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THE APPEALS CHAMBER

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

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

**Public Document
With public annex**

Observations of the Republic of Côte d'Ivoire on the document in support of the appeal against the *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"*

Source: Republic of Côte d'Ivoire

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

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PRELIMINARY OBSERVATIONS

[I] In a decision dated 1 October 2012, the Appeals Chamber ordered that the observations of Côte d'Ivoire on the document in support of the appeal against the *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"*¹ be "disregarded".² It granted the Republic of Côte d'Ivoire leave to file fresh submissions by 4 p.m. on 8 October 2012, provided that they do not exceed 20 pages (regulation 37(1) of the Regulations of the Court) and that they clarify the identity of the individuals representing Côte d'Ivoire for the purposes of the appeal.

[II] As grounds for its decision, the Appeals Chamber relies on the Registry's transmission of a document received at 15.35 on 28 September 2012 from Ms Karine Wetzel, Counsellor representing Côte d'Ivoire before the International Criminal Court,³ to which are annexed "observations of the State of Côte d'Ivoire" on the Defence document in support of the appeal. It also notes that both the annexed document and the observations of the Republic of Côte d'Ivoire exceed the page limit prescribed by regulation 37(1).

[III] As to the first point, the Republic of Côte d'Ivoire is surprised that a document which was not signed by the Counsel whom it duly and exclusively appointed to represent it before the Court was submitted to the Chamber. Whilst regretting that the Chamber was troubled by this inappropriate submission, Côte d'Ivoire notes officially that by mandate of 7 June 2012, formally annexed to a transmission of the Registry to Pre-Trial Chamber I on 11 June 2012,⁴ it had expressly appointed Mr Jean-Pierre Mignard and Mr Jean-Paul Benoit, lawyers at the Paris Bar, "[TRANSLATION] to defend its interests before the International Criminal Court".⁵ It further notes that in its 15 August 2012 decision on jurisdiction,⁶ Pre-Trial Chamber I attached no weight to the Defence's attempts to disqualify that mandate.

[IV] Solely at the Appeals Chamber's behest, the Republic of Côte d'Ivoire annexes hereto a mandate confirming the capacity of Mr Mignard and Mr Benoit as the sole representatives of Côte d'Ivoire before the Court.⁷ Côte d'Ivoire respectfully requests the Chamber to consider that,

¹ ICC-02/11-01/11-250 (OA 2).

² ICC-02/11-01/11-254 (OA 2), point 1.

³ ICC-02/11-01/11-253.

⁴ See ICC-02/11-01/11-150.

⁵ ICC-02/11-01/11-150, Annex 2.

⁶ ICC-02/11-01/11-212, 15 August 2012 [hereinafter "Decision on Jurisdiction"].

⁷ See Annex 1.

for the purposes of the present proceedings, only the observations signed by its duly authorised Counsel are admissible, to the exclusion of any other document. Further, it respectfully requests the Chamber, in consultation with the Registry, to reclassify as confidential the observations of the Republic of Côte d'Ivoire submitted on 28 September 2012 by Mr Mignard and Mr Benoit and those submitted by Ms Karine Wetzel at 15.35 on 28 September 2012.

[V] As to the number of pages of its Observations of 28 September 2012, Côte d'Ivoire recalls that it expressly requested the Appeals Chamber to increase the limit prescribed by regulation 37(1) of the Regulations of the Court.⁸ It again emphasises that the document submitted by the Defence in support of its appeal⁹ addresses ten grounds of appeal in 45 pages. Two of those grounds (grounds 1 and 2) had not been submitted before the Pre-Trial Chamber and directly call into question the status of Côte d'Ivoire before the Court. The other grounds rely on allegations which are grossly detrimental to its honour and misrepresent the true nature of its undertakings and conduct. There are undoubtedly "exceptional circumstances" which warrant an increase in the page limit in accordance with regulation 37(2) of the Regulations of the Court.

[VI] It would be paradoxical at the very least if Côte d'Ivoire, which was invited by the Appeals Chamber to submit observations on the document in support of the Defence's appeal,¹⁰ were unable to respond fully and equitably to that document.

[VII] Consequently, the Republic of Côte d'Ivoire respectfully requests the Appeals Chamber, pursuant to regulation 37(2) of the Regulations of the Court, to authorise it to file the initial and complete text of its 28 September 2012 observations.

[VIII] Subject to the foregoing submissions, the Republic of Côte d'Ivoire respectfully submits the abridged version of its Observations to the Appeals Chamber in accordance with its decision of 1 October 2012.

PRELIMINARY SUBMISSIONS ON THE PROCEDURAL BACKGROUND

1. On 21 August 2012, the Defence team for Mr Laurent Gbagbo lodged before the Appeals Chamber a "Defence appeal against Pre-Trial Chamber I's *Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3),*

⁸ ICC-02/11-01/11-250 (OA 2), point IV.

⁹ ICC-02/11-01/11-240, 6 September 2012 [hereinafter "Document in Support of the Appeal"].

¹⁰ *Directions on the submission of observations*, 31 August 2012, ICC-02/11-01/11-236 OA 2.

19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo’ (ICC-02/11-01/11-212)”.¹¹ The grounds for the appeal are set out in the document in support of the appeal,¹² which the Defence filed on 6 September 2012. Therein, the Defence requests the Appeals Chamber to rule, in the main, that the International Criminal Court lacks jurisdiction in the case of *The Prosecutor v. Laurent Gbagbo* or, in the alternative, “[TRANSLATION] to find that Laurent Gbagbo’s fundamental rights were violated” and “[TRANSLATION] to rule that the Court cannot exercise its jurisdiction in such circumstances”.¹³

2. The exercise of the rights of the Defence cannot be a platform for it to repeat entirely mendacious allegations, which it would be tempting to characterise as ridiculous, were they not grossly detrimental to Côte d’Ivoire’s honour and the integrity of the Court. Thus, in the guise of “facts and procedural background”, the Defence challenges 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,¹⁴ which is nevertheless recognised and accepted by the entire international community.¹⁵ The Defence also claims that Mr Gbagbo was in turn humiliated, threatened, “[TRANSLATION] subjected to pressure”, or was even “[TRANSLATION] a victim of daily ill-treatment and acts of torture”, but does not provide a modicum of evidence or credible references to support these very serious accusations.¹⁶ It also calls into question the Court’s actions by casting aspersions on the conduct of its Prosecutor¹⁷ and even its medical service.¹⁸ In the present Observations, Côte d’Ivoire will endeavour to set out the reasons why the Defence’s arguments in support of its challenge of the 15 August 2012 decision cannot be admitted in law by the Appeals Chamber. It also strongly challenges these untruths and mendacious allegations.

3. The Republic of Côte d’Ivoire is compelled to note that it has itself not enjoyed the guarantees which should have ensured respect for a fair trial and the principle of equality of arms. For example, it has been invited to present its observations on the Defence’s arguments,¹⁹ but does not have access to a number of documents on which the Defence relies in support of its

¹¹ ICC-02/11-01/11-225-tENG, 21 August 2012.

¹² “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””, ICC-02/11-01/11-240, [hereinafter “Document in Support of the Appeal”].

¹³ *Ibid.*, p. 45.

¹⁴ ICC-02/11-01/11-240, paras. 2-3, 5-6 and 17.

¹⁵ See “Observations on the challenge to jurisdiction”, ICC-02/11-01/11-156-tENG, paras. 45-49.

¹⁶ See ICC-02/11-01/11-240, paras. 9-16 and 24-30, in particular 12, 13 and 24.

¹⁷ *Ibid.*, paras. 4, 31-32, 37-38 and 42.

¹⁸ *Ibid.*, paras. 47 and 49.

¹⁹ See the *Directions on the submission of observations*, ICC-02/11-01/11-236 OA 2, para. 4.

arguments.²⁰ Hence it is able to present observations only on that part of the argumentation which is not covered by confidentiality requirements and without being apprised of the evidence which the Defence might choose to submit in the response which it will undoubtedly file on 19 October 2012. Accordingly, Côte d'Ivoire reserves the right to seek leave to submit observations in reply to the arguments which the Defence will subsequently present.

I. THE OBSERVATIONS OF CÔTE D'IVOIRE (GROUNDS 1 AND 2)

4. The Republic of Côte d'Ivoire considers that grounds 1 and 2 have no bearing whatsoever on the establishment of the Court's jurisdiction. In order to circumvent this difficulty, the Defence states that the Pre-Trial Chamber erred in law "[TRANSLATION] thereby voiding the entirety of its decision"²¹ "[TRANSLATION] since the decision was rendered having regard to improperly submitted observations by Côte d'Ivoire".²² However, the Court's jurisdiction is determined solely on the fulfilment of the material, personal, spatial and temporal criteria set forth respectively in the Rome Statute. There is no provision in article 19 of the Statute allowing a party to submit any grounds for lack of jurisdiction other than those flowing expressly from the Statute.

5. Furthermore, initially the Defence merely requested Pre-Trial Chamber I to find the observations submitted by Côte d'Ivoire on 18 June 2012 "inadmissible",²³ and did not seek to link this potential finding to the parallel challenge to the jurisdiction of the Court. The Chamber in fact took the same approach when considering this aspect of the Defence's requests and promptly dismissed it.²⁴ Hence Côte d'Ivoire will demonstrate merely in the alternative that grounds 1 and 2 should be dismissed.

1. Ground 1

6. The Defence raises this first ground in order to contest the fact that the Republic of Côte d'Ivoire is "[TRANSLATION] in these circumstances, a State participating in the instant

²⁰ For the only "facts and procedural background", see notes 4, 7, 8, 11, 13, 15-27, 30-36, 47-49, 53, 57 and 61, as well as Annex 1 to the Document.

²¹ ICC-02/11-01/11-240, para. 78.

²² *Ibid.*, para. 84.

²³ ICC-02/11-01/11-163, p. 17.

²⁴ Decision on Jurisdiction, ICC-02/11-01/11-212, paras. 20-23.

proceedings”.²⁵ In actual fact, this allegation is intended to silence Côte d’Ivoire, by denying it a status with which it is vested *de jure* under the Statute and the Regulations of the Court.

7. In fact, there can be no doubt that in the current matter the Republic of Côte d’Ivoire constitutes a State “participating in the proceedings” within the meaning of regulation 24 of the Regulations of the Court. Under the very provisions of article 12(2) of the Statute, Côte d’Ivoire is both “[t]he State on the territory of which the conduct in question occurred” and “[t]he State of which the person accused of the crime is a national”. Since it is not a party to the Statute, its acceptance of the Court’s jurisdiction is therefore, in accordance with article 12(3), “required under paragraph 2”. This confers on Côte d’Ivoire specific obligations and also discrete rights, particularly where in proceedings concerning a challenge to jurisdiction the State’s undertaking and conduct are challenged directly. Moreover, this was exactly the view taken by Pre-Trial Chamber I²⁶ and subsequently the Appeals Chamber²⁷ when broaching the issue of Côte d’Ivoire’s participation in this leg of the case, which is absolutely crucial for a comprehensive and balanced apprehension of the acts and conduct in question.

8. At this juncture, the Defence seeks above all to deflect the legal debate onto the purview of rule 59 of the Rules of Procedure and Evidence with the aid of regrettable stratagems and approximations.²⁸ Article 19(3) of the Statute, to which rule 59 refers, expressly concerns the Prosecutor’s authority to seek a ruling from the Court regarding a question of jurisdiction and the capacity of victims and those who have referred a situation to submit their observations. Accordingly, article 19(3) and rule 59 apply only to one specific circumstance for determining jurisdiction and by no means provide an exhaustive list of the entities which may make submissions on jurisdiction.

9. Furthermore, the jurisprudence cited by the Defence is of no use to it, since the status of Côte d’Ivoire in these proceedings is not in the least bit “similar”²⁹ to Kenya’s status in *Muthaura et al.* In that case, Kenya did not seek to make submissions on the jurisdiction of the Court; it requested the Chamber “that it be permitted to have legal representation in the courtroom”.³⁰

²⁵ ICC-02/11-01/11-240, para. 76.

²⁶ Decision on Jurisdiction, ICC-02/11-01/11-212, para. 22.

²⁷ *Directions on the submission of observations*, 31 August 2012, ICC-02/11-01/11-236 OA 2, para. 4.

²⁸ See ICC-02/11-01/11-240, para. 77.

²⁹ ICC-02/11-01/11-240, para. 77.

³⁰ ICC-01/09-02/11-340, 20 September 2011, para. 4.

10. In order to discharge its obligations and exercise its rights, Côte d'Ivoire is seeking to "file a response to any document, subject to any order of the Chamber", in accordance with regulation 24(3) of the Regulations of the Court. If the Defence's reasoning were to be endorsed, this provision would be rendered meaningless. However, it was precisely in order to promote the application of regulation 24(3) that Pre-Trial Chamber I and subsequently the Appeals Chamber, relying respectively on rule 58(2)³¹ and rule 103 of the Rules,³² confirmed it and sought the filing of the submissions of Côte d'Ivoire.

2. Ground 2

11. As its second ground, the Defence contends that Pre-Trial Chamber I "[TRANSLATION] deprived [it] of the [applicable] procedural safeguards", by failing to rule on the filing of the submissions of Côte d'Ivoire in a separate decision and thus denying it an opportunity to appeal such decision.³³

12. However, the Statute and the other applicable texts contain no provision compelling the Pre-Trial Chamber to rule separately and in advance on issues which are incidental to the conduct of proceedings concerning jurisdiction. Moreover, the Defence implicitly concedes as much, by succeeding in invoking only a hypothetical "[TRANSLATION] practice".³⁴ In the context of the proceedings initiated under article 19, rule 58(2) of the RPE actually allows a great deal of latitude for the Chamber, which "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings", in particular to pre-empt any "undue delay". In the present matter, the Chamber therefore rightfully decided to adjoin to its 15 August 2012 decision its examination of the request of Côte d'Ivoire.

13. To support its allegation that Côte d'Ivoire "[TRANSLATION] did not have the right to participate in the proceedings",³⁵ the Defence relies on previous rulings which are clearly of no import in the present case. The first decision cited concerned a Congolese organisation's application to participate in the proceedings as *amicus curiae*,³⁶ which the Appeals Chamber dismissed, stating that such participation "would serve merely to repeat submissions already provided by the parties *and participants*".³⁷ In both of the other circumstances cited by the

³¹ ICC-02/11-01/11-212, para. 22.

³² ICC-02/11-01/11-236 OA 2, para. 4.

³³ See ICC-02/11-01/11-240, paras. 80 and 84.

³⁴ *Ibid.*, para. 79.

³⁵ *Ibidem*.

³⁶ ICC-01/05-01/08-602, 9 November 2009, para. 1.

³⁷ *Ibid.*, para. 11.

Defence,³⁸ Pre-Trial Chamber II dismissed an amicus curiae application from a Kenyan organisation.³⁹ 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 provide.

II. ARTICLE 12(3) (GROUNDS 3 to 5)

14. In grounds 3 to 5, the Defence temporarily abandons the considerations which are unrelated to the establishment of the Court's jurisdiction in order to focus on the legal significance of the Republic of Côte d'Ivoire's declaration of 18 April 2003⁴⁰ pursuant to article 12(3) of the Rome Statute.

15. The Republic of Côte d'Ivoire notes that in its presentation of these three grounds, the Defence does not advance any arguments which were not already submitted in its challenge to jurisdiction⁴¹ and that it often merely rehearses the same points which it argued at that time.⁴² Côte d'Ivoire has already amply demonstrated the reasons why it considers that the Defence's arguments should be dismissed, as they were in the Pre-Trial Chamber's decision of 15 August 2012. It respectfully refers the Appeals Chamber to the reasoning which it set out in its observations of 18 June 2012, which remain wholly pertinent to the present discussion.⁴³

III. ALLEGED VIOLATIONS OF MR GBAGBO'S RIGHTS (GROUNDS 6 to 10)

16. The Defence argues that Mr Gbagbo's rights were violated in the context of his arrest on 11 April 2011 and his subsequent eight-month detention Côte d'Ivoire and that the legal consequence is that the Court lacks jurisdiction. The Republic of Côte d'Ivoire disputes whether such violations can be established in fact and, even in that event, they cannot affect in law the exercise of the Court's jurisdiction.

17. Firstly, as the Pre-Trial Chamber which rendered the impugned decision recognised, the alleged violations of the suspect's fundamental rights prior to his surrender to the Court fall within the entirely discrete procedural framework of abuse of process, and do not concern the Court's jurisdiction. Accordingly, the Defence's grounds 9 and 10 should be dismissed.

³⁸ See ICC-02/11-01/11-240, footnote 72.

³⁹ ICC-01/09-01/11-84, 11 May 2011, para. 8, and ICC-01/09-02/11-87, 11 May 2011, para. 8.

⁴⁰ For the text of the declaration, see ICC-02/11-01/11-156-tENG, para. 24.

18. Furthermore, the Republic of Côte d'Ivoire is of the view that, owing to the fact that the allegations of violations of Mr Gbagbo's fundamental right were erroneously subsumed into the procedural framework of a jurisdictional challenge, grounds 6 to 8 must be dismissed *in limine* or, in the alternative, rejected in their entirety in fact and in law. Those grounds, which pertain to the scope of articles 55(1) and 59(2) of the Statute and the ambit of the Court's oversight to ensure compliance, actually disregard the principle of abuse of process. However, it is crucial to understand that abuse of process implies a strict construction of the applicability of articles 55 and 59 of the Rome Statute, not a liberal and extensive construction as called for by the Defence.

19. Even the sequence in which the Defence presented its grounds 6 to 10 shows that it failed to perceive the logical order in which articles 55 and 59 of the Statute governing the rights of the suspect must be interpreted. Hence the Republic of Côte d'Ivoire will begin by requesting the Court to dismiss *in limine* grounds 9 and 10 in their entirety (1), thereby justifying the Court at least *ipso facto* in dismissing *in limine* grounds 6 to 8, or otherwise rejecting them in fact and in law (2).

1. The Defence disregarded the specific regime of abuse of process, hence grounds 9 and 10 should be dismissed *in limine*

20. The Republic of Côte d'Ivoire takes the view that the Defence allegations concerning the Accused's treatment do not fall within the scope of a challenge to jurisdiction or a challenge to admissibility (i) but instead the entirely discrete regime of abuse of process dictating the interpretation of articles 55 and 59(ii).

(i) The Defence's allegations of violations of the suspect's rights do not fall within the scope of jurisdiction or admissibility, hence ground 10 should be dismissed in limine

21. In their observations on the challenge to the jurisdiction of the Court, the Republic of Côte d'Ivoire made a clear distinction between matters concerning the *establishment* and those concerning the *exercise* of the Court's jurisdiction. The Defence's tenth ground patently disregards this fundamental distinction. Yet it is self-evident that the exercise of jurisdiction, i.e. the Court's functioning, is governed by separate rules of procedure than those governing the establishment of jurisdiction, i.e. the determination of the crimes which the Court may prosecute

⁴¹ See ICC-02/11-01/11-129, 25 May 2012, in particular paras. 56-88 (grounds 3 and 4) and 90-108 (ground 5).

⁴² See ICC-02/11-01/11-240, in particular paras. 95, 103, 105 and 111.

⁴³ See ICC-02/11-01/11-156-tENG, in particular paras. 25-36 (grounds 3 and 4) and 37-55.

by satisfying the material, personal, spatial and temporal criteria which are clearly defined in the Rome Statute.⁴⁴

22. The rules governing the exercise – and not the establishment – of jurisdiction include those ensuring respect for the rights of suspects and accused persons. If the Court were to disregard these rules, it could lose the opportunity to exercise its jurisdiction (although it would still be competent to prosecute the crimes) as a result of an abuse of process. The Pre-Trial Chamber confirmed this *summa divisio* between the establishment and exercise of jurisdiction when it held that the alleged breach of Mr Gbagbo’s rights in no way pertains to the jurisdiction of the Court as set out and defined by article 19 of the Statute and article 122(2) of the Rules of Procedure. Côte d’Ivoire does not consider it meaningful to expand on this point any further than it did in its observations of 18 June 2012 on the Challenge to Jurisdiction.⁴⁵

23. Just as they do not pertain to the establishment of jurisdiction, nor do the rights of the suspect or accused person pertain to admissibility. Admissibility determines in law the Court’s ability to exercise its judicial functions, that is, to try crimes falling within its jurisdiction. Like jurisdiction, admissibility is clearly defined by the Statute: article 17 provides an exhaustive list of the grounds on which the Court may decline to exercise its jurisdiction.⁴⁶ Violation of the rights of the suspect or accused is not one of those grounds; the Defence cannot therefore find refuge in an admissibility challenge in order for the Court to accept its allegations concerning violations of Mr Gbagbo’s rights.

(ii) The Defence’s allegations of violations of the suspect’s rights fall under abuse of process, hence ground 9 must also be dismissed in limine

24. While the rights of suspects and accused persons cannot be subsumed into the procedural regime pertaining to the jurisdiction of the Court or into that pertaining to admissibility, they must be safeguarded by another regime. For obvious reasons of legitimacy and integrity which relate to the very exercise of its judicial functions, the Republic of Côte d’Ivoire endorses the Pre-Trial Chamber’s finding that the allegations concerning the protection of the suspect’s rights

⁴⁴ On the concepts of jurisdiction and admissibility, see Santulli, C., *Droit du contentieux international*, Paris, Montchrestien, 2005, pp. 137 and 187.

⁴⁵ ICC-02/11-01/11-156-tENG, paras. 17-19.

⁴⁶ These grounds, which are essentially intended to organise the division of jurisdiction to try crimes under the Statute between the Court and States, may concern respect for the suspect’s rights but by no means in the sense intended by the Defence. Article 17 on admissibility in fact provides for the circumstance that a violation of the rights of the suspect or accused person by the competent national courts, by denying their “intent to bring the person concerned to justice” (see article 17(2)(c)), may result in the national courts ceding their jurisdiction to the Court. Insofar as Côte d’Ivoire has never claimed to exercise its jurisdiction over the person concerned here to try crimes falling within the Statute, this provision cannot apply to the present case.

must be taken seriously and treated appropriately under the regime of abuse of process.⁴⁷ As noted by the Appeals Chamber in *Lubanga* and subsequently the Pre-Trial Chamber in the impugned decision, the fact remains that abuse of process is governed by a procedural regime which is exceptional because of the radical nature of its consequences. Abuse of process deprives a court of the very opportunity to exercise its functions since, in the process followed by its organs, the fundamental rights of the suspect or accused were blatantly flouted. Thus, abuse of process is comparable to a veritable sanction of the court itself (and its organs). It is because the court and its organs acted improperly that they must cease their action claiming to “bring justice”. However, there are several reasons why caution is warranted in the use of abuse of process.

25. Firstly, unlike the regimes for jurisdictional and admissibility challenges, which are governed by articles 19 and 17 respectively, the regime for abuse of process is not defined by the Statute. While the Appeals Chamber held in *Lubanga* that “the Statute does not provide for stay of proceedings for abuse of process as such”,⁴⁸ it did admit the principle that violations of the rights of the suspect or accused may preclude the Court from exercising its jurisdiction. The Pre-Trial Chamber which rendered the impugned decision endorsed the finding in *Lubanga* that, by placing an obligation on the Court to apply and interpret the applicable law in a manner “consistent with internationally recognised human rights”, article 21(3) of the Statute provides a means of introducing abuse of process into the procedural law of the Court.

26. However, although abuse of process has thus been accepted by the Court, as it has been by the international criminal tribunals, the regime must be contemplated in a manner consistent with the relevant available international rules. Yet the rules outside of the Statute and Rules of Procedure which may be applied by the Court pursuant to article 21 of the Statute (flowing from treaties, principles and rules of international law or, in the absence thereof, general principles of law derived from national laws of legal systems of the world) make no provisions for organising a procedural regime for abuse of process. The Republic of Côte d’Ivoire wishes to recall that abuse of process, which is well known in common-law countries, is not necessarily a familiar concept in civil-law countries. In these circumstances, it appears more than reasonable to contemplate abuse of process in relation to the provisions of the Statute concerning the

⁴⁷ ICC-02/11-01/11-212, para. 90.

⁴⁸ ICC-01/04-01/06-772, *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*, para. 35.

fundamental rights of suspects and accused persons. This is how Pre-Trial Chamber I decided to proceed in the impugned decision¹ by focusing on the terms of articles 55 and 59.

2. **The applicability of articles 55 and 59 must not be construed broadly (ground 6 pertaining to article 55 and grounds 7 and 8 pertaining to article 59 must be rejected in law and in fact)**

27. If articles 55 and 59 of the Statute are to serve as the basis for determining the regime for protecting the rights of suspects via abuse of process, their applicability must be strictly construed *ratione materiae*, *ratione personae* and *ratione temporis*.

28. *Ratione materiae*, the Defence finds fault with the Pre-Trial Chamber for having focused on the fundamental rights of accused persons. The Republic of Côte d'Ivoire takes the contrary view that the Chamber quite rightly focused its discussion on those rights and held that "not every violation of articles 55 and 59 of the Statute would lead, *per se*, to the Court being required to decline to exercise jurisdiction".⁴⁹ The Pre-Trial Chamber is not alone in showing such restraint in having recourse to abuse of process – the international criminal tribunals did likewise.⁵⁰ This is a common-sense and measured approach: while abuse of process must protect suspects in the enjoyment of their rights, they must not "abuse" it by construing their rights extensively, at the risk of unduly paralysing judicial action, as the Defence is currently attempting to do.

29. Clearly, when setting out its arguments for its **seventh ground**, the Defence failed to perceive why the Pre-Trial Chamber stated that "basic safeguards envisaged by national law have been made available to the arrested persons". Yet it is wholly logical that the Court's role in verifying compliance with article 59(2) should be restricted to verifying that only those fundamental rights safeguarded under the legislation of the custodial State were not disregarded in the process of arresting suspects and surrendering them to the Court.

30. *Ratione personae*, the applicability of article 55 must cover only those acts attributable to the organs of the Court. Once again, with its regrettable obduracy in disregarding the logic of

⁴⁹ ICC-02/11-01/11-212, 15 August 2012, para. 93.

⁵⁰ Even though the International Criminal Tribunal for the former Yugoslavia and the Criminal Tribunal for Rwanda never suspended the exercise of their jurisdiction on the grounds of abuse of process, both courts provided some useful information on how the fundamental rights of suspects and accused persons must be safeguarded by the procedure. Accordingly, the ICTY held in *Nikolić* that "although the assessment of the seriousness of the human rights violations depend on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of the jurisdiction be declined ... Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will usually be disproportionate". See ICTY, *Prosecutor v. Dragan Nikolić*, Case No. IT-94_2_AR73, Decision, 5 June 2003, para. 30.

abuse of process, the Defence proposes an unacceptable interpretation of article 55 in that in its **sixth ground**, it seeks the application of article 55 to acts which do not fall within the purview of the Prosecutor's investigation powers and which also cannot be ascribed to the Prosecutor.

31. Firstly, while the article 55 prohibitions, such as those pertaining to the arbitrary arrest or detention of the person concerned, may apply "[TRANSLATION] both to the Court and to the national authorities where they are taking part in the investigations",⁵¹ they cannot concern proceedings conducted by the national authorities which are wholly unrelated to the Prosecutor's investigation. This is precisely the case for the national proceedings in Côte d'Ivoire intended to prosecute Mr Gbagbo for economic crimes. Moreover, those proceedings cannot be subject to any due diligence obligation on the part of the Prosecutor. Respect for the binary proceedings is appropriate in this situation: while the Prosecutor must ensure that the investigation proceedings comply with the fundamental rights of the person concerned, this obligation can pertain to national proceedings if – and only if – the Prosecutor initiated those proceedings.

32. Secondly, the Defence demonstrates obvious bad faith by alleging that the violations committed by the Ivorian authorities within the context of the national proceedings on charges of economic crimes could be ascribed to the Prosecutor insofar as there was "[TRANSLATION] wholesale and constant cooperation between the Ivorian authorities and the organs of the Court, be they the Prosecutor during the investigation or the Registry during President Gbagbo's surrender to the ICC".⁵² In light of their general obligation to cooperate pursuant to article 86 of the Rome Statute, it would be difficult to criticise the Ivorian authorities for having cooperated in such a manner with the organs of the Court. Nor can it be inferred from the contact between the Prosecutor and the Ivorian authorities that they colluded in such a manner as to disqualify the proceedings conducted by the latter to try Mr Gbagbo for economic crimes which do not fall within the jurisdiction of the Court.

33. *Ratione temporis*, the Defence's interpretation shows its desire to overextend the applicability of articles 55 and 59. Firstly, article 55 can pertain only to those acts which take place as from the opening of the investigation. In its sixth ground, the Defence requests the Court "[TRANSLATION] to adopt a broader definition of the concept of '[investigation] under'"⁵³ so that it may encompass all actions conducted in relation to the person under investigation,

⁵¹ Hernandez, J. and Pacreau, X. (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, see commentary on article 55, Paris, Pedone, 2012, p. 23.

⁵² ICC-02/11-01/11, Defence observations, 6 September 2012, para. 163.

⁵³ ICC-02/11-01/11, Defence observations, 6 September 2012, para. 126.

whether or not they were conducted at the Prosecutor's request. In the Defence's view, this broad interpretation of the investigation is warranted in order to avoid creating "unequal protection in respect of those other modes of referral (Security Council and State Party) which do not ensue from a formal decision [by the Pre-Trial Chamber] authorising the initiation of an investigation".⁵⁴ This statement is erroneous, since the fact that an investigation was opened by the Prosecutor *proprio motu* by no means results in the suspect's rights being any less protected than they would be in a situation referred by a State Party or the Security Council.

34. Clearly, the Defence is mistaken once again because it has failed to understand, in light of the successive acts provided for in the Statute, that the Pre-Trial Chamber's authorisation to open an investigation is a prerequisite to the Prosecutor's capacity to open an investigation *proprio motu* pursuant to article 15. All of the Prosecutor's actions, including those preceding the Pre-Trial Chamber's authorisation, may therefore fall within the "investigation" as from the time it is duly authorised (and triggered) by the Pre-Trial Chamber. When viewed through this prism – as indeed it must be – the investigation initiated *proprio motu* by the Prosecutor does not engender any "unequal protection in respect of the other modes of referral" as the Defence claims.⁵⁵

35. Secondly, as to the *rationae temporis* applicability of article 59, the Defence claims in its **seventh ground** that the Pre-Trial Chamber ought to have considered that it could apply to Mr Gbagbo's arrest on 11 April 2011; with arrest meaning in its view "[TRANSLATION] the physical act of placing a person under detention and not the legal fiction advanced by the Pre-Trial Chamber in its claim that 'the Chamber considers Mr Gbagbo to have been arrested pursuant to the warrant of arrest issued by the Court'".⁵⁶ This particularly simplistic definition of arrest should not be accepted by the Court, since it is evidently inconsistent with the terms of article 59(1). The only arrest with which article 59 is concerned is the one which took place on 29 November 2011 after Côte d'Ivoire had received from the Court a request for the suspect's arrest and surrender.

36. The Republic of Côte d'Ivoire in no way contests the fact that the procedure followed by the Ivorian authorities after the arrest preceding the suspect's surrender to the Court must be overseen by the Court pursuant to article 59; it does, however, contest the Defence's eighth ground claiming that this oversight was "[TRANSLATION] summary" or "[TRANSLATION] perfunctory". Only the national proceedings followed by the Indictments Chamber of Abidjan

⁵⁴ *Ibidem*.

⁵⁵ *Ibidem*.

⁵⁶ ICC-02/11-01/11-240, Defence observations, 6 September 2012, para. 141.

which travelled to convene at Mr Gbagbo's place of detention (given the security situation at that time in Côte d'Ivoire) require oversight, in the words of the Appeals Chamber in *Lubanga* in order to "see that the process envisaged (in the law of the custodial State) was duly followed"⁵⁷ and not to "sit on judgment as a court of appeal" in the national proceedings leading to the arrest. This point, which was noted by the Prosecution in its observations, requires no further discussion.

37. The Defence's chimerical allegation in its eight ground that the Chamber should have verified pursuant to article 59 that the national law applied by the Indictments Chamber of Abidjan prior to Mr Gbagbo's surrender to the Court complied with the Constitution of Côte d'Ivoire and the country's international undertakings, will certainly persuade the Court to reject them in their entirety. Whether Ivorian law is consistent with its constitution or conventions is a purely internal matter for the Ivorian system; if it were of any interest to the Court, it would only be in relation to article 12(3) of the Statute concerning verifying whether there is a basis for the Court's jurisdiction. Clearly, the Pre-Trial Chamber was not responsible for verifying whether the Ivorian law which was applied in the process of surrendering Mr Gbagbo to the Court was consistent with Côte d'Ivoire's constitution or conventions, but merely whether the provisions of Ivorian law relating to the rights of the suspect were respected, which the Chamber did indeed do.

38. In conclusion, the Republic of Côte d'Ivoire notes that it is absolutely crucial that the Court uphold its jurisprudence endorsing a strict construction of the applicability of articles 55 and 59 in order to guard itself against allegations of breaching suspects' rights which are not only a delaying tactic but are also detrimental to its image, since it is the integrity of its judicial power – which is protected and sanctioned by the abuse of process principle – which is at stake.

For these reasons, the Republic of Côte d'Ivoire requests the Appeals Chamber:

- As a preliminary submission, to authorise it pursuant to regulation 37(2) of the Regulations of the Court to submit the entire text of the observations which it filed on 28 September 2012;
- As a main submission, to dismiss *in limine* grounds 1 and 2, 6, 7, 8 and 9, in that they bear no relation to a challenge to the Court's jurisdiction;

⁵⁷ ICC-01/04-01/06-512, para. 41.

- As a main submission, to reject grounds 3, 4, 5 and 10 for being unfounded in law and in fact;
- As an alternative submission, to reject grounds 1, 2, 6, 7 and 8 for being unfounded in law and in fact.

[signed]

[signed]

Jean-Pierre Mignard

Jean-Paul Benoit

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Dated this 8 October 2012

At Paris