

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-02/11-01/11**

Date: **19 October 2012**

THE APPEALS CHAMBER

Before:

**Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kouroula**

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

Public document

Response of President Gbagbo's Defence to the Observations of the Republic of Côte d'Ivoire (ICC-02/11-01/11-258 OA 2) and of the Office of Public Counsel for Victims (ICC-02/11-01/11-259 OA 2)

Source:

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

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Facts and Procedure

1. On 6 September 2012, the Defence filed a document in support of its appeal,¹ setting out nine grounds of appeal.
2. On 28 September 2012, two French counsel, Mr Mignard and Mr Benoît, filed observations on behalf of the Republic of Côte d'Ivoire.² On the same day, the Prosecutor filed her response to the document in support of the appeal.³
3. On 1 October 2012, the Registry disclosed to the Defence a document dated 28 September 2012 entitled "*Transmission du Greffe d'un document reçu le 28 septembre 2012 à 155h35 de Mme Karine Wetzel, Conseillère Représentante de l'État de Côte d'Ivoire auprès de la Cour pénale internationale*".⁴ The first of the thirty-two annexes to that document was entitled "*Observations de l'Etat de Côte d'Ivoire relatives au «Document à l'appui de l'appel de la Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo.*'"⁵
4. Still on 1 October 2012, the Appeals Chamber decided to disregard the two documents submitted by Mr Mignard and Mr Benoît and by Ms Wetzel, inviting the Republic of Côte d'Ivoire to file observations in accordance with regulations 37(1) and 23(3); the Chamber further instructed the Republic of Côte d'Ivoire to clarify the identity of its representative before the International Criminal Court. The time-limit granted to the Prosecutor and the Defence in which to respond was extended accordingly to 19 October 2012.⁶
5. On 5 October 2012, the legal representative of victims filed their observations.⁷ On the same day, the Appeals Chamber rejected those observations, stating that they were not in

¹ ICC-02/11-01/11-240.

² ICC-02/11-01/11-250 OA2.

³ ICC-02/11-01/11-251 OA2.

⁴ ICC-02/11-01/11-253 OA2.

⁵ ICC-02/11-01/11-253-Anx1.

⁶ ICC-02/11-01/11-254 OA 2.

⁷ ICC-02/11-01/11-255 OA 2.

conformity with regulation 37(1). The Chamber invited the legal representatives of victims to file observations in conformity with the aforementioned regulation by 8 October 2012.⁸

6. On 8 October 2012, the Republic of Côte d'Ivoire and the representative of victims filed fresh observations in accordance with the instructions of the Appeals Chamber.⁹

II. Discussion

1. Preliminary remarks

7. Before setting out its responses to the observations of the legal representative of victims and of Côte d'Ivoire, the Defence would like to make three general points concerning those observations: on the imbalance created between the participants in the proceedings to the detriment of the Defence (1.1), on the nature of the Defence appeal (1.2), and on the importance of these proceedings on the challenge to jurisdiction (1.3).

1.1. Imbalance between the parties to the detriment of the Defence

8. Firstly, the Defence would like to point out that in the context of these proceedings, it finds itself in a position of inferiority in comparison with the other participants: with extremely limited resources, it has to deal not only with the Prosecutor, but also with the legal representative of victims and Côte d'Ivoire.

9. The Defence is therefore up against three protagonists who, despite theoretically having different interests, appear to have shared the workload. Thus, the legal representative of victims relies on the Prosecutor's observations ("The Office generally concurs with the observations put forward by the Prosecution in its response"¹⁰) and Côte d'Ivoire has emerged as the Prosecutor's defender, adopting, moreover, some of her arguments.

⁸ ICC-02/11-01/11-256 OA2.

⁹ ICC-02/11-01/11-258 OA 2 and ICC-02/11-01/11-259 OA2.

¹⁰ ICC-02/11-01/11-259, para. 16. See also para. 42 "The Office reiterates that the Prosecution is best placed to fully address the issues put forward by the Defence with regard to Grounds 6 to 8. Nonetheless, the Office restates in full its previous submissions on the issue".

10. The legal representative of victims also supports Côte d'Ivoire's wish to participate in the proceedings. More surprisingly, she appears to refuse to accept, in principle, the consequences on the proceedings of serious violations of the rights of President Gbagbo committed between 11 April and 29 November 2011. However, given her role, she should be particularly sensitive to such violations.

11. The legal representatives of victims' unquestioning endorsement of the Prosecutor's legal argument is also astonishing. It is as if the interests of each protagonist in having President Gbagbo tried at any cost took precedence over legal considerations, good sense and humanity.

12. With regard to Côte d'Ivoire, the Defence will return later to its manifest wish to carve a place for itself in the proceedings, for which the Statute most certainly makes no provision.¹¹ The Defence will merely note here its astonishment at seeing Côte d'Ivoire defend the actions of the Prosecutor, since that should not be the purpose of the observations it has been authorised to file. It is important to note that in so far as Côte d'Ivoire has been invited to participate in the proceedings only as *amicus curiae*, its purpose should have been to provide the judges with all pertinent materials and explanations concerning what happened in Côte d'Ivoire. In other words, its observations should focus on the facts rather than on the law. However, in this case, Côte d'Ivoire makes lengthy arguments concerning matters of law, which bring very little to the debate, while restricting themselves to a few terse comments on the facts. Even if the Appeals Chamber has not explicitly restricted Côte d'Ivoire to matters of fact, the Defence would nevertheless ask the Chamber to note that Côte d'Ivoire is not fulfilling its proper role.

1.2. Purpose of the Appeal

13. The Defence would like to mention the logic underlying its appeal: it is not based on agreement or disagreement with the Pre-Trial Chamber's conclusions but rather on the Chamber's lack of reasoning. As far as the Defence is concerned, the purpose is not to challenge any particular conclusion of the Pre-Trial Chamber but to lead the Appeals Chamber to find, with regard to each of the grounds raised, that the Pre-Trial Chamber:

¹¹ *Infra*, section 2.2.

- Failed to take account of the materials submitted by the Defence;
- Failed to consider the Defence's line of reasoning;
- Ruled without giving reasons for its decision or without having been clear in its reasoning.

14. In this regard, the Defence considers particularly inappropriate the request of the legal representative of victims that the appeal in its entirety be rejected *in limine*, on the pretext that “the defence failed to specify and substantiate the alleged errors that materially affect the Impugned Decision” and that “the defence merely expresses its disagreement with the Pre-Trial Chamber”.¹²

15. The Defence finds it difficult to follow the reasoning of the victims' representative: is not the purpose of an appeal specifically to express disagreement with the decision at issue? Has not the victims' representative expressed her disagreement with the decision of the Appeals Chamber to allow her only the twenty pages provided for in the Statute? The victims' representative's reasoning is tantamount to the denial of the very basis of what constitutes an appeal.

16. The observations of the victims' representative are particularly misguided since she herself attempts to mislead the Appeals Chamber by relying, in support of her position, on a single and irrelevant decision in *Mbarushimana*, where the issue was essentially one of disagreement between the Defence and the Chamber on a matter of *fact*,¹³ while in this case, nine of the ten grounds of appeal concern errors of *law*. In its support, the Defence relies on the very best of allies: the Rome Statute itself and the core legal texts of the Court which, in terms of applicable law, govern above all else.

17. Furthermore, it is quite legitimate for the Defence to reiterate in these appeal proceedings certain points raised in its original submissions, particularly as they are relevant to an understanding of the Defence's position and some have been largely disregarded by the Pre-Trial Chamber. The Defence would also point out that in its original application, it had anticipated certain problems and had endeavoured to provide a detailed explanation of the legal bases of its

¹² ICC-02/11-01/11-259, paras. 20-21.

¹³ ICC-02/11-01/11-259, para. 22.

approach. The Defence decided from the outset to *demonstrate* rather than *affirm* so as to make a useful contribution to the discourse in the instant case. It should be given credit rather than criticised for that approach, which seeks to explain and stick to the texts and jurisprudence as closely as possible.

18. Moreover, that approach highlights the failings of the Pre-Trial Chamber and the reasons for the appeal: the Pre-Trial Chamber systematically refused to *respond* to the Defence's arguments, sometimes appearing not to have taken them into account. Once again, it is the Pre-Trial Chamber's lack of dialogue and legal reasoning which lies at the heart of the Defence's appeal and not "simple disagreement" with its conclusions.

1.3. Significance of the proceedings

19. The Trial Chamber's lack of legal reasoning is of particular concern in this case since the issues raised by the Defence are especially important, not only in relation to this case, but also in terms of developing the Court's jurisprudence.

20. Firstly, the context: these proceedings are the first to be brought in the ICC against a former Head of State; the legal issues raised and the responses thereto have an immediate impact in the country concerned. The Court's decisions are eagerly awaited. The Court's policy, and that of the parties, should therefore be to explain the proceedings clearly, leaving nothing vague or uncertain. Likewise, more clarity and more considered and accurate responses to the questions raised by the parties are essential for successful outreach.

21. Secondly, the nature of the issues raised: this is the first time that the Court is to rule in this way on the scope of declarations made under article 12(3) and their practical consequences on the exercise of jurisdiction by the International Criminal Court. In this connection, the Defence highlights the bad faith of the victims, who consider that the Defence is "*clearly* not in agreement with the jurisprudence and founding texts of the Court".¹⁴ Indeed, as this is the first time that the issue has been raised before the Court, no jurisprudence exists concerning the

¹⁴ ICC-02/11-01/11-259, para. 38.

implementation of article 12(3). However, the Defence challenges the test adopted by the Pre-Trial Chamber, which has no textual foundation, on the basis of broad principles and the founding texts.

22. Lastly, and most importantly, this debate concerns the central issue of respect for the fundamental rights of an accused. President Gbagbo seeks to have the judges of the Court, the guarantors of justice, acknowledge that his rights, as secured by the Rome Statute and by all the international human rights instruments, have been violated. That issue is of such importance that it was enshrined by the Appeals Chamber in the *Lubanga* case, even though the Statute contains no specific procedure.

23. These proceedings therefore concern the two pillars supporting the proper functioning of this and all courts: the legitimate exercise of its jurisdiction and respect for the fundamental rights of the accused. In raising grounds of appeal, President Gbagbo is merely exercising his legitimate rights, which must be respected in the interest of the proper conduct of the proceedings. Contrary to the argument advanced by the legal representative of victims, these are not procedural incidents. Her stance is surprising and exposes a degree of thoughtlessness: the relevant debate here concerns jurisdiction and legitimacy, from which a legal system draws its strength. To consider violations of President Gbagbo's rights as anecdotal and superficial relativises the principles of law and as a result, weakens the judicial system.

2. Participation of Côte d'Ivoire in the proceedings

24. The observations of the representative of victims and Côte d'Ivoire in this regard raise two separate issues: (1) the margin of discretion afforded to the Pre-Trial Chamber under rule 58(2) of the Rules of Procedure and Evidence and (2) the impact in the impugned judgment of the Pre-Trial Chamber's decision on the participation of Côte d'Ivoire and on the admissibility of the Appeal. The Defence would like to respond to those issues as follows.

2.1. Exercise by the Pre-Trial Chamber of its discretion under rule 58(2) of the Statute

25. Relying on rule 58(2), the OPCV and Côte d'Ivoire consider that the Pre-Trial Chamber has full powers of discretion to adopt any measures deemed necessary, including granting Côte d'Ivoire the right to file observations.¹⁵

26. The Defence is astonished that all concerned¹⁶ are disregarding the fundamental legal principle that obviously no discretion is absolute and that it must be exercised in a specific legal context, within certain parameters. In this regard, rule 59(3) cannot be disregarded in so far as it specifies the entities that may participate in proceedings under article 19(3), as the very title of rule 59 clearly states ("Participation in proceedings under article 19(3)"). However, as the Defence pointed out in its Appeal, that rule refers only to States having referred a situation to the Court and victims. To assume that that rule "in no way alters the status of bodies capable of submitting observations on jurisdiction" as affirmed by Côte d'Ivoire¹⁷ goes against the letter and spirit of the text and the intention of the authors of the Statute and the Rules of Procedure and Evidence. However, it would appear logical to assume that the core texts' authors specifically included therein what they wanted to appear there, excluding anything else. In that regard, reference should be made to the jurisprudence of the Appeals Chamber in *Lubanga*, according to which the absence a ground of appeal from the list provided in article 82 could not be interpreted as a "lacuna", as submitted at the time by the Prosecutor, but on the contrary, the reflection of the wish of the legislator.¹⁸

27. The same reasoning should be adopted in the instant case. In an article having a relatively general title, the States Parties took care to specify the participants in jurisdiction proceedings because that was their intention. It must therefore be assumed that that list excludes any other entity since any other assumption would be to misconstrue the intention of the rule's authors.

¹⁵ ICC-02/11-01/11-259, para. 32; ICC-02/11-01/11-258, para. 12.

¹⁶ As well as the response of the Prosecutor, who essentially affirms that the Pre-Trial Chamber could not have breached rule 59 which was nevertheless applicable in the instant case, because it quite simply failed to heed it, a particularly astonishing line of legal reasoning (Prosecutor's Response, para. 28).

¹⁷ ICC-02/11-01/11-258, para. 8.

¹⁸ ICC-01/04-168 OA 3, paras. 33 *et seq.*

28. That analysis shows that the discretion referred to by the Pre-Trial Chamber under rule 58(2) did not authorise it to ignore the requirements of rule 59 which enumerates the potential participants in any jurisdiction proceedings. That list does not, however, include States, such as Côte d'Ivoire, having made a declaration accepting jurisdiction in accordance with article 12(3).

29. Despite that obvious fact, Côte d'Ivoire, claiming to have the status of a State participating in proceedings, asserted its right to participate, relying solely on regulation 24(3) of the Regulations of the Court which is aimed specifically at "States participating in the proceedings".¹⁹ Côte d'Ivoire uses that same reasoning in its observations concerning these appeal proceedings. Thus, it affirms, with no reference to any text, that the status of participating State is recognised *de jure* by the Statute and the Regulations of the Court. That assertion is clearly erroneous since none of the core texts explicitly grant participation rights to States having made a declaration in accordance with article 12(3). It should be noted, furthermore, that Côte d'Ivoire's reference to article 12(2) of the Statute to attempt to buttress its argument is irrelevant.²⁰ Indeed, the mere fact of it being the State on whose territory the crimes were committed or the State of nationality of the accused does not afford it the right to participate.

30. In fact, what was apparent again in Côte d'Ivoire's reasoning was its desire to exercise all those rights afforded to States Parties to the Statute and, more particularly, States Parties having referred a situation to the Court. In other words, Côte d'Ivoire, supported here by the victims and the Prosecutor, is asking the Appeals Chamber to validate what is clearly an abuse of process.

31. Not only would such validation go against the letter and spirit of the Statute but it would condone Côte d'Ivoire's manifest refusal to submit to the decisions of the Appeals Chamber. Côte d'Ivoire considers unhesitatingly that its intervention request is not made in the context of *amicus curiae* proceedings, stating that "an *amicus curiae* intervention differs significantly from the types of intervention available to participants in the proceedings, in that it requires exceptional expertise which the participants are unable to provide. The submissions of 18 June 2012 themselves fall under this category of information which a participating State may usefully

¹⁹ ICC-02/11-01/11-154.

²⁰ ICC-02/11-01/11-258, para. 7.

provide”.²¹ However, it is specifically on the basis of rule 103, and therefore placing itself within the framework of the *amicus curiae* procedure, that the Appeals Chamber invited Côte d’Ivoire to file its observations; moreover, the Appeals Chamber rightly referred thereto in its decision of 16 October 2012 concerning requests for extensions of page limits filed by Côte d’Ivoire and the legal representative of victims. Thus it established that Côte d’Ivoire does not have the status of participating State and that it has merely been invited to participate in the proceedings as *amicus curiae*, which status does not confer upon it the same rights as participants.²²

32. Côte d’Ivoire does not appear to have altogether understood the nature of these proceedings, the status granted to it and the resulting room for manoeuvre. A number of the arguments made in its observations reveal that lack of understanding (*Cf. Infra*).

33. For example, Côte d’Ivoire seeks to reclassify the original observations submitted on 28 September 2012 by Mr Mignard and Mr Benoit, and those submitted by Ms Wetzel on the same day.²³ Those observations were disregarded by the Appeals Chamber,²⁴ and therefore, logically, cannot be reclassified. Moreover, on whose behalf do they seek that Ms Wetzel’s observations be “confidentially included” in the proceedings while they themselves state that Ms Wetzel does not represent Côte d’Ivoire? Here, the Defence shares the Chamber’s scepticism concerning Côte d’Ivoire’s request for reclassification²⁵ and asks the Chamber to draw the logical conclusions from the rejection *ab initio* of those observations, which cannot therefore be included in the case file in any form whatsoever, whether as public or confidential filings.

²¹ ICC-02/11-01/11-154, para. 13.

²² ICC-02/11-01/11-266 OA 2, para. 11.

²³ ICC-02/11-01/11-154, para. IV.

²⁴ ICC-02/11-01/11-254 OA 2.

²⁵ ICC-02/11-01/11-266 OA 2, para. 16.

2.2. Effect of the Pre-Trial Chamber's decision on Côte d'Ivoire's participation on the tenor of the judgment

34. The representatives of victims affirm that the Appeals Chamber should reject the ground of appeal concerning Côte d'Ivoire's participation as having had no material effect on the Pre-Trial Chamber's decision.²⁶

35. That affirmation is unsupported; in other words, it is a stance based on *a priori*. The opposite is therefore equally valid from a logical standpoint.

36. Firstly, it appears to be impossible to establish which arguments were more and which less influential on the decision of the Pre-Trial Chamber, which appears to have taken account of Côte d'Ivoire's arguments in relation to certain points.²⁷ Consequently, it would seem reasonable to consider that Côte d'Ivoire's intervention did have an impact on the Pre-Trial Chamber's decision.

37. Furthermore, why would the legal representative of victims believe that Côte d'Ivoire's observations had less of an impact on the Pre-Trial Chamber's decision than the Defence application?

38. The essence of the Defence's ground of appeal is the issue of the integrity of the judicial procedure. The procedure establishes a system which functions if it is balanced. Balance is dependent, first and foremost, on the number of protagonists. If the interface is not equal, balance is destroyed, the procedure undermined and the result distorted. That is why only certain parties may be heard in the courtroom. A trial is not an exercise in participative democracy. The Defence and the Prosecution are the principal players in the process. There are of course victims but they are authorised to participate in the proceedings only to a limited degree. Intervention by any other protagonist can therefore only be exceptional, necessary and limited, failing which the

²⁶ ICC-02/11-01/11-259, para. 33.

²⁷ ICC-02/11-01/11-259, para. 61.

balance of the apparatus will be compromised, particularly as the Defence is already facing the Prosecutor and the legal representative of victims.

39. The Defence notes Côte d'Ivoire's repeated intention to upset this balance; Côte d'Ivoire in fact affirms that "it has not enjoyed the guarantees which should have ensured respect for a fair trial and the principle of equality of arms"²⁸ and "accordingly, reserves the right to seek leave to submit observations in reply to the arguments which the Defence will subsequently present".²⁹ Côte d'Ivoire is therefore attempting a coup: it is attempting to place itself at the same level as the other parties. It is demonstrating its lack of understanding of its place, its lack of understanding of the notion of equality of arms and the fact that the Defence always has the last word.

40. The Defence raises more than a procedural point here, contrary to the contention of the representative of victims;³⁰ it is the balance of the trial which is at issue. The Defence must, systematically and with the limited resources available to it, respond to three adversaries. The imbalance is obvious and raises the question of fairness. In that connection, the Appeals Chamber's decision was welcome in so far as it reminded the victims and Côte d'Ivoire of their true place in the proceedings. The Statute makes a clear distinction between parties and participants. As the Appeals Chamber pointed out, that is explained by "the more limited role of victims in the proceedings"³¹ and because Côte d'Ivoire is participating in the proceedings only "by invitation of the Appeals Chamber pursuant to rule 103".³² Accordingly, and contrary to its affirmations, Côte d'Ivoire has no *de jure* status under the Treaty.

3. Interpretation of the declaration of 18 April 2003

41. The Defence raises a very simple argument as regards the interpretation of the declaration of 18 April 2003: (1) Nothing in the Statute allows for validation of the test set by the Pre-Trial Chamber which is, on the contrary, inconsistent with the very principles of the texts; and (2) the

²⁸ ICC-02/11-01/11-258 OA 2, para. 3.

²⁹ ICC-02/11-01/11-258 OA 2, para. 3.

³⁰ ICC-02/11-01/11-259, paras. 27-28.

³¹ ICC-02/11-01/11-266 OA 2, para. 14.

³² ICC-02/11-01/11-266 OA 2, para. 11.

statement must be interpreted as a unilateral act of the State of Côte d’Ivoire. However, on both points, the responses received sought to sow confusion rather than bring clarity.

3.1. Interpretation of a declaration made under article 12(3)

42. For the record, in its original application, the Defence suggested a simple test be applied to a declaration made under article 12(3). As a unilateral act on the part of the State of Côte d’Ivoire, creating international obligations, the declaration must be interpreted in light of the intention of the Ivorian authorities at the time of the declaration and the political context surrounding it. That logical and uncontroversial application of the relevant international law should have led the Pre-Trial Chamber to acknowledge that the declaration was part of a process for resolving the political crisis that had beset the country since September 2002, when an attempted coup against President Gbagbo resulted in the *de facto* partition of the country, with the northern zone remaining in rebel hands until the victory of Alassane Ouattara. In January 2003, the parties to the conflict signed the Linas-Marcoussis Peace Agreements. One provision of those Agreements provided: “The amnesty law shall under no circumstances exonerate the perpetrators of grave economic crimes and grave violations of human rights and international humanitarian law”.³³ The Government of Côte d’Ivoire was able to refer to the Court a number of crimes committed during the period from 19 September 2002 to January 2003. An amnesty law covering those same crimes was enacted at the same time.³⁴ As a result: (1) the declaration was never intended to cover crimes committed after January 2003; and (2) the letters of December 2010 and May 2011 (besides the contested attribution thereof to Côte d’Ivoire) could not therefore “confirm” that the declaration of 2003 related to crimes committed seven years later.

43. The Pre-Trial Chamber, disregarding and failing to respond to the arguments of the Defence, considered that: “the Chamber is of the view that it will be ultimately for the Court to

³³ ICC-02/11-01/11-129-Anx17, VII, 5.

³⁴ ICC-02/11-01/11-129-Anx19.

determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation.”³⁵

44. As far as the Defence is concerned, as it showed in its original application in anticipation of the problem and in its document in support of the Appeal, there simply does not exist in the Statute any legal basis for that affirmation. The sole textual justification provided by the Pre-Trial Chamber is rule 44.³⁶ That justification is repeated by the victims³⁷ who join the Prosecutor in stating that “Rule 44 makes clear that the inquiry required to define a situation (including its temporal scope) is the same under article 12(3) and article 13”.³⁸

45. Nevertheless, it is important to repeat that while rule 44 limits the discretion of a State in defining the scope of acceptance of jurisdiction, it is in relation to a single and unique point – the crimes covered. In other words, a State may not limit the scope of its acceptance of jurisdiction to certain crimes only. If jurisdiction is accepted, it must cover all crimes falling within the jurisdiction of the Court. On the other hand, rule 44 makes absolutely no mention of criteria to be followed in terms of a territorial or temporal dimension and cannot justify the Court exercising any control over those dimensions, contrary to the affirmation of the Pre-Trial Chamber.

46. When a declaration is made under article 12(3), there is not necessarily a “situation”, within the meaning of the Statute. Indeed, a “situation”, a legal term specifically enshrined in the Statute, does not exist until a referral, within the meaning of article 13, has been made by a State Party, the Security Council or the Prosecutor, if he or she decides to open an investigation *proprio motu*. Before that, legally, no “situation” exists and there are therefore no “objective parameters” which would make it possible to judge the scope of a declaration made under article 12(3).

47. Lastly, neither the Prosecutor, the legal representative of victims nor Côte d’Ivoire make any effort to address the paradox raised by the Defence in its document in support of the Appeal:

³⁵ ICC-02/11-01/11-212, para. 60.

³⁶ ICC-02/11-01/11-212, para. 59.

³⁷ ICC-02/11-01/11-259 OA 2, para. 40.

³⁸ ICC-02/11-01/11-251 OA 2, para. 38.

if the scope of acceptance of jurisdiction were dependant on the “situation”, the consequence would be that this scope would change depending on when an investigation was opened. Thus, if the Prosecutor had opened an investigation in 2003, the interpretation of the declaration as suggested by the Defence would probably have been accepted by all parties, since it appeared to be obvious that the 18 April 2003 acceptance of jurisdiction was the result of the political crisis and, like the amnesty law, put an end to it. Is the Appeals Chamber therefore truly able to validate a test which would mean that the scope of a single document would be able to give rise to different interpretations depending on when an investigation was opened by the Court?

48. The confusion can be explained by poor comprehension on the part of the Pre-Trial Chamber and the participants of what is effectively a declaration made under article 12(3). The representative of victims denies any confusion whatsoever in this connection on the part of the Pre-Trial Chamber.³⁹ Nevertheless, by adopting in turn the Prosecutor’s arguments,⁴⁰ the victims are contributing to that confusion. The relevant passage itself leaves no room for doubt:⁴¹

35. [...] The Appellant contends that an acceptance of jurisdiction under article 12 (3) does not create a “situation” before the Court, but only constitutes an acceptance of the Court’s subject-matter jurisdiction.

36. If this is the Appellant’s argument, it is not supported by the Statute. Article 12(3) is the mechanism for non-States Parties to confer jurisdiction on the Court, while article 13 provides States Parties with the opportunity to refer specific situations to the Court. Accordingly, a non-state party that accepts the Court’s jurisdiction under article 12(3) of the Statute is not required to make a further “referral” of a situation under article 13 of the Statute. Nor is any other step necessary for the purposes of creating an active “situation” before the Court. [...]

38. [...] The reference to “the situation” in [Rule 44] shows that an article 12(3) referral is the non-State party equivalent of an article 13 referral for a State Party, and that the scope of the situation under each must be interpreted in the same manner.

49. That series of assertions by the Office of the Prosecutor is one of the most astonishing and it is damaging because, with a remarkable lack of critical thinking, the victims subscribe to it. In fact, when the Prosecutor says that a State making a declaration under article 12(3) is not “required” to make a referral under article 13, she seems to be unaware that, in any event, such a State has no such legal capacity as it is not party to the Statute. Article 13 requires that it be a party to the Statute. Furthermore, it is clearly erroneous to claim that no additional action would

³⁹ ICC-02/11-01/11-259 OA 2, para. 38.

⁴⁰ ICC-02/11-01/11-259 OA 2, para. 16.

⁴¹ ICC-02/11-01/11-251 OA 2 (the Prosecutor’s response to the document in support of the appeal regarding jurisdiction).

be necessary following a declaration made under article 12(3) in order to create an “active situation” before the Court. The term “situation” does not even appear in article 12. It appears in the Statute for the first time in article 13, which concerns referrals by a State Party, the Security Council or the Prosecutor. Only a referral made in accordance with article 13 creates an active situation. In other words, if there is no referral, there is no situation.

50. In light of the foregoing, how can the Prosecutor refer to an “article 12(3) referral” while the Statute restricts the power to refer a situation to the Court to three entities (States Parties, Security Council and the Prosecutor)? The Prosecutor is creating referral by a non-State Party. The evident lack of comprehension is even more astonishing since the Office of the Prosecutor must have taken exactly the opposite view when it decided to open an investigation *proprio motu* into the crimes committed in Côte d’Ivoire under articles 13(c) and 15 of the Statute, thus demonstrating that the declaration under article 12(3) does not in fact constitute a referral and that a further step is required to create a situation.

51. Article 12(3) in no circumstances takes the place of referral, contrary to the participants’ arguments. It does, however, replace ratification which is normally required under article 12(2) to enable the Court to exercise its jurisdiction over the crimes covered by the Rome Statute. Lack of ratification is a clear and definitive obstacle to the Court’s exercise of jurisdiction. Article 12(3) allows the Court to exercise its jurisdiction, even when crimes are committed on the territory of a non-State Party or by a national of that non-State Party; it is therefore a less general substitute for ratification. A declaration made under article 12(3) must precede any material situation. The Pre-Trial Chamber, supported by the victims, essentially reversed the logic of the Statute.

52. Clearly then, in the case of a non-State Party, the declaration made under article 12(3) is the prerequisite and the inevitable starting point from which the Court is able to exercise its jurisdiction. It replaces ratification absolutely and in its entirety. There can be no situation, no referral and quite simply, no trial, without that declaration. The declaration supports and sets the parameters of the resulting situation and not the reverse.

4. Scope of the letters of December 2010 and May 2011

53. The Appeals Chamber will recall that the Defence submitted that the letters signed by Alassane Ouattara in December 2010 and May 2011 could not constitute an undertaking on Côte d'Ivoire's part, since they were both drafted prior to the Constitutional Council's proclamation of Alassane Ouattara as President of the Republic on 4 May 2011. As far as the Defence is concerned, Alassane Ouattara therefore had no authority prior to 4 May 2011 to make international undertakings on behalf of Côte d'Ivoire.

54. Contrary to Côte d'Ivoire's assertion, the Defence has never in its submissions on jurisdiction contested "[TRANSLATION] the results of the second round of presidential elections held on 28 November 2010 and Mr Alassane Ouattara's accession to the Presidency of the Republic".⁴² The Defence merely recalled the irrefutable reality of Ivorian law on this issue: no individual can make undertakings on behalf of the State of Côte d'Ivoire without the relevant standing and without being recognised – as is the case here – as President by the Constitutional Council. Furthermore, the Defence is surprised that Côte d'Ivoire relies on the recognition of "[TRANSLATION] the entire international community"⁴³ and shows such scant regard for its own Constitutional Council – the highest court in the country and the only body authorised under the Constitution to proclaim the results of a presidential election.

55. The Pre-Trial Chamber did not consider this aspect of the Defence's initial application in its decision. It stated that it need not rule on whether the letters *are attributable to Côte d'Ivoire*, but then went on to state in its next sentence that the letters showed *Côte d'Ivoire's desire* to accept the jurisdiction of the Court. The contradiction is clear. By making this statement, the Pre-Trial Chamber ruled in spite of itself on the Defence application. Such a logical error will surely not escape the Appeals Chamber's attention.

56. The victims submit that the Pre-Trial Chamber's error has no bearing on the impugned decision, and that this ground is therefore inadmissible,⁴⁴ again echoing the Prosecutor's

⁴² ICC-02/11-01/11-258 OA 2, para. 2.

⁴³ ICC-02/11-01/11-258 OA 2, para. 2.

⁴⁴ ICC-02/11-01/11-259 OA 2, para. 39.

reasoning.⁴⁵ While it is true that the Pre-Trial Chamber appears to have relied exclusively on the April 2003 declaration as the basis for its jurisdiction, the Defence nevertheless submits that the Pre-Trial Chamber's position has a two-fold impact.

57. Firstly, if, as the Pre-Trial Chamber states, these documents have no legal value, why then have the Chambers systematically relied on them since the opening of the investigation on 3 October 2011? Clearly they have been accorded some degree of weight, and it is not unreasonable to think that these documents elucidate for the judges the scope of the April 2003 declaration and that it is impossible to detach them from the Pre-Trial Chamber's overall assessment of the declaration.

58. Furthermore, as to the principle: even if the weight attributed to these letters is debatable, the question of their attribution should be decided once and for all. If, as the Defence contends, they are not attributable to Côte d'Ivoire, they must simply be ignored by the judges. Hence it is important for this matter to be settled, as the Defence requested of the Pre-Trial Chamber.

5. Ground pertaining to the breach of article 55(1)

59. The Defence wishes to respond principally to the issue of the conditions and applicability of the protection granted by article 55(1), which was the basis for its ground of appeal. However, given the nature of the Observations, it must also address the reality of the treatment which President Gbagbo suffered.

5.1. Conditions and applicability of article 55(1)

60. The Defence submits that article 55(1) must be construed broadly, in accordance with article 21(3), in order better to guarantee Laurent Gbagbo's rights. Thus, as from the opening of an investigation into a person, the Prosecutor – who bears responsibility for the investigation – also has duties towards that person.

⁴⁵ ICC-02/11-01/11-251 OA 2, para. 54.

61. In particular, the Defence is of the view that the Pre-Trial Chamber's interpretation that a rights violation must be directly imputable either to the Prosecutor or to the national authorities at the Prosecutor's explicit behest is excessively restrictive. Côte d'Ivoire echoes the Chamber's interpretation, submitting that article 55 cannot apply "[TRANSLATION] to acts which do not fall within the purview of the Prosecutor's investigation powers and which also cannot be ascribed to the Prosecutor".⁴⁶ However, there is no indication of any such requirement in article 55. On the contrary, to follow the reasoning of the Pre-Trial Chamber and the Prosecutor and Côte d'Ivoire would render meaningless the protection provided by article 55(1). It is indeed highly unlikely that the Prosecutor would explicitly request a suspect's torture.

62. Interpreting article 55(1) in a manner consistent with internationally recognised human rights means that once a person is under investigation, the Prosecutor, as the person responsible for the investigation, also has duties towards that person, contrary to Côte d'Ivoire's contention.⁴⁷

63. Responsibility is always accompanied by rights and duties. The Prosecutor's duties are manifold: firstly, to gather information and to intervene when apprised of past or present violations of legal provisions or the person's rights. How exactly the Prosecutor should intervene will depend on the context, and the success of the intervention must certainly be assessed taking into account the extent of the Prosecutor's actual discretion. But the Prosecutor must intervene; failing to do so would be a breach of her duties – contrary to Côte d'Ivoire's submission.

64. The Prosecutor must not take sides. As such, she has a duty of truth. She cannot deny – as she is doing here – that the legal and constitutional provisions of Côte d'Ivoire have been violated in President Gbagbo's case or that he has suffered numerous serious breaches of his rights.

65. It is therefore incumbent upon the Appeals Chamber to remind the Prosecutor of her duty of truth. Not only must she advocate the truth but she must also champion it, in accordance with

⁴⁶ ICC-02/11-01/11-258 OA 2, para. 30.

⁴⁷ ICC-02/11-01/11-258 OA 2, para. 31.

article 54 of the Rome Statute, which provides that one of the Prosecutor's duties with respect to investigations is to "establish the truth".

66. The truth is not distinct from justice. The Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana from 27 August to 7 September 1990⁴⁸ recalled that the Prosecutor shall "[TRANSLATION] promote the cause of justice, by seeking to ensure respect for human rights and fundamental freedoms acknowledged under national and international law and shall act freely and diligently at all times, in accordance with the law and recognised standards and ethics of the legal profession".

67. Promoting the cause of justice means, first and foremost, protecting the rights of individuals, victims or accused persons. This is reflected, *inter alia*, in article 55(1) of the Rome Statute, which provides that a person "shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment [...] [and s]hall not be subjected to arbitrary arrest or detention" once "an investigation under this Statute" is opened.

68. It was therefore incumbent upon the Prosecutor, who had opened an investigation in Côte d'Ivoire, to ensure that President Gbagbo's rights were respected. She should have been concerned with this issue when President Gbagbo was imprisoned in Côte d'Ivoire. The Prosecutor must be held accountable for her attitude towards him. Furthermore, she must investigate incriminating and exonerating circumstances and must take into account all relevant facts and evidence.⁴⁹ Finally, it bears repeating that President Gbagbo was and still is considered to be innocent.

69. Concerning the Prosecutor's duties and the extent of her responsibility, the Defence rejects any attempt to caricature its proposal. In fact, the Defence proposed a moderate test. It does not claim that the Prosecutor is always responsible for all acts committed by the national authorities

⁴⁸ Guidelines on the Role of Prosecutors, United Nations, available at: <http://www2.ohchr.org/english/law/prosecutors.htm>.

⁴⁹ Article 54 of the Rome Statute.

at all times, regardless of the circumstances. On the contrary, the Defence proposed that the specific circumstances be taken into account on a case-by-case basis.

70. However, it is clear in the instant case that President Gbagbo was being detained pending his transfer to The Hague. The Defence has demonstrated this amply, *inter alia* by relying on statements of Ivorian officials, including those of Alassane Ouattara himself.⁵⁰

71. Thus, as from March 2011 – scilicet almost one month prior to Laurent Gbagbo’s arrest – lawyers commissioned by Alassane Ouattara submitted to the Court a detailed memorandum⁵¹ in which they set forth the reasons why they believed that there was no impediment to the ICC’s exercising its jurisdiction in Côte d’Ivoire, and presented a list of crimes ascribed to Laurent Gbagbo and his supporters.⁵² On 9 May 2011, the Ivorian Minister of Justice, Jeannot Kouadio Ahoussou, clearly stated regarding the initiation of a national investigation for crimes committed by Mr Gbagbo: “[TRANSLATION] We have excluded [from the investigation] what falls within the jurisdiction of the International Criminal Court [ICC], such as crimes against humanity” and pointed out that a technical delegation of the Court had been in Côte d’Ivoire since 25 April.⁵³ This negotiated “burden-sharing” was confirmed by Alassane Ouattara during an interview with *Le Figaro* on 12 September 2011. He stated that he did not wish to prosecute certain post-election crimes, preferring to concentrate on economic crimes, and called on the ICC to act instead of the Ivorian authorities.⁵⁴ On 30 September 2011, the Ivorian Minister of Human Rights, Gnénéma Coulibaly, stated after a meeting with ICC officials that day: “[TRANSLATION] I explained to the President of the ICC the importance of this [transfer] procedure to national reconciliation. If the former president were no longer under our responsibility, in Côte d’Ivoire, it would facilitate the reconciliation process and contribute to cooling passions in further debates, in particular the legislative elections” scheduled for 11 December, added Coulibaly, who considered that ICC officials “[TRANSLATION] appeared to be receptive to our arguments”. This

⁵⁰ ICC-02/11-01/11-129-Corr, paras. 241-254.

⁵¹ ICC-02/11-01/11-129-Anx50.

⁵² ICC-02/11-01/11-129-Anx51.

⁵³ *L’Express*, “Côte d’Ivoire : Un mois après sa chute, l’Ex Président Gbagbo devant la justice”, 6 May 2011, available at: http://www.lexpress.fr/actualites/1/monde/cote-d-ivoire-un-mois-apres-sa-chute-l-ex-president-gbagbo-devant-la-justice_989817.html.

⁵⁴ *Le Figaro*, “Ouattara, « l’Etat de droit est en marche en Côte d’Ivoire »”, 12 September 2011, available at: <http://www.lefigaro.fr/international/2011/09/12/01003-20110912ARTFIG00622-ouattara-l-etat-de-droit-est-en-marche-en-cote-d-ivoire.php>.

statement clearly illustrates the political will of the Ivorian authorities that the ICC should be seized of the Laurent Gbagbo case and, above all, the intent not to complete the proceedings initiated in Côte d'Ivoire for economic crimes.⁵⁵ On 7 October 2011, in an interview with France 24, Guillaume Soro, the Prime Minister of Côte d'Ivoire, in reply to a question on whether President Gbagbo would be transferred to The Hague, stated: “[TRANSLATION] I think that it is inevitable after the killings in our country. Mr Laurent Gbagbo is after all responsible for more than 3 000 deaths. During the post-election crisis, he had the opportunity of handing over power and leaving with dignity, but by refusing to do so and using the army against the people, he obviously deserves to be transferred to The Hague.”⁵⁶

72. All of this is compelling evidence of Côte d'Ivoire's bad faith in stating that the treatment which President Gbagbo suffered took place within the context of an investigation into economic crimes,⁵⁷ while the Ivorian authorities, right up to the Head of State, never had any real desire for those proceedings to be completed; President Gbagbo's extended, arbitrary detention had only one purpose: to ensure that he remained available to the ICC.

73. As for the Prosecutor, she was informed in detail, if only because she had sent many missions to Côte d'Ivoire at that time. President Gbagbo's lawyers also wrote to her detailing the violations their client was suffering.^{58 59} The Prosecutor chose deliberately to ignore those violations.

74. At no point since the commencement of the proceedings has the Prosecutor responded to the Defence's simple question: would it have been so complicated to make enquiries with the national bodies, with all the moral and legal authorities she enjoys under the Rome Statute, as to the detention conditions of President Gbagbo, the main subject of the investigation? Especially since the close collaboration between the Office of the Prosecutor and the national authorities is in no doubt, in light of the evidence submitted by the Defence in its initial application.

⁵⁵ 7aubenin.com, “La CPI étudie le transfèrement de Gbagbo à La Haye”, 30 September 2011, available at: <http://www.7aubenin.com/2011/09/30/la-cpi-etudie-le-transferement-de-gbagbo-a-la-haye/>.

⁵⁶ Le Nouveau Courrier, “La CPI arrive, Soro sue à grosses gouttes”, 8 October 2011, available at: <http://www.nouveaucourrier.info/2011/10/08/la-cpi-arrive-soro-sue-a-grosses-gouttes/>.

⁵⁷ Observations of Côte d'Ivoire, paras. 31 and 32.

⁵⁸ ICC-02/11-01/11-129, ICC-02/11-01/11-240 OA 2.

⁵⁹ ICC-02/11-01/11-129-Conf-Anx11 and ICC-02/11-01/11-129-Conf-Anx12.

75. On this point, the Defence emphasises the bad faith evinced by the legal representative of victims, who criticises it for having relied on press and media articles “which cannot in any event ground such serious allegations”.⁶⁰ Firstly, as the Defence emphasised in its appeal, it relied on the means at its disposal in order to attempt unsuccessfully to secure the Prosecutor’s disclosure of her correspondence with the national authorities. The Defence certainly saw no indication of such misgivings from the victims when the Prosecutor relied exclusively on such media sources, without any accompanying investigation, to accuse President Gbagbo of intending forcibly to regain power, to evade justice or to pressurise witnesses in the event of his interim release. Simple intellectual consistency at least would have moved the victims to refrain from advancing such an argument.

76. In the final analysis, the question which the Appeals Chamber must address is whether it should endorse a test which prohibits *ab initio* – and this is the crux of the issue – any ill-treatment and torture suffered by a person under investigation by the ICC from being taken into account, solely because there is no evidence that such ill treatment or torture was ordered directly by the Prosecutor.

5.2. Reality of the rights violations, torture and ill treatment suffered by President Gbagbo

77. The Defence devoted almost thirty pages of its initial application to the violations of the Ivorian legal and constitutional provisions pertaining to President Gbagbo’s arrest and detention. It detailed the ill-treatment he had suffered, which specialists have likened to torture. In other words, it emphasised the Ivorian authorities’ disregard for the rule of law and human rights.

78. Côte d’Ivoire resorted to terse invective in response. In its submissions to the Trial Chamber, Côte d’Ivoire’s position was to address only those issues pertaining to article 12(3), merely stating in one line that it contested the allegation that Laurent Gbagbo had been ill-treated.⁶¹ It followed the same approach in its submissions on appeal. Thus in its introduction alone, Côte d’Ivoire characterises the violations of Laurent Gbagbo’s rights as “entirely

⁶⁰ ICC-02/11-01/11-259 OA 2, para. 46.

⁶¹ ICC-02/11-01/11-154, para. 22.

mendacious allegations” which are “ridiculous” and “grossly detrimental to Côte d’Ivoire’s honour”.⁶² It criticises the Defence for having failed to support “these very serious accusations” and ends that single paragraph devoted to the issue by “strongly challeng[ing] these untruths and mendacious allegations”.⁶³

79. It is therefore apparent that Côte d’Ivoire is refusing systematically to substantiate its contradiction of the facts, despite the ICC having provided it with two opportunities to do so, firstly before the Trial Chamber and now before the Appeals Chamber. Why, then, has Côte d’Ivoire not seized these opportunities to defend its “honour”? It would seem that the invective is being used here to conceal an absence of concrete evidence.

80. It is worth recalling that *refutation* is not *demonstration*. In this respect, the concept of “mendacious allegations” is meaningless. An allegation can be proven or refuted. And once proven, an allegation simply becomes a fact. The Defence has set out the facts of the systematic violations of President Gbagbo’s rights during his eight months in detention.

81. In conclusion, the Defence notes once again that Côte d’Ivoire has failed to understand its role as *amicus curiae* in these proceedings. Côte d’Ivoire is not here to defend its interests; it is here to provide the Court with knowledge which in theory only it can provide. Yet Côte d’Ivoire makes submissions only *as to the law* – despite the fact that the Appeals Chamber may obtain information on the applicable law from other sources – but provides no information whatsoever *as to the facts*, which it alone is able to provide.

82. Such a discrepancy between the information which Côte d’Ivoire could provide and the flimsiness of its submissions is also apparent in its observations on the interpretation of article [59(2)].

⁶² ICC-02/11-01/11-154, para. 2.

⁶³ ICC-02/11-01/11-154, para. 2.

6. The alleged breach of article 59(2)

83. Concerning the alleged breach of article 59(2), the Defence would like to respond to the observations by providing clarifications both as to the scope of the ICC's oversight over the process followed by the national authorities and as to the Pre-Trial Chamber's discussion of the facts of the case.

6.1. Extent of the Pre-Trial Chamber's oversight of compliance with the conditions of article 59(2) of the Statute

84. In its initial application, the Defence requested the Pre-Trial Chamber to apply the provisions of article 59(2), which state that a person's transfer shall be assessed "in accordance with the law of [the custodial] State" and that the national authorities shall determine whether "the person's rights have been respected". This simple and obvious reading of the article was also upheld by the Appeals Chamber in *Lubanga*, which stated that the role of the Court "is to see that the process envisaged by [national] law was duly followed and that the rights of the arrestee were properly respected".⁶⁴

85. Yet the Pre-Trial Chamber held that "its role with respect to proceedings under article 59 of the Statute is limited to verifying that the **basic safeguards** envisaged by national law have been made available to the arrested person".⁶⁵ This restrictive test meets with approval from Côte d'Ivoire,⁶⁶ and the victims in particular, since this was the position also adopted by the Prosecutor⁶⁷ and the victims are always in agreement with the Prosecutor.

86. However, the Observations do not provide the Appeals Chamber with any clarification as to the origin of the Pre-Trial Chamber's limitation of its role to only the "basic safeguards", despite the absence of such limitation from both article 59 and previous decisions, and instead invite the Pre-Trial Chamber to verify not only that the arrested person's rights have been

⁶⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, ICC-01/04-01/06-772 OA 4, para. 41.

⁶⁵ ICC-02/11-01/11-212 OA 2, para. 104 [emphasis added].

⁶⁶ ICC-02/11-01/11-258 OA 2, para. 29.

⁶⁷ ICC-02/11-01/11-251 OA 2, para. 69.

respected (without distinction) but also more generally that the arrest complies with national procedure.

87. Furthermore, still on the issue of the extent of the Chamber’s oversight, the Defence continues to maintain that the arrest which must be considered for the purposes of article 59(2) is the person’s physical arrest, regardless of the time at which it took place. In this regard, Côte d’Ivoire criticises the Defence for adopting a “particularly simplistic definition” of arrest.⁶⁸ However, it appears to the Defence that its suggestion is underpinned by common sense: an arrest is in fact a *physical* act depriving a person of liberty. How can Côte d’Ivoire use “arrest” to describe the mere notification of an arrest warrant to a man who has already been in custody for eight months?

88. More importantly, how can the Pre-Trial Chamber validate this quite simply Orwellian linguistic sleight-of-hand? Especially in view of the fact that – as the Defence noted above⁶⁹ – the sole purpose of Laurent Gbagbo’s arrest was, *from the outset*, to ensure that he remained at the ICC’s disposal. This is a fine example of why the Pre-Trial Chamber’s refusal to take into account the effective commencement of Laurent Gbagbo’s detention for the purposes of article 59 compliance is a denial of the reality on the ground. By fixating on the official notification of an arrest warrant as the starting point prior to which no protection was possible, the Pre-Trial Chamber apparently wishes to disregard the fact that the close collaboration between the Prosecutor and the national authorities allowed those authorities, knowing that a suspect was under investigation, to bring forward his arrest in order to evade their obligations under the Rome Statute. However, the requirement to protect human rights cannot be so easily circumvented by a linguistic fiction.

89. This fiction is compounded by an excessively formalistic approach in the Pre-Trial Chamber’s reasoning, where it merely “rubber stamped” and approved without discussion the document summarising the notification of the warrant of arrest and hence the “arrest” of Laurent Gbagbo provided by Côte d’Ivoire.⁷⁰ The Pre-Trial Chamber again adopted this excessively

⁶⁸ ICC-02/11-01/11-258 OA 2, para. 35.

⁶⁹ *Supra*, section 5.1.

⁷⁰ ICC-02/11-01/11-212, para. 102.

formalistic approach in its assessment of the process followed by Côte d'Ivoire and the resultant violations.

6.2. Actuality of the violations of article 59(2)

90. In its initial application, the Defence painstakingly listed all of the violations of national procedure and of Laurent Gbagbo's rights which occurred in the process of his transfer to the ICC on 29 November 2011. This multitude of serious violations ought to have led the Pre-Trial Chamber to find that article 59 of the Statute had been breached.

91. Côte d'Ivoire concedes that the Pre-Trial Chamber's role was to see that the process envisaged in the custodial State was "duly followed".⁷¹ Yet the Pre-Trial Chamber failed signally to verify that national process had been followed. It disregarded all of the violations listed by the Defence, and instead merely read the summary judgment of the Abidjan Indictments Division – the only document mentioned in its "reasoning" – stated its content and found that the process had been followed.⁷²

92. By endorsing the Prosecutor's Response wholesale, the victims also look no further than this superficial analysis of the facts by the Pre-Trial Chamber. In her Response, the Prosecutor submits that the Pre-Trial Chamber effectively ascertained whether the Accused's rights had been respected.⁷³ However, the Prosecutor herself takes some liberties in her interpretation of the decision. For example, she states that the following facts were "addressed" by the Chamber: (i) the fact that President Gbagbo's lawyers were informed at the last minute about the hearing on his transfer; (ii) the presence of armed men in the courtroom; (iii) the fact that the Rome Statute has no legal effect in Ivorian law as it has not been ratified by Côte d'Ivoire; and (iv) the violation of President Gbagbo's right to appeal since he was immediately transferred to The Hague at the end of the hearing.⁷⁴ However, a close reading of the Prosecutor's response shows that she is attempting to mislead the Appeals Chamber. Points (i), (ii) and (iv) are not in fact mentioned in the dispositive part of the decision ("analysis of the Chamber"). As indeed can be

⁷¹ ICC-02/11-01/11-258 OA 2, para. 36.

⁷² ICC-02/11-01/11-212, para. 105.

⁷³ ICC-02/11-01/11-251 OA 2, paras. 76-77.

⁷⁴ ICC-02/11-01/11-251 OA 2, para. 77.

seen in the references in the footnotes of the Prosecutor’s response, these points are mentioned only in the summary of the Defence’s submissions and are not subsequently discussed. Therefore, the Prosecutor’s “demonstration” in support of the Pre-Trial Chamber’s decision instead supports the Defence’s position: the Chamber did not “address” these issues, but rather disregarded them. As for point (iii) on the fact that the Rome Statute has no legal effect in Ivorian law, the Pre-Trial Chamber merely recalls that this issue was noted by the Abidjan Indictments Division.

93. The crux of the matter is the applicability of article 59 in Ivorian national law. Moreover, it is the only concrete violation stated by the Defence to which Côte d’Ivoire refers in its observations, dismissing it out of hand as a “chimerical allegation”.⁷⁵ And yet, let us be clear: the Defence has demonstrated that article 59 of the Rome Statute could not provide a legitimate basis for Laurent Gbagbo’s transfer to the ICC,⁷⁶ *and there is no other legal basis to justify the transfer in Ivorian law*. Consequently, the Defence’s arguments as to the unconstitutionality of the Rome Statute should have been at the core of the Pre-Trial Chamber’s consideration, and not disregarded. A finding resulting from a genuine analysis of the texts and Ivorian law would have been straightforward and irrefutable: Ivorian law as it stands contains no provision to authorise Côte d’Ivoire to transfer Laurent Gbagbo to the ICC, hence his transfer automatically violated article 59.

94. In conclusion, if the Appeals Chamber were to endorse the arguments of the Prosecutor, Côte d’Ivoire and the legal representative of victims, it would be validating a highly questionable tri-fold assertion: an “arrest” is not the physical act of placing a person in custody; national proceedings concerning such complex and fundamental issues, conducted in haste and marred by irregularities, nevertheless respect the person’s rights; and, lastly, an assessment restricted solely to reading a brief judgement constitutes “effective oversight” of the rights of the accused and meets expectations of the oversight which an institution such as the ICC should exercise over the practice of national courts. The reality is that this tri-fold assertion reveals a refusal to act and to consider a complex situation in any depth. It claims powerlessness and leaves individuals under investigation by the ICC defenceless and at the mercy of the national authorities.

⁷⁵ ICC-02/11-01/11-258 OA 2, para. 37.

⁷⁶ ICC-02/11-01/11-240 OA 2, para. 150.

7. “Abuse of process”

95. The final clarification which the Defence would like to make upon reading the submissions of Côte d’Ivoire and the legal representative of victims concerns “abuse of process”. In light of both the Pre-Trial Chamber’s and the participants’ apparent confusion, the Defence deems it useful to recall the content of the Appeals Chamber judgment underpinning the test for a stay of proceedings on grounds of serious human rights violations (7.1), before clarifying how the test applies to the present case (7.2).

7.1. The Appeals Chamber’s rejection of “abuse of process” in Lubanga

96. The Appeals Chamber’s finding in *Lubanga* bears repeating from the outset. In its judgment, on which all of the parties and participants relied, the Appeals Chamber unambiguously rejected the application of the “doctrine” or “principle” of “abuse of process” in proceedings before the ICC. In a section of the judgment devoted to analysing the principle,⁷⁷ the Appeals Chamber first recalled the logic of abuse of process and how it has been applied in a number of common-law countries. The Appeals Chamber went on to consider that (1) “[a]buse of process is not listed as a ground for relinquishing jurisdiction in article 17 of the Statute”⁷⁸ and (2) “[t]he power to stay proceedings for abuse of process [...] is not generally recognised as an indispensable power of a court of law”.⁷⁹ It therefore naturally reached the conclusion that “the Statute does not provide for stay of proceedings for abuse of process as such”.⁸⁰

97. Only later in its judgment in *Lubanga* did the Appeals Chamber establish the test allowing the Court to terminate proceedings as a result of serious human rights violations, in a section with the heading “Article 21 (3) of the Statute, and its relevance to the assumption of jurisdiction by the Court in any given case”, which deliberately omits any mention of “abuse of process”.⁸¹

⁷⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, ICC-01/04-01/06-772 OA 4, Section B, paras. 26-35.

⁷⁸ *Ibid.*, para. 34.

⁷⁹ *Ibid.*, para. 35.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, Section C, p. 18.

7.2. *Application of the Lubanga judgment to the present case*

98. Reading the Appeals Chamber’s lucid judgment in *Lubanga*, the Defence is surprised that the Pre-Trial Chamber, and subsequently the legal representative of victims, Côte d’Ivoire and the Prosecutor, characterise a part of the Defence application as “abuse of process”, whereas the Defence makes no reference to abuse of process, instead setting out the serious violations of President Gbagbo’s human rights committed between his arrest on 11 April 2011 and his transfer to the ICC on 29 November 2011. The Defence’s approach is consistent with the approach adopted in the *Lubanga* judgment.

99. To state that the part of the Defence application related to the serious human rights violations does not fall within the scope of a challenge to jurisdiction – as Côte d’Ivoire claimed,⁸² consistent with the Pre-Trial Chamber’s position⁸³ – is to misread the *Lubanga* judgment. The Appeals Chamber in *Lubanga* rejected “abuse of process” *as such* as potential grounds for a challenge to jurisdiction. However, when it devised its own test, at no point did it state that the test could not be applied in the context of a challenge to jurisdiction. On the contrary, it linked it explicitly to the exercise of the jurisdiction of the Court.⁸⁴

100. It would therefore appear that, in light of the jurisprudence, the Defence was perfectly justified in applying for a “permanent stay of proceedings” in the context of its challenge to the jurisdiction of the Court and is justified in relying on the Pre-Trial Chamber’s recharacterisation as a ground. The Defence invoked the violations of President Gbagbo’s rights in order to request a “permanent stay of proceedings”; it did not frame them in a context of “abuse of process”. It is worth noting that the characterisation is of secondary importance; what is important is the seriousness of the violations of President Gbagbo’s rights.

⁸² ICC-02/11-01/11-258 OA, para. 222.

⁸³ ICC-02/11-01/11-129, para. 88.

⁸⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, ICC-01/04-01/06-772 OA 4, Section B, para. 36.

101. The legal representative of victims,⁸⁵ once again endorsing the Prosecutor's line of argument,⁸⁶ submits that the ground should be rejected because a recharacterisation of the application as "abuse of process" would not have affected the Pre-Trial Chamber's decision, since the Chamber finally chose to respond to the substance of the application on this point.

102. In the Defence's view, it is important to clarify what this process is and its legal basis in particular. This will indicate to the parties the context in which it should be considered. Furthermore, the legal characterisation has an impact on the manner in which the Pre-Trial Chamber handled the issue of the violations of President Gbagbo's rights. The confusion resulting from the various submissions and responses of the participants in these proceedings as to the exact meaning of the *Lubanga* judgment shows that such clarification is necessary. However, only the Appeals Chamber, which issued the judgment, can provide that clarification. If the Appeals Chamber were to decline to consider the matter on the grounds that it would have had no bearing on the decision, it would then perpetuate the ambiguity for the future. Must we wait for a Defence application in a future case to be dismissed *ab initio* before the Appeals Chamber issues a ruling on the matter? It would, on the contrary, be useful if it would take this opportunity to clarify the legal basis of abuse of process in the interests of the proper administration of justice.

103. Disregarding its role as *amicus curiae*, Côte d'Ivoire submits to the Chamber legal arguments which had already been set out elsewhere and by others, and does not provide any concrete facts to contradict the Defence on the violation of the accused's rights. Similarly, the victims merely rehearse the Prosecutor's arguments and take umbrage at Laurent Gbagbo's exercising his rights.

104. Whether they are characterised as "abuse of process" or as something else, the crux of the present proceedings is the Ivorian authorities' serious and systematic violation of President Gbagbo's fundamental rights for almost eight months. The ill treatment and torture took place before the Prosecutor's very eyes, yet she never deigned to intervene or make the slightest attempt to enquire as to her main suspect's health, despite successive requests from his lawyers.

⁸⁵ ICC-02/11-01/11-259 OA, para. 51.

⁸⁶ ICC-02/11-01/11-251 OA, para. 82.

As a result of this recklessness, the man transferred to the ICC was weakened and exhausted. A further consequence is that the proceedings before the Court are henceforth in question.

105. It is incumbent upon the Court to champion, even *a posteriori*, the fundamental principles protecting an individual's physical integrity and dignity, to redress injustice and to punish protagonists who breach an individual's rights and fail to fulfil their duty. In other words, to ensure that law triumphs over indifference; "[i]n those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice".⁸⁷ The Defence is committed to the preservation of legitimacy in the exercise of international criminal justice, hence its application to the Appeal Chamber in the present proceedings.

FOR THESE REASONS, may it please the Appeals Chamber to:

- **Find**, for all the more reason, in the appellant's favour on the basis of his previous submissions.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 19 October 2012 at The Hague, The Netherlands.

⁸⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, ICC-01/04-01/06-772 OA 4, para. 39.