in Simone Gbagbo's case to the wife narrative by the ICC prosecution and the Pre-Trial Chamber. The language used, such as the recurrent choice of the word 'husband', 'emphasises the personal

[7] N. Hodgson, 'Gender Justice or Gendered Justice? Female Defendants in International Criminal Tribunals' 25 *Feminist Legal Studies* (2017) 337–357.

[8] See also L. Sjoberg and C. Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics* (London: Zed Books, 2007); C. Gentry and L. Sjoberg, *Beyond Mothers, Monsters, Whores: Thinking about Women's Violence in Global Politics* (London: Zed Books, 2015); C. Sperling, 'Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide' 33(2) *Fordham Urban Law Journal* (2006) 637–127, at 653–656; D. Brown, *The Beautiful Beast: The Life and Crimes of SS-Aufseherin Irma Grese* (Ventura, CA: Golden West Historical Publications, 1996); U. Weckel and E. Wolfrum, *'Bestien' und 'Befehlsempfänger': Frauen und Männer in NS-Prozessen nach 1945* (Göttingen: Vandenhoeck & Ruprecht, 2003); N. Hogg, 'Women's Participation in the Rwandan Genocide: Mothers or Monsters?' 92 *International Review of the Red Cross* (2010) 69–102.

[9] Hodgson, *supra* note 7, at 346, referring to *Prosecutor v. Ghagbo* Response on behalf of Simone Gbagbo to the 'Requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire, le Procureur c. Simone Gbagbo et demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut de Rome' (ICC-02/11-01/12-39), Pre-Trial Chamber II, 8 April 2014.

[10] Hodgson *supra* note 7, at 346.

and familial connection between the two'.[11] The patriarchal stereotyping appears most striking in how the Pre-Trial Chamber presupposes that the motivation for Simone Gbagbo's alleged crimes was not to retain her own political power or her political party's power, as is granted to be the case for the inner circle of President Gbagbo, but rather 'her husband's power'.[12]

How does other academic scholarship in criminology, sociology, history, and criminal law see perpetrator women? There is a broad concordance about the starting point that women's participation in violent crime is significantly minor in quantity compared to that of men, and that women's participation differs in quality.[13] I entitled this section 'The Female Perpetrator of *International Crimes* as a Hard Case for Feminism(s)' to mark a focus in a discussion that risks exceeding the limited space available. Why call the female perpetrator of international crimes a hard case? I try to explain by a short excursion into the narratives of women in international law and their incompatibility with the real-life eventuality of women's transgression to perpetration of international crimes.

Women have a history of perpetrating international crimes, including sexual violence against women and men, at all levels of responsibility.[14] National trials after World War II and the armed conflicts and episodes of large-scale violence in the Democratic Republic of Congo (DRC), Rwanda, and former Yugoslavia, to name only a few, have dealt with the criminal responsibility of women, including women who committed direct violence. Women prosecuted in international criminal trials have so far been accused as indirect perpetrators, indirect co-perpetrators, and involved in joint criminal enterprise. Despite these examples, the paradigmatic image of women in international criminal justice remains that of victims of sexual and gendered violence. That is likely to relate the arguably essentialised, ahistorical notions and narrative strategies of women's general propensity to preserve life,

[11] *Ibid*, at 349–350.

[12] *Ibid*, at 350, referring to the Pre-Trial Chamber decision.

[13] N. Rafter and E. A. Stanko, *Judge, Lawyer, Victim, Thief: Women, Gender Roles, and Criminal Justice* (Boston, MA: Northeastern University Press, 1982); C. Cardi and G. Pruvost, 'Thinking Women's Violence' 5 *History of the Present* (2015) 200–216.

[14] For examples of literature, see K. Allar, 'Setting the Picture Straight: The Ordinary Women of Nazi Germany and Rwanda Who Participated in Genocide' in K. Auerbach (ed.), *Aftermath – Genocide, Memory and History* (Melbourne: Monash University Press, 2015); S. Linton, 'Women Accused of International Crimes: A Trans-Disciplinary Inquiry and Methodology' 27(2) *Criminal Law Forum* (2016) 159–226; S. Brown, 'Female Perpetrators of the Rwandan Genocide' 16 *International Feminist Journal of Politics* (2014) 448–469; L. Sharlach, 'Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide' 1(3) *Journal of Genocide Research* (1999) 387–399; S. Tabak, 'False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Colombia' 44 *NYU Journal of International Law and Policy* (2011) 103–161; A. Jones, 'Gender and Genocide in Rwanda' 4 *Journal of Genocide Research* (2002) 65–94; A. Smeulers, 'Female Perpetrators: Ordinary or Extra-ordinary Women?' 15(2) *International Criminal Law Review* (2015) 207–253.

aversion to violence, or otherwise higher values, hardly leaving space for deviance, violence, and crimes by women.[15]

Women's history in international law, as its explicit objects, subjects, agents, and actors, is typically considered short and modest, but perhaps it is more adequately qualified as obscured and ignored.[16] The red line can be sketched in a few main roles and routes in diverse temporalities, grossly simplified. Women are seen to have entered international law as pacifists acting in the law against war; as empathetic and solidary carers for others in international humanitarian law and abolition of slavery;[17] as equal citizens in the advocacy for suffrage and women's rights more broadly, and as victims of sexual and gendered violence; experts of it and combatants against it in international criminal law.[18] These roles remain to a large extent, despite the diverse contexts, marked by gendered assumptions of women's character and moral disposition, and not least by women themselves.

Should that situation be 'redressed' and if yes, how? Sociological and physical limits to women's role as direct perpetrators are diminishing, as women more broadly access positions of leadership in various contexts and modern weapons technologies provide an array of 'smart' solutions for conducting warfare.[19] For legal

[15] See M. A. Drumbl, '"She Makes Me Ashamed to Be a Woman": The Genocide Conviction of Pauline Nyiramasuhuko, 2011' 34 *Michigan Journal of International Law* (2013) 559–603; H. Charlesworth, 'Are Women Peaceful? Reflections on the Role of Women in Peace-Building' 16(3) *Feminist Legal Studies* (2008) 347–361; J. York, 'The Truth about Women and Peace' in L. A. Lorentzen and J. Turpin (eds.), *The Women and War Reader* (New York: New York University Press, 1998) 19–25; K. Engle, 'Judging Sex in War' 106 *Michigan Law Review* (2008) 941–961; C. Coutler, 'Female Fighters in the Sierra Leone War: Challenging the Assumptions?' 88 *Feminist Review* (2008) 54–73.

[16] See generally I. Tallgren (ed.), *Portraits of Women in International Law: New Names and Forgotten Faces?* (Oxford: Oxford University Press, 2023).

[17] J. G. Gardam, 'The Law of Armed Conflict: A Gendered Regime?' in D. G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, Studies in Transnational Legal Policy No. 25 (Washington, DC: ASIL, 1993) 174–175.

[18] K. Askin, 'Gender Crimes Jurisprudence in the ICTR: Positive Developments' 3 *Journal of International Criminal Justice* (2005) 1007–1018; K. L. King and M. Greening, 'Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for Former Yugoslavia' 88 *Social Science Quarterly* (2007) 1049–1071; C. MacKinnon, 'The ICTR's Legacy on Sexual Violence' 14 *New England Journal of International and Comparative Law* (2008) 211–221. For critical views, see J. Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' 9(1) *Melbourne Journal of International Law* (2008) 78–124; J. Halley, 'Rape in Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' 30(1) *Michigan Journal of International Law* (2008) 1–123; K. Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (Redwood City, CA: Stanford University Press, 2020).

[19] See S. A. Labenski, 'The Importance of Women as Villains and Violators: Scenes from the ICTY, the ICTR, and Abu Ghraib', Master's thesis, June 2013, American University of Cairo. On women's agency in armed conflict and political violence, see C. Moser and F. Clark (eds.), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001). On the 'prototypical constructions' of women as non-combatants, 'the Beautiful

academic Doris Buss, asking 'where are the women?' directs us to roles and places often obscured in dominant narratives and 'opens up a range of questions about what war and armed conflict are, how they are understood, practiced, and represented, and how women and men, femininities and masculinities, are involved in and produced through war'.[20] Diversity of women's and men's real experiences in conflict, including violence and criminality, should be 'recognized as valid, rather than being excluded from the discourse or reduced to stereotype'.[21]

Many commentaries suggest that international criminal trials have a role in 'writing history'.[22] From that perspective, the transformation of gender balance of the benches in international criminal trials may also alter the authorship of histories about violence and international crime. The unease that persists regarding women's perpetuation of international crimes is, however, also current, perhaps in particular amongst women, and feminists. The infamous photos of Karen England's and other US personnel's cruel violence on detainees in Abu Ghraib prison in Iraq shocked because, as one commentator put it, 'this is not how women are expected to behave. Feminism taught me 30 years ago that not only had women gotten a raw deal from men, we were morally superior to them. When it came to distinguishing right from wrong, the needle of our compass always pointed to true north'.[23]

On the IntLawGrls, a website on women and international law, a blog series titled 'Women in Nuremberg' celebrated women amongst the prosecutorial staff and defence counsels, as well as staffers, interpreters, and journalists. In contrast, the very few women accused of international crimes were barely mentioned, with the suggestion they are 'Not Our Sisters'.[24] As the editors noted, '[t]he crimes of which these women were convicted ought to be unimaginable, and will remain, here at least, unprintable'.[25] The desire to identify only with the positive accomplishments of women remains. It has, however, been met with scholarship striving to dissipate the obscurity surrounding women perpetrators in crimes of totalitarian regimes. A branch of German and international academic discussion on Nazi criminality has since the 1980s sought an end to 'the rituals of innocence in the women's

Soul', and men as fighters, 'the Just Warrior', see J. B. Elshtain, *Women and War* (New York: Basic Books, 1987).

[20] D. Buss, 'Seeing Sexual Violence in Conflict and Post-Conflict Societies: The Limits of Visibility' in D. Buss et al. (eds.), *Sexual Violence in Conflict and Post-Conflict Societies: International Agendas and African Contexts* (New York: Routledge, 2014) 3, at 5.

[21] H. Durham and K. O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' 92(877) *International Review of the Red Cross* (2010) 31–52, at 51.

[22] E.g. L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001).

[23] M. J. Melone, 'We've come a long, and wrong, way', *St. Petersburg Times*, 7 May 2004.

[24] B. Van Schaack, 'Not Our Sisters', INTLAWGRRLS, 31 July 2007, on file with author.

[25] *Ibid.*

movement and in women's history'.[26] In international (criminal) law, this turn is in the making, and the rewritten decision of Simone Gbagbo's arrest warrant makes an important contribution to it.

Complementarity Test in Simone Gbagbo's Admissibility Decision, Prosecutor v. Simone Gbagbo, *Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo*

In the five years from the first International Law Commission (ILC) draft in 1993 for a statute of an international criminal court to the adoption of the Rome Statute in the 1998 diplomatic conference attended by the delegations representing 161 states, the issue of delimitation of the international and national criminal jurisdiction was among the most difficult to negotiate.[27] The solutions found, substantially in Article 17 entitled 'Issues of Admissibility', packaged together with Article 20 on '*Ne bis in idem*', became parts of a multifarious compromise package that made the adoption possible. As the lengthy Articles 18–19 spell out, the concrete application of the delimitation was likely to become cumbersome. Articles 17–20 are typically read in connection with the preamble of the Statute's tenth paragraph, 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. This paragraph provides the origin of the discourse on 'the complementarity principle'.[28]

This legal and doctrinal landscape on complementarity is at the centre of Judge Sarah Easy's 'Separate and dissenting opinion' to Pre-Trial Chamber I decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo. Judge Easy explains the motivation of her dissent as follows: 'In governing the relationship between the (ICC) and domestic criminal courts, Article 17(1)(a) is of great consequence for women and minority groups for whom such institutions have historically been unavailable or ineffective in securing justice.'[29] The dissent relates

[26] See C. Koonz, *Mothers in the Fatherland* (New York: St. Martin's Press, 1987); L. Gravenshort and C. Tatschmurat (eds.), *Töchter-Fragen, NS-Frauen-Geschichte* (Freiburg im Breisgau: Kore, 1990); G. Bock, 'Equality and Difference in National Socialist Racism' in J. Scott (ed.), *Feminism and History* (Oxford: Oxford University Press, 1996) 267–290; J. Stephenson, *Women in Nazi Germany* (London: Routledge, 2001); Weckel and Wolfrum *supra* note 8; K. Kompisch, *Täterinnen: Frauen im Nationalsozialismus* (Köln: Böhlau, 2008).

[27] W. A. Schabas and M. M. El Zeidy, 'Article 17: Issues of Admissibility' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., London: Bloomsbury, 2016) 781–831; D. N. Ntanda Nsereko, 'Article 18: Preliminary Rulings Regarding Admissibility' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., London: Bloomsbury 2016) 832–848; I. Tallgren and A. Reisinger Coracini, 'Article 20: Ne bis in idem' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., London: Bloomsbury, 2016) 899–931.

[28] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, preamble.

[29] Separate and Dissenting Opinion of Judge Sarah Easy, § 5 (footnote omitted).

to how the Pre-Trial Chamber arrived at its conclusion to dismiss the inadmissibility challenge by Côte d'Ivoire. In doing so, Judge Easy dismisses the Pre-Trial Chamber's decision.

Judge Easy's feminist reimagining rejects the Pre-Trial Chamber I use of the 'same person/same conduct' test as being too narrow and vague.[30] In doing so, she refers to the language used in the Appeals Chamber decision on Libya's appeal against the Pre-Trial Decision in the case against Saif Al-Islam Gaddafi.[31] In this case, the Appeals Chamber dismissed the admissibility challenge by Libya. In her judgment, Judge Easy regrets that the Pre-Trial Chamber 'has not seized the opportunity to further clarify the content of this [same person/same conduct] test and address the gender justice concerns arising out of its application'.[32] At this point, it is necessary to return to the observations about the context of the feminist redrafting exercise that I started with. Who were the judges deciding the case that is now 'reimagined'? Silvia Fernández de Gurmendi (presiding), Ekaterina Tredafilova, and Christine Van den Wyngaert. A bench of three women resorted to an interpretation that is, to quote Easy, 'likely [to] operate in a discriminatory manner against women who are statistically significantly more likely to be victims of sexual and gender-based violence, by precluding them from seeking redress at both the national and international level'.[33]

The main critique of Judge Easy's dissent is, however, not directed at the Pre-Trial Chamber's decision, but the state of Côte d'Ivoire, its legal system, judiciary, and 'court and law enforcement personnel'.[34] The sharp rewriting fails to pay attention to the history of Côte d'Ivoire's relationship with the ICC as a movement towards a closer relation – the acceptance of its jurisdiction as a non-state party in 2003, the *proprio motu* investigation in 2011, state party to the Rome Statute in 2013. In contrast, Judge Easy underlines that the court must exercise 'the expressive function of denouncing state conduct which fosters impunity',[35] having inquired about the quality and the conduct of the national law enforcement authorities and judiciary. This position mirrors a contentious aspect in the Statute negotiations that the Court has tried not to dwell on extensively in its case law.

Judge Easy explains how 'evidence before me indicates that entrenched discriminatory attitudes towards women and girls in Côte d'Ivoire present a significant barrier to the genuine investigation of incidents of sexual and gender-based violence'.[36] She quotes at length a report by an NGO describing shocking events of

[30] *Ibid*, § 4.
[31] 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', *Gaddafi and Al-Senussi* (ICC-01/11-01/11), Appeals Chamber, 21 May 2014.
[32] Separate Opinion of Judge Easy, § 5.
[33] *Ibid*, § 9.
[34] *Ibid*, § 32.
[35] *Ibid*, § 24.
[36] *Ibid*, § 27.

sexual and gendered violence in detail.[37] She further finds that there is evidence suggesting 'that the pervasive trivialisation of these crimes is so significant that even if the justice system had not been disrupted by political turmoil and conflict, lacunae in the prosecution of sexual and gender-based crimes would prevail'.[38] Judge Easy further argues that 'gender-based discrimination is not only practised by the general population but evinced by the very institutions charged with effecting justice. Of great concern is the systematic encouragement by the Ivorian police for the victims to seek an amicable solution with their rapist'.[39]

I am, firstly, surprised by how this feminist rewriting outright refuses to consider whether any co-operation with or support to the Côte d'Ivoire authorities would be meaningful.[40] While Judge Easy mentions the efforts of the UN operation in Côte d'Ivoire (UNOCI) to train the national and local police in sexual and gender-based violence, they are considered as 'unlikely to have a transformative effect . . . due to the nature of structural discrimination which is omnipresent across economic and socio-political spheres'.[41] Judge Easy appears to choose a straightforward polarisation of the national and the international jurisdiction – an outcome the Rome Statute negotiators struggled to avoid.[42] Her decision flags the prioritisation of international law and the 'international community', trusting both with inherently superior qualities, at least regarding the interests of women and girls. The ICC is presented as being able and potentially willing to completely take over the administration of criminal justice in Côte d'Ivoire. The domestic judiciary and administration of the post-colonial state are painted in indelible dark colours, as a despicable nest of violence, brutality, and injustice. Consideration is given exclusively to the interests of victimised women, in particular those who relate to the ICC favourably, potentially having received attention and promises of international reparations to be granted subsequently

A second issue with Judge Easy's feminist reimagining is the exclusive focus on criminal trials, and on punishment in particular. A prison sentence as lengthy as possible is considered the only ever acceptable consequence for perpetrators of any sexual violence.[43] No empirical evidence is deemed necessary by Judge Easy to demonstrate the explicit and extraordinary value of international criminal trials from

[37] *Ibid*, § 31.
[38] *Ibid*, § 32
[39] *Ibid*, § 32 (footnote omitted).
[40] For a remarkable recent volume on the possibilities and challenges of accountability in several African countries, see E. C. Lubaale and N. Dyani-Mhango, *National Accountability for International Crimes in Africa* (London: Palgrave Macmillan, 2022). For a study on the earlier practice, S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).
[41] Separate Opinion of Judge Easy, § 32.
[42] Schabas and El Zeidy, *supra* note 27; Ntanda Nsereko, *supra* note 27; Tallgren and Reisinger Coracini, *supra* note 27.
[43] See Separate Opinion of Judge Easy, § 33.

the point of view of victims, for example, or the societal effects of international punishments, in general.[44] This certainty of the superiority of international criminal justice departs from scholarship searching also for alternative, not criminal prosecution-based models of resolution of conflicts in transitional justice or more broadly in post-conflict societies.[45] It contrasts with the experience that 'in terms of the relative significance of the local fit and international frame in retributive justice outcomes for women, international norms must always work their influence through the filter of domestic structures and domestic norms'.[46] Judge Easy's separate and dissenting opinion is not so inclined; instead it sees as a particular risk 'the prevalence of customary law, particularly in northern rural regions' (of Côte d'Ivoire) which 'further enshrines structural discrimination and inadequate protections for victims of sexual violence'.[47]

Further, Judge Easy's dissent does not introduce any attempt to balance the goal of retribution with other interests, such as granting a fair trial to the accused. This might be because of gendered assumptions about the identity of the parties in a criminal trial at the ICC: the male perpetrators and the female victims, notwithstanding the current case. Judge Easy admits that the Court has established that 'the assessment of the conduct forming the subject of domestic proceedings in the context of an admissibility challenge must focus on the underlying incidents and not their legal characterisation'.[48] That the reasons for that position can be seen as diverse, including the acknowledgement of the heterogeneity of legal cultures, criminal law, and justice systems in the world, is not addressed.

There is a connection, as Judge Easy also notes, to the *ne bis in idem* principle in Article 20, 'which protects the accused from double penalisation of the same acts under different labels of criminality'.[49] Easy 'regret[s]', however, 'that this interpretation is likely to adversely impact victims … by confining the ambit of recognition and reparations available to those prescribed for ordinary crimes'.[50] She further undertakes an astute, if somewhat complex, examination of the procedural and doctrinal minutiae of Articles 17 and 20 in light of the growing ICC case law to ground her conclusions. Because of the various 'significant barriers to justice for women and girls in Côte d'Ivoire, it cannot be said that the ongoing investigation into Ms Simone Gbagbo's criminality' by the justice system of Côte d'Ivoire

[44] F. Jessberger and J. Geneuss (eds.), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (Cambridge: Cambridge University Press, 2020).

[45] For discussion, see e.g. L. Yarwood (ed.), *Women and Transitional Justice* (Abingdon: Routledge, 2013); C. O'Rourke, *Gender Politics in Transitional Justice* (Abingdon: Routledge, 2013).

[46] O'Rourke, *supra* note 45, at 96.

[47] Separate Opinion of Judge Easy, § 32.

[48] *Ibid*, § 12.

[49] *Ibid*.

[50] *Ibid*.

'constitutes a genuine investigation',[51] Judge Easy believes. She therefore concurs 'with the Majority in finding that the present case is admissible before the Court'.[52]

Judge Sarah Easy's feminist rewriting has the merit of strong internal consistency: it makes the legal and procedural interests of female victims of sexual and gender-based violence in an international criminal trial the superior, if not the only, objective of the ICC. A concern I have with the approach used by Judge Easy is that should one wish to extend the reflection to potential real-life consequences of this rewriting for Ivorians in the narrated context, several challenges appear. Who (that is, what constituency of power) guarantees the sustainability of such an exclusively punitive policy? In the tensions of the fragile 'international community', with its wavering and often racialised policies of international criminal justice, the ICC has so far been struggling annually to gather the financial resources for its functioning. Its longevity is a real concern: in the reimagined situation of Côte d'Ivoire, what happens to the victims when the odds are reversed in the ICC and the international crews pack their bags to focus on another situation?

The decision therefore gives reason to inquire about the nature of 'justice' in a feminism where everything should be sacrificed for the ambition of 'saving' a number of 'women and girls' from the hands of their own malicious post-colonial state, its authorities, customary law, the legal profession as a whole, denounced for 'conduct which fosters impunity',[53] 'weak effort',[54] 'pervasive trivialisation of these crimes'[55] – to such a fatal and lasting extent that even any future proceedings 'of such crimes would likely not be considered genuine'.[56] I am not ignorant of or insensitive to the suffering and injustices encountered by individuals and communities facing or having faced sexual violence. Rather, I wish to take issue with the feminist anti-impunity position upon which Judge Easy's reasoning is based, and I would like to respectfully encourage open discussions on the civilisational assumptions of feminist approaches that emphasise international criminal prosecutions at the expense of the (post-colonial, African) national state and its own efforts towards post-conflict justice.

The issue could be approached in terms of universalism of international criminal law and 'women's rights', opposing them to particularism(s), local culture, as early post-colonial feminist theory did.[57] Yet, to my understanding, the main questions are no longer there. After the 'Me Too' movement and the global backlash on feminism (s), including the deplorable spectacle of annihilation of the Women, Peace and

[51] *Ibid*, § 34.
[52] *Ibid*, § 35.
[53] *Ibid*, § 24.
[54] *Ibid*, § 31.
[55] *Ibid*, § 33.
[56] *Ibid*.
[57] See e.g. R. Lewis and S. Mills (eds.), *Feminist Postcolonial Theory: A Reader* (Edinburgh: Edinburgh University Press, 2003).

Security agenda in Afghanistan since 2021, is it plausible to argue for some imagined perfection, a superiority of legal protection of women's rights or universal 'international law' safeguarding women's interests at the *centre* that could be as clearly juxtaposed with its 'lack' in the *periphery*?[58] Women's lives and their rights, their bare existence, to start with their physical inviolability, sexuality, and their political and economic survival as members of society are globally under threat or already attacked, be it in Finland, Australia, the United States, or Côte d'Ivoire. Why should feminist reimagining so resolutely turn its back on the possibilities of exchanges and collaboration between the local, national, and international judiciary and law enforcement – experts, judicial personnel, representatives of victims? Finally, whose interests are served by excluding any chance of a transformative reform in Côte d'Ivoire as a whole: what does such a hopeless image, as one of 'The Dark Corners of the World',[59] convey to Ivorians of the future of their own democratic state?

THE REMAINS OF THE REWRITING

I have raised many questions in the preceding pages, such as the following: Is feminist reimagining constrained by the international law in force and its established structures, its sediments of institutional practice, formed when (almost) all women, their ideas and interests were absent? How should feminism(s) relate to that long absence, so full of consequences for current law and jurisprudence? Should a feminist remain always combative or rather try to show resilience – to whom? I started my reflections by calling for attention to the contexts in which feminist rewriting takes place. In the instructions for this fascinating project, the rewriters were invited to imagine themselves in the same position of knowledge as the ICC judges were at the time of rendering their decisions. Inside the frames formed by that rule, the authors have creatively searched for ways to change, to transform, to remedy, by rewriting decisions of the ICC.

The two rewritten decisions discussed above reflect diverse and to some extent contradictory desires. Natalie Hodgson's rewriting aims, primarily, at discrediting certain stereotypical categorisations of the roles and behaviour of women and men, deconstructing the discursive choices of the original decision and offering a new rationality for approaching perpetration of international crimes. In that sense, and in my subjective understanding, it is primarily based on the rationale of emancipation of women aiming at a formal equality of sexes and genders. The second rewriting by Sarah Easy is feminist in a different manner, more frontal and ambitious in how it

[58] R. Kapur, '"The First Feminist War in All History": Epistemic Shifts and Relinquishing the Mission to Rescue the "Other Woman"' 116 *AJIL Unbound* (2022) 270–274; K. Bennoune, 'Multi-Directionality and Universality: Global Feminisms and International Law in the Twenty-First Century' 116 *AJIL Unbound* (2022) 275–280.

[59] J. Reynolds and S. Xavier, '"The Dark Corners of the World": TWAIL and international Criminal Justice' 14(4) *Journal of International Criminal Justice* 959–983.

aims at rewriting the political architecture of the Rome Statute: its (in)famous oscillation between the acknowledgement of national sovereignty, the past status quo of impunity and the complementary international criminal jurisdiction. The impression of a categorical, civilisational dismissal of the ailing post-colonial state is a risk that I have touched on.

Beyond the temporal contexts, feminist reimagining can be approached in terms of the places of rewriting, the situations of the exercise in geographical, political, cultural spaces, languages, and discourses: the locations of, firstly, committing the alleged international crimes, secondly, taking the original decision, and thirdly, the feminist rewriting each flavour the exercise. How do feminism(s) relate to populations, languages, everyday lived experiences 'on the ground' of the interventions of international criminal courts and tribunals in 'the situation of Côte d'Ivoire'?

The violence addressed as (alleged) international crimes by the prosecutor of the ICC in The Hague took place in Côte d'Ivoire, a state that became independent from its colonisation by France in 1960.[60] The international crimes were allegedly committed both by and against nationals or residents of Côte d'Ivoire, a population of 29 million. Seventy-eight languages are spoken in Côte d'Ivoire.[61] The official language, imposed during the colonial period, is French, currently understood by an estimated 80 per cent of the population.[62] It is the language used in the media, election campaigns, and the administration of justice. The literacy rate at the time of the alleged violence (2012) was 40.98 per cent.[63] The latest estimation (2019) is 89.89 per cent.[64]

The feminist rewriting took place in Australia and the United Kingdom, by native speakers of English. The draft decisions discussed in November 2022 contained no or few references to local academic or media sources or other locally produced knowledge about Côte d'Ivoire. In that sense, the feminist justice rendered may appear, from the point of view of the local population, its academic scholars, media, and civil society, to remain as distanced from the contexts of everyday life and of the violence, the victims, and the perpetrators as the regular ICC practice has been critically claimed to be.[65] A difference of importance exists, however, in how the ICC judges have access to a dedicated staff researching, collecting, translating, interpreting, analysing, and synthesising materials, and writing drafts of the decisions. Part of that work became available for the feminist rewriters via documents of

[60] See e.g. www.agi-ivoiriens.com/cote_ivoire/cote_ivoire_histoire.html; J. N. Loucou, *Côte d'Ivoire: les résistances à la conquête coloniale* (Abidjan: Éditions CERAP, 2007).
[61] Ethnologue, 'Côte d'Ivoire', available at www.ethnologue.com/country/CI/.
[62] *La langue française dans le monde: Édition 2019* (Paris: Gallimard and OIF, 2019).
[63] www.indexmundi.com/facts/c%C3%B4te-d%27ivoire/indicator/SE.ADT.LITR.ZS.
[64] *Ibid*.
[65] For a recent contribution, see O. Ba, K.-J. Bluen, and O. Owiso, 'The Geopolitics of Race, Empire, and Expertise at the ICC', *International Studies* (Oxford: Oxford Research Encyclopedia of International Studies, 2023).

the Court. The pro bono feminist judgment authors we are reading in this volume had no or very limited means at their disposal to engage translators, for example.

Distance can be seen in a positive light, as an element of impartiality, an intrinsic value in criminal justice. Even more so, one could argue, in a situation of violence that could be qualified as 'political violence' since it occurs, in the narrative of the ICC at least, between adherents to conflicting political parties in a national state. Distance may, however, also cause ignorance, so that the knowledge and experiences of the distant other – 'the Other' of what is close/known – are neglected or marginalised. Lack of local sources of information in making decisions in a central question of a particular society can signal indifference, or at worst a standing as hierarchically superior masters who believe they should have the last word. Here I would make a distinction between the legal questions of jurisdiction and competence and the intellectual, value-based positionings, bearing in mind how 'feminist justice' is at times associated with aspirations towards the experience of a palpable, human, material justice by the persons concerned, eventually engaged in dialogues, and less concerned for the formal procedures.

In that sense, the astute rewritings discussed here do not exhaust the possibilities of a feminist reimagining of Côte d'Ivoire. As we have been invited in this project to think 'outside the box', I shall shortly try to explain that remark. One example of an 'outside-the-box' reflection would be to openly question the choice of international criminal justice as the central instrument for a feminist reimagining of 'the situation of Côte d'Ivoire'. It would mean countering another kind of inability or unwillingness, namely that of the 'international community' and international lawyers to critically evaluate the limits of their institutional practices. In such an evaluation, the Côte d'Ivoire situation might figure as a poignant example of structural violence where the focus on individual criminal responsibility is inapt, so that any international resources and attention should at best be directed differently.

To arrive at that reflection requires admitting that the *actus reus* of Simone Gbagbo's and the other accused's crimes, casually characterised as 'election violence', exceed the conceptual frame of criminal responsibility in which the ICC tried to make it fit. The 'election violence' or a threat of it was and remains recurrent and omnipresent, not restricted to the temporal jurisdiction of the ICC in 'the situation in the Republic of Côte d'Ivoire', or to the acts or omissions of the accused that featured in the ICC case materials. Therefore, instead of the frame set by the ICC, a feminist rethinking might rather try to address the general, structural, constitutional, and legal difficulties of peaceful democratic governance in a young state scarred by colonialism and the slave trade, surrounded by neighbouring states confronting comparable problems, aggravated by the fact that they are situated in Africa, a continent and populations exploited, discriminated, othered, and ostracised like no other.

The thinking 'outside the box' would therefore question whether an efficient cure to a tense and dysfunctional political system in a confrontational social environment

that is turning every upcoming election into a potential starting point for a new outbreak of violence can be found in the elegant courthouse in The Hague, or in the international prison-house in Scheveningen. A feminist rethinking might even ask to what extent the ICC and the overwhelming, passionate commitment, activism, and academic investment in international criminal punishment forms part of a global political economy that adds to the already manifold challenges faced by post-colonial states.

Another line of 'outside-the-box' thinking might dig even deeper, analysing the ideological, cultural, and civilisational underpinnings of the arguably 'Western' and gendered conceptions of the hierarchies of violence. Why is rape, in particular, as if intuitively, considered a 'fate worse than death'?[66] Since when, where, and why should one think so? Do feminism(s) have to integrate the ideologies or cultural mythologies of the magical 'purity' of virgins of Christianity and other religions, thus confirming the male control of female sexuality and the patriarchal demands on the familial and national lineage of children?[67] Similarly, it comes across that diverse types of sexual conduct or victims are valued in civilisational, culture-based ways, too. Is anal sex more serious or less serious violence than vaginal penetration, for example, and what civilisational assumptions or fears might figure behind such hierarchies? Finally, why is 'violent gang rape of … grandmothers'[68] more serious or shocking a crime than the same conduct regarding persons not having biological descendants?

These are complex and sensitive issues to study and discuss. Leaving the security of the like-minded 'box' may become a risky excursion into unknown or even hostile territory, thus prone to misunderstandings and manifold confusion. Yet the word 'feminist' would seem to call for a courageously critical reconsideration of the gendered and European-originated 'international' humanitarian law, the basis of the current international criminal law on sexual and gendered violence: what and who have been the protected interests behind the criminalisation of this violence, and where and among whom did these norms first take form?[69] Why should the victims of sexual violence be burdened, in addition to physical and mental pain and eventual bodily injury, with the tragic, ominous stigma, as if 'damaged goods for life'? A feminist rewriting at its best would make sure that the shame and stigma change sides, not 'soiling' the victims, and this without regard to their sex, gender, sexual orientation, age, ability, motherhood or not, or civil status.

Some of the 'outside-the-box' feminist rewritings of the ICC decisions would abstain from applying every rule of the current order of international law. Instead,

[66] See C. McGlynn, 'Rape as "Torture"? Catherine MacKinnon and Questions of Feminist Strategy' 16(1) *Feminist Legal Studies* (2008) 71–85.

[67] See e.g. Y. Knibiehler, *La virginité féminine: Mythes, fantasmes, émancipation* (Paris: Odile Jacob, 2012).

[68] Separate Opinion of Judge Easy, § 31.

[69] See e.g. H. Matthews, 'Redeeming Rape: Berlin 1945 and the Making of Modern International Criminal Law' in I. Tallgren and T. Skouteris (eds.), *The New Histories of International Criminal Law – Retrials* (Oxford: Oxford University Press, 2019) 90–109; Engle, *supra* note 18.

they would question and reflect. They might also choose not to use the money from donors to queue for an audience with the staff of the ICC Prosecutor's Office at the margins of the meeting of the Assembly of States Parties to the Rome Statute. They would, instead, launch a broad public reflection on the sense of trying to enforce individual criminal responsibility for long-term structural societal and political problems in a post-colonial African state by an international court in Europe. Thereby they would also question the use of resources available for and in Côte d'Ivoire, such as the short and at times erratic attention span of the Western/Global North's governments, media, and public on a small selection of *jus in bello* violence, instead of focusing on peace and thus the prohibition of violence in general (*jus ad bellum*).[70] This would require facing the challenge of imagining together with the civil society, academia, judiciary, and law enforcement personnel of Côte d'Ivoire different, hopefully better adapted, ways to channel the general desire for justice and progress, and profit from the benevolent intellectual energies of international lawyers – perhaps feminists at the forefront.

12.2 FEMALE DEFENDANTS IN THE SIMONE GBAGBO WARRANT

Natalie Hodgson

In 2012, the Pre-Trial Chamber III issued a warrant under Article 58 of the Statute for the arrest of Ms Simone Gbagbo,[71] the first female defendant in the history of the Court. The Chamber found there were reasonable grounds for believing that Ms Gbagbo had committed the crimes against humanity of murder, rape, other forms of sexual violence, persecution, and other inhumane acts.[72] The Chamber determined that Ms Gbagbo's criminal responsibility could reasonably be established as an indirect co-perpetrator under Article 25(3)(a), based upon her involvement in the 'inner circle' of her husband, Mr Laurent Gbagbo.[73] Furthermore, the Chamber held that, despite Ms Gbagbo's detention in custody, the issuance of the warrant was necessary in light of her political contacts, economic resources, and propensity to commit further crimes within the jurisdiction of the Court.[74]

In this reimagined judgment, Natalie Hodgson endorses the Chamber's decision to issue the warrant of arrest for Ms Gbagbo whilst refuting the gendered stereotypes encoded in the original presentation of the facts. Employing gender-neutral language that avoids overemphasis of Ms Gbagbo's status as a 'wife and mother', Hodgson challenges traditional narratives of the passive, disenfranchised female

[70] Matthews, *supra* note 69, develops this argument in general with regard to 'the feminist anti-impunity project'.

[71] Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Simone Gbagbo, *Simone Gbagbo* (ICC-02/11-01/12-2), Pre-Trial Chamber III, 2 March 2012.

[72] *Ibid*, § 19.

[73] *Ibid*, §§ 29–30.

[74] *Ibid*, §§ 41–45.

defendant, as well as broader ideas about femininity and conflict. Hodgson concludes by offering some thoughts on the relevance and irrelevance of a defendant's gender in criminal prosecutions.

No.: ICC-02/11-01/12
Date: 2 March 2012

Original: English

PRE-TRIAL CHAMBER III(B)

Before: Judge Natalie HODGSON

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

Public redacted version

Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Simone Gbagbo

Pre-Trial Chamber III (Chamber) of the International Criminal Court (ICC or Court) issues the following decision on the Prosecutor's Application Pursuant to Article 58 as to Simone GBAGBO (Prosecutor's Application).

PROCEDURAL HISTORY

1. On 3 October 2011, the Pre-Trial Chamber authorised an investigation into the situation in the Republic of Côte d'Ivoire.[75]

2. On 30 November 2011, the Pre-Trial Chamber issued a warrant of arrest against Laurent Gbagbo (Mr Gbagbo).[76]

3. On 7 February 2012, the Prosecutor filed an application for a warrant of arrest against Simone Gbagbo (Ms Gbagbo). The Prosecutor argues that Ms Gbagbo is responsible, as an indirect co-perpetrator under Article 25(3)(a) of the Rome Statute (Statute), for the crimes against humanity of murder,[77] rape and other sexual violence,[78] other inhumane acts,[79] and persecution.[80]

4. Under Article 58(1) of the Statute, to issue an arrest warrant, the Chamber shall determine whether there are reasonable grounds to believe that the person

[75] Corrigendum to Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the Republic of Côte d'Ivoire* (ICC-02/11-14-Corr), Pre-Trial Chamber III, 15 November 2011.

[76] Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11-9-Red), Pre-Trial Chamber III, 30 November 2011.

[77] Art. 7(1)(a) ICCSt.

[78] Art. 7(1)(g) ICCSt.

[79] Art. 7(1)(k) ICCSt.

[80] Art. 7(1)(h) ICCSt.

concerned has committed a crime within the jurisdiction of the Court, and that the arrest of the person appears necessary.

THE JURISDICTION OF THE COURT AND THE ADMISSIBILITY OF THE CASE AGAINST MS GBAGBO

Jurisdiction

5. For conduct to fall within the Court's jurisdiction, three criteria must be satisfied:

(i) The conduct amounts to a crime listed in Article 5 of the Statute;
(ii) The crime occurred within the relevant timeframe specified in Article 11 of the Statute; and
(iii) The crime satisfies the territorial or nationality criteria in Article 12 of the Statute.

6. Given the similarities between this application and the application against Mr Gbagbo, the Chamber adopts its earlier reasoning from the Decision on the Prosecutor's Application for a Warrant of Arrest against Mr Gbagbo and concludes that the case against Ms Gbagbo falls within the temporal, territorial, and nationality jurisdiction of the Court.[81]

7. For the reasons listed below, the Chamber also concludes that the case against Ms Gbagbo falls within the Court's subject-matter jurisdiction.

Admissibility

8. The Prosecutor submits that the current case is admissible. Although there are domestic proceedings against Ms Gbagbo, the Prosecutor submits that these concern 'economic' crimes which are not substantially the same conduct as the present case.

9. The Prosecutor further submits that the case is of sufficient gravity, based on the scale, nature, and manner of the commission of the crimes and the impact of these crimes on the victim.

10. Article 19(1) of the Statute grants the Chamber the discretionary power to determine the admissibility of a case on its own motion. The Appeals Chamber has held that, at the arrest warrant stage where the Prosecutor's application is made on a confidential and *ex parte* basis, the Chamber should only exercise its discretion in exceptional circumstances, so as to preserve the interests of the relevant person.[82]

[81] Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11-9-Red), Pre-Trial Chamber III, 30 November 2011.

[82] Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', *Situation in the Democratic Republic of the Congo* (ICC-01/04-169-US), Appeals Chamber, 13 July 2006, §§ 52, 53.

11. The Chamber notes its reasoning from the Decision Authorising the Investigation in the Republic of Côte d'Ivoire, where the Chamber was satisfied that potential cases arising in the situation would be admissible and of the requisite gravity. It is inappropriate at this stage for the Chamber to examine the admissibility of the case against Ms Gbagbo more fully.

WHETHER THERE ARE REASONABLE GROUNDS TO BELIEVE THAT ONE OR MORE CRIMES FALLING WITHIN THE JURISDICTION OF THE COURT HAVE BEEN COMMITTED

12. The Prosecutor submits that Ms Gbagbo is criminally responsible for the crimes against humanity of (1) murder, (2) rape and other forms of sexual violence, (3) other inhumane acts, and (4) persecution.

13. When the 2010 presidential election in Côte d'Ivoire was held, the Front populaire ivoirien (FPI), the political party of which Ms Gbagbo was a member, was in power. The incumbent president of Côte d'Ivoire was Mr Gbagbo, Ms Gbagbo's husband. On 2 December 2010, the Independent Electoral Commission announced that Alassane Ouattara (Mr Ouattara) had won the election with 54 per cent of the vote. Mr Ouattara was a member of the Rassemblement des Républicains (RDR) political party. On 3 December 2010, the Constitutional Council announced that the election results were invalid and Mr Gbagbo was the winner.[83]

14. The Prosecutor submits that in subsequent months, Ms Gbagbo along with Mr Gbagbo and other members of his inner circle orchestrated significant violence against individuals perceived to be supporters of Mr Ouattara, as part of an alleged plan to retain their political power by all means necessary.

Contextual Elements of the Crimes against Humanity

15. Under Article 7(1) of the Statute, a crime against humanity involves any of the specified acts (underlying acts) when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. An 'attack directed against any civilian population' is a course of conduct involving the multiple commission of the acts referred to in Article 7(1), pursuant to or in furtherance of a state or organisational policy to commit such an attack.[84]

Widespread or Systematic Attack against a Civilian Population

16. The Chamber finds that there are reasonable grounds to believe that between 28 November 2010 and 8 May 2011, multiple attacks were committed against civilians who were or were perceived to be supporters of Mr Ouattara.

[83] Twenty-Seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, UN Doc No S/2011/211, 30 March 2011, ICC-02/11-24-US-Exp-Anx5.36, §§ 14–15.

[84] Art. 7(2)(a) ICCSt.

17. The materials provided by the Prosecutor indicate that victims were attacked because they lived in areas believed to support Mr Ouattara.[85] Victims were also identified on ethnic, religious, or national grounds as perceived supporters of Mr Ouattara.[86] The attacks were carried out by the Ivorian Defence and Security Forces (FDS), youth militia, and mercenaries (collectively, the pro-Gbagbo forces).[87]

18. Members of the inner circle, including Ms Gbagbo, distributed weapons to the pro-Gbagbo forces. The pro-Gbagbo forces were also given direct and indirect instructions and training on how to target supporters of Mr Ouattara.[88]

19. The materials indicate that attacks continued over a period of five months and resulted in between 706 and 1,059 murders, 35 rapes, the arbitrary arrest of at least 520 individuals, and the infliction of serious bodily injury and suffering on at least 90 people.[89] The attacks involved multiple incidents and occurred in the city of Abidjan, in the west of Côte d'Ivoire (including Bedi-Goazon, Bloléquin, Duékoué, and Gagnoa), and in the coastal areas of Côte d'Ivoire (including Sassandra).[90]

20. The materials indicate that violence followed a consistent pattern. The pro-Gbagbo forces erected road blocks in order to identify individuals who, based on their ethnicity or religious background, may have supported Mr Ouattara. Attacks on civilians were carried out concurrently in multiple locations, demonstrating coordination among the pro-Gbagbo forces.

21. The Chamber therefore concludes that there are reasonable grounds to believe that in the aftermath of the Côte d'Ivoire presidential elections, pro-Gbagbo forces attacked the civilian population, targeting people who they believed were supporters of Mr Ouattara.

22. The Chamber further concludes that there are reasonable grounds to believe that these attacks were both widespread and systematic.

Pursuant to or in Furtherance of a State or Organisational Policy to Commit such an Attack

23. The Prosecutor submits that Mr Gbagbo and his inner circle constituted an 'organisation'.

[85] J. T. Balima, 'Afrique de l 'Ouest: Crise Ivorienne – L'ABSF fait un décompte macabre', *All Africa*, 10 July 2011, ICC-02/11-24-US-Exp-Anx6.35.

[86] *Ibid*.

[87] Twenty-Seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, UN Doc. No. S/2011/211, 30 March 2011, ICC-02/11-24-US-Exp-Anx5.36, 10–12.

[88] Video material ICC-02/11-24-US-Exp-Anx7.1. See Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11-9-Red), Pre-Trial Chamber III, 30 November 2011, n. 80.

[89] See Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *Prosecutor v Laurent Gbagbo* (ICC-02/11-01/11-9-Red), Pre-Trial Chamber III, 30 November 2011, n. 34.

[90] See *ibid*, § 35.

24. The Chamber is satisfied that there are reasonable grounds to believe that an inner circle existed, comprising individuals occupying formal and informal positions in Mr Gbagbo's government. Ms Gbagbo was a member of this inner circle.[91]

25. The materials provided by the Prosecutor indicate that the inner circle adopted a policy to attack Mr Ouattara, members of the RDR political party, and civilians who were believed to support Mr Ouattara, in order to retain their political power by all means necessary.

26. The existence of this policy can be inferred by: the consistent and widespread attacks by pro-Gbagbo forces against civilians believed to support Mr Ouattara; the provision of finance and weapons to pro-Gbagbo forces by members of the inner circle; and instructions provided by members of the inner circle to pro-Gbagbo forces.

27. The Chamber therefore concludes that there are reasonable grounds to believe that the attacks occurred pursuant to, or in furtherance of, an organisational policy to commit such an attack.

Underlying Acts

28. The Prosecutor submits that Ms Gbagbo, as an indirect co-perpetrator, committed the crimes against humanity of murder (Count 1),[92] rape and other forms of sexual violence (Count 2),[93] other inhumane acts (Count 3),[94] and persecution (Count 4).[95]

29. The Prosecutor refers to the following four incidents in support of the charges:

(i) The attacks relating to the Radiodiffusion Télévision Ivoirienne (RTI) demonstrations between 16 and 19 December 2010.
(ii) The attack on the women's march in Abobo on 3 March 2011.
(iii) The Abobo market shelling on 17 March 2011.
(iv) The Yopougon massacre on 12 April 2011.

30. The Chamber notes that, in the Decision on the Prosecutor's Application for a Warrant of Arrest against Mr Gbagbo, the Chamber found that there were reasonable grounds to believe that the acts of murder, rape, and other forms of sexual violence, persecution, and other inhumane acts had been committed by pro-Gbagbo forces during these incidents.[96]

[91] See V. Hugeux, 'Simone Gbagbo femme fatale', *L'Express*, 20 February 2003, available at https://web.archive.org/web/20040619003526/http://www.lexpress.fr/info/monde/dossier/cotedivoire/dossier.asp?ida=376354.
[92] Art. 7(1)(a) ICCSt.
[93] Art. 7(1)(g) ICCSt.
[94] Art. 7(1)(k) ICCSt.
[95] Art. 7(1)(h) ICCSt.
[96] Decision on the Prosecutor's Application pursuant to Article 58 for a Warrant of Arrest against Laurent Koudou Gbagbo, *Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11-9-Red), Pre-Trial Chamber III, 30 November 2011.

31. As such, the Chamber adopts its earlier reasoning and concludes that there are reasonable grounds to believe that the charged crimes were committed in Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011.

WHETHER THERE ARE REASONABLE GROUNDS TO BELIEVE THAT MS GBAGBO IS CRIMINALLY RESPONSIBLE FOR THE CRIMES ALLEGED BY THE PROSECUTOR

32. The Prosecutor submits that Ms Gbagbo is responsible for the alleged crimes as an indirect co-perpetrator.[97]

33. The Chamber is satisfied that there are reasonable grounds to believe that Ms Gbagbo fulfils the elements of co-perpetration.

34. Immediately prior to the 2010 election, Ms Gbagbo had her own cabinet within the Presidency with its own staff. In a country where women are significantly underrepresented in political positions, Ms Gbagbo was an active decision maker and possessed significant political power.[98] Many perceived her as the alter ego of the president.

35. Ms Gbagbo's significant political power reflects her long political career. She was a founding member of the FPI. In addition, she has served as a member of the Parliament for Abobo and secretary of the Congrès national pour la résistance et la démocratie (CNRD) political group.[99]

36. This Chamber has already found that there is a reasonable basis to believe that members occupying formal and informal positions in the government comprised an 'inner circle' who operated pursuant to a policy to retain their political power by all means necessary. Ms Gbagbo was a member of this inner circle.

37. During the relevant period, the materials provided by the Prosecutor indicate that Ms Gbagbo participated in meetings of the inner circle to plan and coordinate attacks against Ouattara supporters, in order to retain her political position and her own political power. Ms Gbagbo instructed the pro-Gbagbo forces to commit crimes against individuals who were perceived to support the political opponents of the FPI. Ms Gbagbo held meetings with officials in the FDS and supplied them with military equipment. The FDS perpetrated violence on her orders. Ms Gbagbo also provided instructions to members of the youth militia to commit crimes against Ouattara supporters.

38. The Chamber finds that there are reasonable grounds to believe that a common plan existed among the inner circle and that Ms Gbagbo and the other members of the inner circle were aware that implementing this plan would lead to the commission of the offences discussed above in the ordinary course of events.

[97] Art. 25(3)(a) ICCSt.
[98] See Hugeux, *supra* note 91.
[99] *Ibid.*

Given her position in the inner circle, Ms Gbagbo was aware of the relevant circumstances that enabled her and other members of Mr Gbagbo's inner circle to exercise joint control over the alleged crimes.

39. Further, by virtue of the various roles they occupied and actions they performed, Ms Gbagbo and the other members of the inner circle made a co-ordinated and essential contribution to the alleged crimes. The pro-Gbagbo forces complied with the orders they received from the inner circle with almost automatic compliance.

40. There are reasonable grounds to believe that Ms Gbagbo acted with the necessary degree of intent and knowledge in performing her role within the common plan.

41. Therefore, the Chamber concludes that there are reasonable grounds to believe that Ms Gbagbo is responsible for the crimes as an indirect co-perpetrator.

WHETHER THE REQUIREMENTS FOR THE ARREST OF MS GBAGBO UNDER ARTICLE 58(1)(B) OF THE STATUTE HAVE BEEN MET

42. Pursuant to Article 58(1) of the Statute, when there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court, the Chamber shall issue a warrant of arrest if the arrest of the person appears necessary.

43. The grounds on which an arrest may appear necessary are: (i) ensuring the person's appearance at trial; (ii) ensuring that the person does not obstruct or endanger the investigation or court proceedings; and (iii) to prevent the person from continuing with the commission of the crime or a related crime within the jurisdiction of the Court which arises from the same circumstances.[100]

44. A person's past and present political position, international contacts, financial and professional background, their access to necessary networks and financial resources, and the likely length of any potential sentence are factors that might increase the risk that an individual will abscond or avoid arrest.[101] Additionally, a person's access to networks and financial status is a relevant factor in determining whether they have the means to interfere with the investigation or safety of witnesses.[102]

45. Ms Gbagbo has a long political history and strong political connections throughout Côte d'Ivoire. Ms Gbagbo no longer holds a position of power and is

[100] Art. 58(1)(b) ICCSt.

[101] Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Prosecutor v. John-Pierre Bemba Gombo* (ICC-01/05-01/08-14-tENG), Pre-Trial Chamber III, 10 June 2008, § 87; Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, *Prosecutor v John-Pierre Bemba Gombo* (ICC-01/05-01/08-631-Red), Appeals Chamber, 2 December 2009, § 70.

[102] Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's Decision, *supra* note 101, at § 74.

currently being detained in Côte d'Ivoire. However, evidence indicates that she still enjoys a significant degree of political support. Her supporters have called for her release and oppose her transfer to the ICC.[103]

46. Ms Gbagbo has studied abroad in Senegal and France, as well as having completed multiple international training courses. This suggests that Ms Gbagbo has international connections that could assist her to abscond. The Prosecutor has provided evidence that Ms Gbagbo has access to significant financial resources. Further, Ms Gbagbo's connection to high-profile members of the former government and her relationship with Mr Gbagbo might also assist her to access relevant contacts and resources in order to abscond.

47. As discussed above, there are reasonable grounds to believe that Ms Gbagbo is responsible for serious crimes within the jurisdiction of the Court that could attract a significant penal sanction if proven.

48. Forces loyal to the FPI are alleged to have been previously involved in concealing crimes committed by members of the inner circle. The United Nations has reported that pro-Gbagbo forces allegedly involved in murder and other human rights violations in Côte d'Ivoire have denied the UN access to alleged mass graves, preventing any investigation of their conduct.[104]

49. Supporters of Ms Gbagbo are currently discussing strategies for regaining political power in Côte d'Ivoire. The pro-Gbagbo forces that remain loyal to Ms Gbagbo and the other members of the inner circle continue to have access to significant material resources, including weapons.[105]

50. The Chamber is therefore satisfied that Ms Gbagbo's arrest is necessary: (i) to ensure her appearance before the Court; (ii) to ensure that she does not use her connections and resources to obstruct or endanger the investigation; and (iii) to prevent the further commission of crimes within the jurisdiction of the Court.

CONCLUDING COMMENTS

51. Ms Gbagbo is the first woman to be the subject of an application for an arrest warrant before this Court. As it is likely that this case will attract interest due to the gender of the accused, it is worth making some final remarks.

52. Historically, women have been involved in conflict in a range of ways, including as perpetrators, enablers, and bystanders to violence.[106] However, the

[103] 'La Grande Marche de la Liberté le 18 Février 2012 à la Haye', 9 January 2012, ICC-02/11-35-US-ExpAnx1.17; 'La Grande Marche européenne en faveur de la libération du président Gbagbo: la diaspora ivoirienne et africaines dans les rues de Paris le 12 novembre', *FPI-Allemagne*, 10 November 2011, ICC-02/11-35-US-Exp-Anx1.18.

[104] Report of the High Commissioner for Human Rights on the Situation of Human Rights in Côte d'Ivoire, UN Doc. A/HRC/17/49, 15 February 2011, ICC-02/1 l-24-US-Exp-Anx5.38, 39.

[105] *Ibid*, 35.

[106] See e.g. M. Alison, *Women and Political Violence: Female Combatants in Ethno-National Conflict* (Abingdon: Routledge, 2009); N. Hogg, 'Women's Participation in the Rwandan Genocide: Mothers or Monsters?' 92(877) *International Review of the Red Cross* (2010) 69–102.

underrepresentation of women in politics and the military, particularly in leadership positions, means that women have been less likely to be identified as those who are potentially 'most responsible' for alleged international crimes. Thus, women have rarely been selected for prosecution before international criminal tribunals.

53. All accused persons before this Court have the right to a fair hearing conducted impartially.[107] This Court's application and interpretation of the law must be without any adverse distinction as to gender.[108] The issue before this Court is not whether Ms Gbagbo's conduct adhered to the traditional gender roles that woman are expected to perform,[109] or whether Ms Gbagbo should be punished for her relationship with her husband, but rather the extent to which Ms Gbagbo herself is or is not guilty of perpetrating international crimes.

54. There may be times when an accused's gender becomes legally relevant. Similarly to how international criminal tribunals have previously drawn on expert cultural evidence,[110] expert gender evidence may provide assistance in understanding an accused's actions and how these may have been influenced by a patriarchal social context. Hypothetically, one can imagine a situation where such evidence might assist the court in understanding, for example, the extent of an accused's political influence.[111] Such evidence is most likely to provide an explanation for a defendant's actions, but not legally excuse the defendant's conduct.[112]

FOR THESE REASONS, THE CHAMBER

DECIDES that the conditions established by Article 58(1) of the Statute in order to issue a warrant of arrest against Simone Gbagbo are met in relation to 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(l)(a); (2) rape and other forms of sexual violence under Article 7(1)(g); (3) other inhumane acts under Article 7(l)(k); and (4) persecution under Article 7(l)(h) of the Statute committed in the territory of Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011.

Judge Natalie Hodgson

[107] Art. 67(1) ICCSt.
[108] Art. 21(3) ICCSt.
[109] See A. Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (London: Routledge, 1990).
[110] See e.g. Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Déo Sebahire Mbonyinkebe (Rule 89(c)), *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza* (ICTR-99-50-T-22241), Trial Chamber II, 2 September 2005.
[111] For example, Biljana Plavšić has claimed that she was excluded from high-level meetings because of her gender: B. Plavšić, *Svedocim* (Banjaluka: Trioprint, 2005) 113.
[112] On cultural evidence in mitigation, see e.g. Judgment, *Prosecutor v. Carlos Soares Carmona* (Case No. 03 C G 2000) Special Panel for Serious Crimes, Trial Chamber, 8 March–5 April 2001, 9.

12.3 COMPLEMENTARITY TEST IN THE SIMONE GBAGBO ADMISSIBILITY DECISION

Sarah Easy

In 2014, Pre-Trial Chamber I rejected a challenge to the admissibility of the case against Ms Simone Gbagbo brought by Côte D'Ivoire in accordance with Article 19(2)(b) of the Statute, and on the ground of inadmissibility under Article 17(1)(a).[113] The Chamber held that Côte D'Ivoire had failed to establish that an investigation into the same case was being conducted at the national level on the basis that the investigative steps taken by the national authorities in order to ascertain Simone Gbagbo's criminality were not 'tangible, concrete and progressive' but rather 'sparse and disparate'.[114] Furthermore, the Chamber found that the contours of the national investigation were so unclear that it was not in a position to discern, with sufficient clarity, that the subject matter of the national investigation covered the same conduct as described in the Article 58 decision.[115]

In this rewritten decision, Sarah Easy injects gendered considerations into the so-called same person/same conduct test which has failed to expressly recognise the absence of the prosecution of sexual and gender-based crimes as a factor supporting the admissibility of a case. Easy offers a novel interpretation of the term 'genuinely' under Article 17(1)(a) which would restrict the class of proceedings to which the ICC has to defer to a genuine prosecution that is capable of bringing perpetrators of sexual and gender-based crimes to justice. Ultimately, Easy concurs with the Chamber in determining that Côte D'Ivoire has provided insufficient information to establish it is investigating the same conduct but goes further in identifying the gendered barriers obstructing the existence of a national genuine investigation.

No.: ICC-02/11-01/12
Date: 6 May 2021

Original: English

TRIAL CHAMBER IX(B)

Before: Judge Sarah EASY

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Redacted Version

Decision of Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo

[113] Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case against Simone Gbagbo, *Simone Gbagbo* (ICC-02/11-01/12-47), Pre-Trial Chamber I, 11 December 2014, § 78.
[114] *Ibid*, § 65.
[115] *Ibid*., § 76.

SEPARATE AND DISSENTING OPINION OF JUDGE SARAH EASY

1. I agree with the Majority of the Chamber that the challenge to the admissibility of the case against Ms Simone Gbagbo brought by Côte d'Ivoire (the Admissibility Challenge) must be rejected. Notwithstanding my agreement, I append the following separate and dissenting opinion to present my views on certain aspects of the judgment. I clarify that I only address the issues arising in this matter which I consider require my attention.

APPLICABLE LAW

2. As recalled by the Majority of the Chamber, the Admissibility Challenge is brought by Côte d'Ivoire as a state having jurisdiction over the case against Ms Gbagbo, in accordance with Article 19(2)(b) of the Rome Statute (the Statute), and on the ground of inadmissibility under Article 17(1)(a) of the Statute. Article 17 (1)(a) provides that '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'.

3. The majority judgment confirmed that the second tier of the assessment of admissibility under Article 17(1)(a), concerning the question of unwillingness or inability, should only be considered when the state, having jurisdiction, is inactive in investigating or prosecuting the case before the Court.[116] As such, the Chamber must first determine whether the state has discharged its burden of demonstrating the existence of an ongoing investigation or prosecution of the case by its domestic authorities.[117]

Same Person/Same Conduct Test

4. In assessing the parameters of the case before the Court, the Majority of the Chamber applied the definition of a 'case' as previously set out by the Appeals Chamber, being: (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.[118] In adopting this definition, the Majority of the Chamber implicitly accepted the narrow and vague 'same person/same conduct' test for determining whether the first tier of the assessment of admissibility under Article 17(1)(a) had been satisfied, being that the state is investigating or prosecuting the same case before the Court.

[116] Majority Judgment, *Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber 1, 11 December 2014, § 27 (hereafter Gbagbo Majority Decision).
[117] *Ibid*.
[118] *Ibid*, § 33.

5. It should be noted that the so-called same person/same conduct test is not prescribed by Article 17(1)(a), having evolved through interpretations of the chambers of this Court.[119] In governing the relationship between the International Criminal Court and domestic criminal courts, Article 17(1)(a) is of great consequence for women and minority groups for whom such institutions have historically been unavailable or ineffective in securing justice.[120] As such, it is regrettable that the majority judgment has not seized the opportunity to further clarify the content of this test and address the gender justice concerns arising from its application.

6. In my view, and contrary to the opinion of the Majority of the Chamber, the same person/same conduct test, if confirmed in its current form, would likely give rise to adverse distinctions upon gender grounds, contrary to Article 21(3) of the Statute. This is of particular significance to the case at hand, given that Ms Simone Gbagbo is charged with individual criminal responsibility for crimes against humanity, including the gender-based crimes of rape and other forms of sexual violence under Article 7(1)(g), and other inhumane acts under Article 7(1)(k).[121] Some of these crimes allegedly took place in the context of the 2011 women's march in Abobo, where thousands of women protested against the Gbagbo government.[122]

7. Firstly, there remains considerable ambiguity as to what degree of similarity the conduct being investigated or prosecuted by the domestic authorities must bear in relation to the conduct charged by the Prosecutor for the case to be deemed inadmissible. This ambiguity has been exacerbated by the relaxation of the admissibility test to require only 'substantially the same conduct'.[123] The Appeals Chamber opined that the incidents being investigated or prosecuted domestically may constitute substantially the same conduct where they 'form the crux of the Prosecutor's case and/or represent the most serious aspects of the case'.[124] I consider that defining

[119] See e.g. 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, *Katanga* (ICC-01/04-01/07-1497), Appeals Chamber, 25 September 2009, §§ 1, 75–79; 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', *Situation in Kenya* (ICC-01/09-02/11-274), Appeals Chamber, 30 August 2011, §§ 2 and 61.

[120] See for example L. Chappell, 'The Role of the ICC in Transitional Gender Justice: Capacity and Limitations' in S. Buckley-Zistal and R. Stanley (eds.), *Gender and Transitional Justice* (Basingstoke: Palgrave Macmillan, 2011) at 43.

[121] Warrant of Arrest, *Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber II, 29 February 2012, § 8.

[122] *Ibid*.

[123] 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', *Muthaura, Kenyatta, and Ali* (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011, § 39.

[124] 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', *Gaddafi and Al-Senussi* (ICC-01/11-01/11), Appeals Chamber, 21 May 2014, § 72.

admissibility criteria in relation to the 'crux' or 'seriousness' of the case is not only unworkable in its vagueness but poses a grave risk to the effective prosecution of sexual and gender-based crimes. This is due to the traditional treatment of sexual and gender-based crimes as lesser crimes or simply the inevitable byproduct of conflict.[125]

8. Furthermore, the Chamber has clarified 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 with which the respondent is charged.[126] To date, the Court is yet to recognise that *gendered* incidents, described in the Article 58 Decision as sexual or persecutory in nature, which are not covered by the national proceedings, may equally constitute a factor supporting the admissibility of a case.

9. Accordingly, under the existing interpretation of 'substantially the same conduct', one could argue that a domestic case investigating virtually all of the conduct charged by the Prosecutor but omitting an incident or incidents constituting sexual and gender-based crimes would be inadmissible before the International Criminal Court. Such an interpretation would likely operate in a discriminatory manner against women, who are statistically significantly more likely to be victims of sexual and gender-based violence, by precluding them from seeking redress at both the national and international level.

10. In my opinion, the definition of a 'case' under Article 17(1)(a) by reference to the 'same conduct' has textual support through the parallel definition of the closely linked *ne bis idem* principle under Article 20(1).[127] There is nothing, however, in the Statute or the reasoning of the Appeals Chamber which provides a sound legal basis for the easing of this test of 'substantially the same conduct'. For this reason, and taking into account the potential gendered consequences of the existing interpretation, I consider that for a case to be deemed inadmissible under Article 17(1)(a), the conduct being investigated or prosecuted by the state must cover *all of the same* conduct charged in the Article 58 Decision. The degree of permissible dissimilarity between the conduct being investigated and the conduct charged should be confined to minor discrepancies in the description of the underlying facts, so that the conduct is the same in time, location, and subject matter.

[125] See e.g. R. Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' 46(1) *McGill Law Journal* (2000) 217–240.

[126] Decision on the Admissibility of the Case against Abdullah Al-Senussi, *Al-Senussi* (ICC-01/11-01/11), Pre-Trial Chamber I, 11 October 2013, § 79.

[127] Article 20(1) of the Rome Statute states: 'Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.'

11. For the avoidance of doubt, a domestic case which *goes beyond* the crimes charged in the warrant of arrest, by investigating or prosecuting additional conduct, will not be deemed inadmissible, provided it covers the 'same conduct' at a minimum.

Defining Conduct

12. It is well settled by the Chambers of this Court that the assessment of the conduct forming the subject of domestic proceedings in the context of an admissibility challenge must focus on the underlying incidents and not their legal characterisation.[128] This finding upholds the closely linked *ne bis idem* principle under Article 20(1), which protects the accused from double penalisation of the same acts under different labels of criminality.[129] I regret that this interpretation is likely to adversely impact victims in states which have not incorporated international crimes into their domestic law, by confining the ambit of recognition and reparations available to those prescribed for ordinary crimes. However, there is no provision in the Statute capable of supporting an alternative interpretation by mandating the manner in which states must incorporate the substantive crimes listed under Article 5 into their domestic legal system.

13. Although there may be discrepancies between the way a particular act is criminalised under the Statute and under domestic law, Article 17(1)(a) is clear that the state must nevertheless 'have jurisdiction' over the case, and thus criminalise the same conduct. Consequently, to use the example of the crime against humanity of rape, the Prosecutor must be careful in ensuring that all relevant incidents of penetration criminalised at the international level are punishable under domestic law. Thus, a state which restricts the definition of rape to penile–vaginal penetration only may not be said to have jurisdiction over a case involving anal, oral, or other forms of penetration. As such, I consider that an inquiry into the manner in which the conduct is criminalised by the domestic legal system is necessary and permissible to the extent of establishing that the same conduct is in fact within the jurisdiction of the state.

Genuine Proceedings

14. Article 17(a) renders a case admissible if the state is unwilling or unable *genuinely* to carry out the investigation or prosecution, yet the Chambers have directed little to no attention to the interpretation of 'genuinely' as a standalone

[128] Decision on the Admissibility of the Case against Abdullah Al-Senussi, *supra* note 126, § 66; Decision on the Admissibility Challenge by Dr Saif Al-Islam Gadafi, *Gadafi* (ICC-01/11-01/11-344), Pre-Trial Chamber, 5 April 2019, §§ 85 and 88.

[129] This finding is further reinforced by the contrasting use of the terms 'conduct' as opposed to 'crime' under Article 20(1).

term. There appears to be tacit understanding that this term operates so as to require a genuine unwillingness and/or genuine inability on the part of the state to render a case inadmissible. For instance, the second tier of the admissibility test has been formulated as 'the genuineness of Libya's willingness and ability to investigate'.[130] This formulation has sometimes led to the introduction of extraneous criteria into Article 17(1)(a): 'the allocation of the burden to the State is also consistent with the raison d'être of the principle of complementarity: to prove a case inadmissible, the State must establish that it is undertaking a *meaningful* investigation that genuinely seeks to ascertain the criminal responsibility of the suspect'.[131] Reference to the investigation as 'meaningful', a term not present in the text of the Statute, reflects the prosecution's struggle to establish some standard of adequacy concerning the national proceedings that would render a case inadmissible before the Court. Such a standard is in fact provided for by a proper reading of the term 'genuinely'.

15. A closer examination of the context in which the term 'genuinely' is employed reveals that it in fact modifies the objective quality of the investigation or prosecution to which the Court must defer under Article 17(1)(a), requiring a genuine investigation or prosecution. This is evident under Article 17(1)(b) wherein the adverb 'genuinely' is repeated and positioned more closely to the verb 'prosecute', reading: 'unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute'. Furthermore, Articles 17(2) and 17(3), which set out the criteria for determining unwillingness and inability respectively, make no mention of the term genuinely. This interpretation of 'genuinely' has been endorsed by the Court to the extent that it has confirmed that proceedings may be deemed 'inconsistent with an intent to bring the person to justice', where the violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as capable of providing any *genuine* form of justice.[132] In this way, the Court has acknowledged that it is the genuineness of the proceedings, as opposed to the genuineness of the state's unwillingness or inability, which is relevant to admissibility.

16. As such, the term 'genuinely' restricts the class of national proceedings that requires deference from the Court. Without the inclusion of the word 'genuinely', any national proceedings where there was an intent to bring the accused to justice, and the system was not unavailable, would preclude action by the Court, even if the proceedings were so inadequate as to be incapable of bringing the accused to justice.

[130] Prosecution's Response to Libyan Government's Further Submissions on Issues Related to the Admissibility of the Case against Saif Al-Islam Gaddafi, *Gaddafi* (ICC-01/11-01/11-276 Gaddafi), Pre-Trial Chamber, 13 February 2013, § 23.

[131] Judgment on Kenya's Appeal on the Admissibility of the Case, *Muthaura, Kenyatta & Ali* (ICC-01/09-02/11-274OA), Appeals Chamber, 30 August 2011, § 61, emphasis added.

[132] Appeal on behalf of Abdullah Al-Senussi, *Al-Senussi* (ICC-01/11-01/11-565), Appeals Chamber, 17 October 2013, § 3.

17. The drafting history of the Statute confirms that it was the states' intention to modify the class of proceedings precluded from the purview of the Court, with the term evolving from 'effectively prosecute' to 'duly prosecute' before arriving at 'genuinely prosecute'.[133] Whilst it is clear that the term was not intended to set aside national proceedings simply because the Office of the Prosecutor could develop a more effective prosecutorial strategy, the term cannot be interpreted in a way that is permissive to impunity and thus contrary to the object and purpose of the Statute.

18. The term 'genuine' is defined by the *Oxford Dictionary* as 'having the supposed character, not sham or feigned'.[134] Genuineness is thus a distinct concept from unwillingness or inability. Rather, the genuineness of an existing prosecution informs the Court as to whether the state is truly willing or able to carry out the prosecution. Whilst a state may intend to bring someone to justice by appropriately investigating their criminality (demonstrating willingness) and enjoy a functioning national justice system, in the sense that it is not unavailable as a result of conflict or natural disaster (demonstrating ability), it may still, by the disingenuous design or inadequate workings of its system, be incapable of bringing the accused to justice.

19. This interpretation of genuineness is more closely aligned with the overall object and purpose of the Statute. Whilst the principle of complementarity has often been described as striking a balance between state sovereignty and an effective and credible ICC,[135] it must be emphasised that state sovereignty and effective prosecution by the Court are not competing *objects* of the Rome Statute. Rather, the Preamble establishes that the overall, singular object and purpose of the Statute is to ensure that 'the most serious crimes of concern to the international community must not go unpunished' and to 'put an end to impunity'. This object is pursued primarily by states through domestic proceedings and complementarily by the Court when the state is found unwilling or unable. If the prosecution of a case is so inadequate as to be incapable of ever bringing the accused to justice, it cannot be said to be a genuine prosecution for the purpose of Article 17(1)(a).

20. The requirement for a genuine investigation or prosecution in the assessment of admissibility is aligned with the 'Policy Paper on Sexual and Gender Based Crimes 2014', adopted by the Prosecutor, which separates the evaluation of 'the existence of genuine proceedings' under paragraph 40 from the assessment of 'whether such proceedings are vitiated by an unwillingness or inability' under paragraph 42.[136]

[133] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome*, 15 June–17 July 1998, Vol. II, 90–96.

[134] *Oxford English Dictionary Online* (Oxford: Oxford University Press, 2022).

[135] See e.g. W. Schabas, C. Stahn, and M. El Zeidy, 'The International Criminal Court and Complementarity: Five Years On' 19 *Criminal Law Forum* (2008) 1–3.

[136] ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (June 2014), at 41. The Policy Paper lists potential barriers to genuine proceedings, including: 'discriminatory attitudes and gender stereotypes in substantive law, and/or procedural rules that limit access to justice for victims of such crimes, such as inadequate domestic law criminalising conduct proscribed under the Statute; the existence of amnesties or immunity laws and statutes

21. As such, I find that the state challenging the admissibility of a case before the Court must demonstrate the existence of an ongoing investigation or prosecution which covers all of the same conduct against the same person being investigated or prosecuted by the Court. If the state discharges this burden, it must further establish its willingness and ability to genuinely carry out the ongoing investigation or prosecution.

ANALYSIS

Existence of an Ongoing Investigation

22. As stated above, I agree with the determination made by the Majority of the Chamber that Côte d'Ivoire's challenge to the admissibility of the case against Ms Gbagbo before the Court must be rejected.[137] However, for reasons set out below, I respectfully disagree with the reasoning employed by the majority in reaching its decision.

23. The Majority of the Chamber found that Côte d'Ivoire failed to establish that an investigation into the same case was being conducted at the national level on the basis that the investigative steps taken by the national authorities to ascertain Ms Gbagbo's criminality were not 'tangible, concrete and progressive' but rather 'sparse and disparate'.[138] However, a plain reading of Article 17(1)(a) reveals that the first tier of the admissibility assessment requires only that 'the case is being investigated'. Introducing extraneous criteria as to the efficiency of the investigation obfuscates the distinction between 'inaction' and 'unwillingness or inability' under the two-step admissibility test that the majority itself confirmed in its judgment.[139] Indeed, the majority's consideration of the temporal aspects of the investigation are directly provided for by the second tier of the test under Article 17(2)(b), which states that 'unjustified delay' may be a determinative factor of unwillingness.

24. I find concerning the continued efforts to construct a hurdle to the first tier of the admissibility assessment, in what may be perceived to be an attempt by this Court to avoid the evaluation of a state's criminal legal system.[140] The finding of

of limitation, and the absence of protective measures for victims of sexual violence. Other indicators of an absence of genuine proceedings may be the lack of political will, including official attitudes of trivialisation and minimisation or denial of these crimes; manifestly insufficient steps in the investigation and prosecution of sexual and gender-based crimes, and the deliberate focus of proceedings on low-level perpetrators, despite evidence against those who may bear greater responsibility'.

[137] Gbagbo Majority Decision, *supra* note 116, at § 78.

[138] *Ibid*, at § 65.

[139] *Ibid*, at § 27.

[140] See e.g. Decision on the Confirmation of Charges, *Samoei Ruto, Kiprono Kosgey, Arap Sang* (ICC-01/09-01/11-373), Pre-Trial Chamber, 4 February 2012; Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, *Kirimi Muthaura, Kenyatta and Hussein Ali* (ICC-01/09-02/11-26), Pre-Trial Chamber II, 31 March 2011.

unwillingness or inability by the Court serves the expressive function of denouncing state conduct which fosters impunity for the most serious crimes of international concern. It is an important judicial responsibility mandated by Article 17(2), from which we must not shy away.

25. Upon review of the uncontested evidence provided by Côte d'Ivoire, I find that the relevant domestic authorities have:

(a) formally initiated an investigation to ascertain the criminality of Ms Gbagbo;[141]
(b) detained Ms Gbagbo as a result of said investigation;[142]
(c) interrogated Ms Gbagbo in furtherance of this investigation;[143]
(d) questioned a civil party concerning the conduct of Ms Gbagbo;[144] and
(e) attempted to collect evidence relevant to her crimes.[145]

> In light of these investigative steps undertaken by the domestic authorities, I find that there is an ongoing investigation into the criminal conduct of Ms Gbagbo on the part of the state. To determine otherwise, as the majority have done, would be farcical.

Same Conduct/Same Person Test Applied

26. I now turn to whether the case against Ms Gbagbo currently being investigated by Côte d'Ivoire is the same case, in that it is investigating all of the same conduct against the same person. In order for the admissibility challenge at hand to succeed, Côte d'Ivoire must establish that it is currently investigating conduct constituting the basis of *all of the conduct* forming the basis of the charges against Ms Gbagbo, including the crimes against humanity of (1) murder under Article 7(l)(a), (2) rape and other forms of sexual violence under Article 7(1)(g), (3) other inhumane acts under Article 7(l)(k), and (4) persecution under Article 7(l)(h) of the Statute committed in the territory of Côte d'Ivoire:

(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.

27. I share the view of the Majority of the Chamber that the economic crimes alleged in the first set of proceedings against Ms Gbagbo, referred to as RI-09/2012, RI-33/2012, and RI-04/2012, are evidently of a different nature to the conduct alleged

[141] Gbagbo Majority Decision, *supra* note 116, § 65.
[142] *Ibid*.
[143] *Ibid*, § 73.
[144] *Ibid*, § 60.
[145] *Ibid*, § 72.

in the case before this Court.[146] Similarly, the crimes against the state alleged in the second set of proceedings, referred to as RI-01/2011, fail to cover the same conduct as the case before this Court, namely killings, rapes, or acts causing great suffering or serious injury to individuals.[147] Finally, I concur that the contours of the national investigation are so unclear that I am not in a position to discern, with sufficient clarity, that the subject matter of the third set of proceedings covers all of the same conduct as described in the Article 58 decision.[148]

28. Despite the failure of Côte D'Ivoire to satisfy the first tier of the admissibility test under Article 17(1)(a), for the sake of completeness and in order to clarify the content of this test, I will proceed to assess the unwillingness or inability of the state to carry out a genuine prosecution, as detailed in Article 17(2) and (3) of the Statute.

Unwillingness or Inability

29. As described above, the Majority of the Chamber's finding that the investigative steps taken by the national authorities in order to ascertain Ms Gbagbo's criminality were not 'tangible, concrete and progressive' but rather 'sparse and disparate'[149] should be characterised more appropriately as an 'unjustified delay' constituting unwillingness on the part of the state to prosecute Ms Gbagbo under Article 17(2)(b), as opposed to the non-existence of an investigation.

30. In the alternative, the fact that the state's ongoing investigation cannot be said to be genuine, in that it is incapable of bringing Ms Gbagbo to justice, may also evince unwillingness on the part of Côte D'Ivoire. Whilst the definition of 'unwillingness' under Article 17(2) appears to be exhaustive, in that it enumerates the factors to be taken into account by the Court in its interpretation of this term, the state must nevertheless establish under Article 17(1)(a) willingness to carry out a genuine investigation, as opposed to any investigation which the authorities deem fit.

31. The evidence before me indicates that entrenched discriminatory attitudes towards women and girls in Côte D'Ivoire present a significant barrier to the genuine investigation of incidents of sexual and gender-based violence with which Ms Simone Gbagbo is charged. While the Criminal Code of Côte D'Ivoire (the Criminal Code) provides a prison term of between five and twenty years for the crime of rape,[150] the evidence submitted by the victims indicates that neither the

[146] *Ibid*, § 47.
[147] *Ibid*, § 49.
[148] *Ibid*, § 76.
[149] *Ibid*, § 65.
[150] *Côte d'Ivoire: Code pénal*, art. 354, 1981-640; 1995-522, 31 July 1981. A term of life sentence can be imposed in the cases of gang rape if the perpetrator is related to the victim or holds authority over them. The Code fails to criminalise spousal rape.

Gbagbo nor the Ouattara governments enforce this law in practice.[151] Indeed, officials from both governments as well as rebel leaders have been accused of authorising the use of sexual violence against women as a tool for political control.[152] The investigative steps taken by the Ivorian authorities to date constitute a weak effort to address even the most serious incidents of sexual violence. Such incidents, which remain unpunished, allegedly include the violent gang rape of women, including grandmothers, children as young as six, and pregnant women whose family members were sometimes forced to watch or participate.[153] Other women were abducted and endured sexual slavery for extended periods of time, sometimes forced to give birth to children conceived through rape. Many died because of the egregious sexual violence inflicted upon them. Human Rights Watch describes an environment of increasingly entrenched lawlessness in which impunity for such sexual and gender-based crimes persists.[154]

32. The evidence suggests that the pervasive trivialisation of these crimes is so significant that even if the justice system had not been disrupted by political turmoil and conflict, lacunae in the prosecution of sexual and gender-based crimes would prevail. Importantly, gender-based discrimination is not only practised by the general population but evinced by the very institutions charged with effecting justice. Of great concern is the systematic encouragement by the Ivorian police for victims to seek an amicable solution with their rapist.[155] In other instances, women's claims of sexual and gender-based violence are simply ignored. Both court and law enforcement personnel are described as suffering from an inadequate understanding of sexual violence, typically allowing perpetrators to escape prosecution.[156] Disturbingly, women have even reported the solicitation of sexual favours from magistrates in exchange for a favourable judicial decision.[157] Whilst there have been recent efforts by the United Nations Operation in Côte d'Ivoire (UNOCI) to train the national and local police in sexual and gender-based violence,[158] these are

[151] Human Rights Watch, 'Turning Rhetoric into Reality, Accountability for Serious International Crimes in Côte D'Ivoire', April 2013, available at www.hrw.org/sites/default/files/reports/CDI0413_ForUpload.pdf, in Observations des victimes, *Gbagbo* (ICC-02/11-01/12-40-Red), Pre-Trial Chamber I, 9 April 2014, § 71.

[152] FIDH, MIDH, and LIDHO, 'Côte d'Ivoire: La lutte contre l'impunité à la croisée des chemins', October 2013, available at www.fidh.org in Observations des victimes, *Gbagbo* (ICC-02/11-01/12-40-Red), Pre-Trial Chamber I, 9 April 2014, § 71. *Ibid*.

[153] *Ibid*.

[154] Human Rights Watch, *supra* note 151, at § 71.

[155] *Ibid*., § 71.

[156] FIDH, MIDH, and LIDHO, *supra* note 152, at § 71.

[157] Unité de l'Etat de Droit de l'Unoci, Étude d'évaluation du système judiciaire ivoirien – L'organisation et le fonctionnement du système judiciaire en Côte d'Ivoire, juin 2007, cited in Observations des victimes, *Gbagbo* (ICC-02/11-01/12-40-Red), Pre-Trial Chamber I, 9 April 2014, § 71 (on file with author).

[158] Voir Conseil de Sécurité des Nations Unies, Trente et unième rapport périodique du Secrétaire général sur l'Opération des Nations Unies en Côte d'Ivoire, U.N. Doc. S/2012/964, 31 December 2012, at 22 and 23, available at www.refworld.org/reference/countryrep/unsc/

unlikely to have a transformative effect in the short term, especially if conducted in isolation. This is due to the nature of structural discrimination which is omnipresent across economic and socio-political spheres, as well as being rooted in historically unequal power relationships.[159] Furthermore, the prevalence of customary law, particularly in northern rural regions, further enshrines structural discrimination and inadequate protections for victims of sexual violence.[160] Reports suggest that victims are further discouraged from pursuing legal recourse by members of their family who view sexual violence as a 'family problem' and thus may advocate for reconciliation with the perpetrator.[161]

33. Furthermore, significant inadequacies in the procedural rules governing the prosecution of sexual and gender-based crimes in Côte D'Ivoire mean that future proceedings of such crimes would likely not be considered genuine. Although the *cour d'assises* has jurisdiction over cases of rape, the evidence reveals a systematic practice of mischaracterising the crime as indecent assault.[162] This is coordinated so that the crime will be tried before a lesser court in order to relieve some of the pressure on the *cour d'assises*, which suffers from a lengthy backlog of cases.[163] Whilst trying rape as a lesser crime may not impair the efficiency, impartiality, or independence of the proceedings, and thus still evince an intention to secure a conviction against the accused under Article 17(2), I consider the penalties available for indecent assault under the Criminal Code to be manifestly inadequate, standing at just two months' to two years' imprisonment.[164] The real possibility that the incidents of rape with which Ms Simone Gbagbo is charged would be tried as lesser crimes casts serious doubt as to the genuineness of the investigation being conducted by the Ivorian authorities.

34. The absence of a legislative framework establishing protective measures for victims of sexual violence in Côte D'Ivoire represents a further barrier to genuine proceedings as it is likely to significantly diminish the number of witnesses willing to testify. Indeed, in relation to the situation in Côte D'Ivoire, the Security Council determined that '[i]t is likely that a significant number of rapes went unreported because the victims were afraid of retaliation or did not trust the judicial system'.[165] The concern most often voiced by the victims themselves is the lack of guarantees

2, cited in Observations des victimes, *Gbagbo* (ICC-02/11-01/12-40-Red), Pre-Trial Chamber I, 9 April 2014, at § 64.

[159] E. Henn, *International Human Rights Law and Structural Discrimination: The Example of Violence against Women* (1st ed., Berlin: Springer, 2019).

[160] FIDH, MIDH, and LIDHO, *supra* note 152, at § 71.

[161] Human Rights Watch, *supra* note 151, at § 71.

[162] *Ibid*.

[163] *Ibid*.

[164] *Côte d'Ivoire: Code penal*, Art. 360, 1981-640; 1995-522, 31 July 1981.

[165] Conseil de Securite des Nations Unies, Trentième rapport périodique du Secrétaire général sur l'Opération des Nations Unies en Côte d'Ivoire, U.N. Doc. S/2012/506, 29 June 2012, available at www.refworld.org/reference/countryrep/unsc/2012/en/90296, at 26, cited in Observations des victimes, *Gbagbo* (ICC-02/11-01/12-40-Red), Pre-Trial Chamber I, 9 April 2014, § 64.

that their rights will be respected by the Ivorian justice system, should the case against Ms Simone Gbagbo be pursued before the national courts.[166] The absence of protective measures for victims of sexual violence may also impede their ability to testify by causing additional psychological strain.[167] Although the views of victims are not mandated as part of the legal criteria for assessing admissibility, the Chamber values this opportunity to hear their perspective which is grounded in their lived experience. It should be highlighted that the vast majority of victims have expressed their desire for Ms Simone Gbagbo to be tried before this Court.[168] In light of these significant barriers to justice for women and girls in Côte D'Ivoire, it cannot be said that the ongoing investigation into Ms Simone Gbagbo's criminality constitutes a genuine investigation.

CONCLUSION

35. I conclude that Côte d'Ivoire has not demonstrated that the same case against Ms Simone Gbagbo alleged in the proceedings before the Court is currently subject to genuine domestic proceedings within the meaning of Article 17(1)(a) of the Statute. Accordingly, I concur with the majority in finding that the present case is admissible before the Court.

Judge Sarah Easy

[166] Observations des victimes, *Gbagbo* (ICC-02/11-01/12-40-Red), Pre-Trial Chamber I, 9 April 2014, § 98.
[167] D. Jjuko, 'Double Victimization? Using a Human Security Framework to Assess the Effectiveness of the Witness Protection Regime in Kenya' 15(3) *African Security* (2022) 189–212, at 196.
[168] Observations des victimes, *supra* note 166, § 97.