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Date: 5 October 2012

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 THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

**Observations on behalf of victims
on the Defence's document in support of the appeal against Pre-Trial Chamber I's
Decision on the Defence Challenge to the Jurisdiction of the Court**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Mr. Laurent Gbagbo,¹ who was surrendered to the Court on 30 November 2011. During the first appearance of Mr. Gbagbo before the Court, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

2. On 25 May 2012, the Defence submitted a *“Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12(3), 19(2), 21(3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo”* with 15 public Annexes and 37 confidential Annexes,³ and on 30 May 2012, a corrigendum to the said application⁴ (the “Defence Challenge”).

3. On 4 June 2012, the Single Judge of the Chamber issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”⁵ by which she granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings.⁶ Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims (the “Office”) as the common legal

¹ See the “Warrant of Arrest For Laurent Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 23 November 2011.

² See the transcripts of the hearing of 5 December 2011, No. ICC-02/11-01/11-T-1-ENG, p. 8.

³ See the *“Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12(3), 19(2), 21(3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo”*, No. ICC-02/11-01/11-129, 25 May 2012 (dated 24 May 2012).

⁴ See 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-02/11-01/11-129)”, No. ICC-02/11-01/11-129-Corr-tENG, 30 May 2012 (dated 29 May 2012) (the “Defence Challenge”).

⁵ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012.

⁶ *Idem.*, p. 25.

representative of all the victims admitted to participate in the proceedings related to the confirmation of charges.⁷

4. On 15 June 2012, Pre-Trial Chamber I issued the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute”⁸, whereby the Chamber decided, *inter alia*, to: (i) appoint the Office, for the purpose of proceedings following the Defence Challenge, to represent those victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber;⁹ (ii) invite the Office to submit, by 27 June 2012, written observations on the Defence Challenge on behalf of both victims admitted to participate in the proceedings related to the confirmation of charges hearing and victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber;¹⁰ and (iii) instruct the Victims Participation and Reparations Section to provide to the Office the necessary information in relation to all victims related to the present case whose applications for participation in the proceedings have not been communicated to the Chamber.¹¹

5. On 18 June 2012, Côte d’Ivoire requested leave to submit observations on the Defence Challenge.¹² On the same day, Côte d’Ivoire submitted said observations.¹³

⁷ *Ibid.*, p. 26.

⁸ See the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-153, 15 June 2012.

⁹ *Idem.*, p. 5.

¹⁰ *Ibid.*, par. 7 and p. 5.

¹¹ *Ibid.*, par. 8.

¹² See the “Request by the Republic of Côte d’Ivoire to submit observations on 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”, No. ICC-02/11-01/11-154-tENG, 18 June 2012.

¹³ See the “Observations de la République de Côte d’Ivoire sur la requête en incompétence de la Cour pénale internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo”, No. ICC-02/11-01/11-156, 18 June 2012.

6. On 25 June 2012, the Defence objected to Côte d'Ivoire request and requested its observations to be disregarded by Pre-Trial Chamber I.¹⁴
7. On 27 June 2012, the Office filed its observations on the Defence Challenge.¹⁵
8. On 28 June 2012, the Prosecutor submitted her observations on the Defence Challenge.¹⁶
9. On 15 August 2012, Pre-Trial Chamber I issued its "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-02/11-01/11-129)'" (the "Impugned Decision").¹⁷
10. On 21 August 2012, the Defence appealed the Decision on the Defence Challenge¹⁸ and subsequently submitted its document in support of said appeal on 6 September 2012.¹⁹
11. On 31 August 2012, the Appeals Chamber issued its "Directions on the submissions of observations",²⁰ ruling that "victims who were allowed to file

¹⁴ See the "Requête de la Défense aux fins de Rejet des demandes présentées par les Avocats se prétendant mandatés par la République de Côte d'Ivoire, portant notamment sur la possibilité d'assister à l'audience de confirmation des charges ainsi que sur la possibilité de déposer des Observations sur la requête en incompétence de la Cour", No. ICC-02/11-01/11-163, 25 June 2012.

¹⁵ See the "Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court", No. ICC-02/11-01/11-165, 27 June 2012.

¹⁶ See the "Prosecution Response to Defence motion for a declaration on lack of jurisdiction of the Court based on Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute", No. ICC-02/11-01/11-167-Red-Corr, 28 June 2012.

¹⁷ See 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 (ICC-02/11-01/11-129)'" , No. ICC-02/11-01/11-212, 15 August 2012 (the "Impugned Decision").

¹⁸ See the "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), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo' (ICC-02/11-01/11-212)", No. ICC-02/11-01/11-225-tENG, 21 August 2012.

¹⁹ See the "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-02/11-01/11-212)'" , No. ICC-02/11-01/11-240 OA 2, 6 September 2012 (the "Document in Support of the Appeal").

observations pursuant to Pre-Trial Chamber I's 15 June 2012 "Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute" (ICC-02/11-01/11-153) may submit observations on Mr Gbagbo's document in support of the appeal and on the Prosecutor's response by no later than 5 October 2012".²¹

12. On 28 September 2012, Côte d'Ivoire and the Prosecution responded to the Document in support of the appeal.²²

13. On 1 October 2012, the Office was notified of the "Transmission du Greffe d'un document reçu le 28 septembre 2012 à 15h35 de Mme Karine Wetzel, Conseillère Représentante de l'État de Côte d'Ivoire auprès de la Cour pénale internationale"²³ together with annex 1 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'".²⁴ On the same day, the Appeals Chamber disregarded both submissions

²⁰ See the "Directions on the submissions of observations", No. ICC-02/11-01/11-236 OA 2, 31 August 2012.

²¹ *Idem.*, p. 3.

²² See respectively the "Observations de la République de Côte d'Ivoire sur le 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'", No. ICC-02/11-01/11-250 OA2, 28 September 2012 and the "Response to the Lauren (sic) Gbagbo's 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' (ICC-02/11-01/11-212)", No. ICC-02/11-01/11-251 OA2, 28 September 2012 (the "Prosecution's Response").

²³ See the « Transmission du Greffe d'un document reçu le 28 septembre 2012 à 15h35 de Mme Karine Wetzel, Conseillère Représentante de l'État de Côte d'Ivoire auprès de la Cour pénale internationale", No. ICC-02/11-01/11-253, 1 October 2012 (dated 28 September 2012).

²⁴ See the "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' »", No. ICC-02/11-01/11-253-Anx1 OA 2, 1 October 2012 (dated 28 September 2012).

made on behalf of Côte d'Ivoire and directed the Ivorian authorities to submit observations by 8 October 2012, clarifying who is representing them.²⁵

14. In accordance with the Appeals Chamber's Directions, the Principal Counsel of the Office submits her observations in response to the Defence's Document in support of the Appeal and on the Prosecutor's response thereon on behalf of victims authorised to participate in the proceedings and on behalf of victims having communicated with the Court in relation to the case.

II. OBSERVATIONS ON BEHALF OF VICTIMS

A. Observations on the Prosecution's Response

15. The Office generally concurs with the observations put forward by the Prosecution in its response.

B. Observations on the Defence's Document in Support of the Appeal

16. As a preliminary remark, the Office notes that the Defence provides the Appeals Chamber with no less than eleven pages and a half of "facts and procedural history".²⁶ Rather than summarizing the facts at stake, the Defence provides very partisan views, therefore litigating issues that should not be involved at this stage of the proceedings. It is all the more regrettable that the strategy of the Defence in the current case has, to date, consisted in avoiding any kind of litigation on the merits of the case, multiplying the procedural incidents.²⁷

²⁵ See the "Decision on Observations submitted by the Republic of Côte d'Ivoire", No. ICC-02/11-01/11-254 OA2, 1 October 2012.

²⁶ See the Document in Support of the Appeal, *supra* note 19, paras. 2-68.

²⁷ See *inter alia* the "Views and concerns of victims in relation to the 'Order scheduling a hearing in relation to Mr. Gbagbo's fitness to take part in the proceedings against him' and on the Defence's request for postponement", No. ICC-02/11-01/11-245, 17 September 2012, par. 17.

17. The Office also submits that, despite the contention of the Defence with regard to an alleged violation of the legality principle,²⁸ the sole fact that it does not agree on the Pre-Trial Chamber's findings on its Challenge cannot, and should not, be interpreted as such a violation. Any other interpretation would frustrate the very same principle and would vitiate the appeals procedure.

1. The Defence's appeal must be dismissed *in limine*

18. The Office notes that under the pretext of appealing the Impugned Decision, the Defence merely reiterates its initial challenge, although stating no less than ten grounds for appeal. Amongst these ten grounds, nine are qualified by the Defence as "errors of law" (Grounds 1 to 7, 9 and 10) and one as an "error of facts" (Ground 8).

19. The Office contends that all of these ten grounds should be dismissed *in limine* since the Defence failed to specify and substantiate the alleged errors that materially affect the Impugned Decision. In this regard, the Appeals Chamber itself established that:

"in interlocutory appeals an appellant must allege that there are specific legal, factual or procedural errors that materially affect the impugned decision. Therefore an appellant cannot simply claim that an impugned decision violated the overall fairness or led to a violation of his or her human rights without specifying and substantiating such claim. Any such general arguments would require the Appeals Chamber to review the correctness of the entire impugned decision in the absence of allegations of any specific error by the parties".²⁹

20. Instead, the Defence merely expresses its disagreement with the Pre-Trial Chamber with regard to:

²⁸ See the Document in Support of the Appeal, *supra* note 19, paras. 69-70.

²⁹ Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled "Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'", No. ICC-01/05-01/08-2151-Red, 5 March 2012, par. 41.

- the scope of article 12(3) of the Rome Statute and rule 44 of the Rules of Procedure and Evidence (Grounds 3 to 5);
- the scope of article 55 of the Rome Statute (Ground 6);
- the scope of article 59(2) of the Rome Statute (Grounds 7 and 8);
- the qualification by the Pre-Trial Chamber of the Defence's contentions regarding the human rights violations allegedly suffered by the suspect (Grounds 9 and 10).

21. In this regard, the Appeals Chamber itself clearly established that: "[it] *will not substitute its own judgment for that of the Pre-Trial Chamber but rather will defer to the latter's findings unless they are clearly erroneous*" and that if the appellant fails to identify clear errors in the Impugned Decision "*his arguments must be dismissed*".³⁰

22. In particular, the Appeals Chamber clarified that arguments concerning additional factors comprising "*primarily a list of disagreements with either the conclusions drawn by the Pre-Trial Chamber from the available facts or the weight accorded to particular instances of his past alleged good behaviour*", at most could offer "*alternative conclusions which could have been drawn by the Pre-Trial Chamber*".³¹ However, "*the question is not whether the Pre-Trial Chamber could also have reached other conclusions. The question is whether the Pre-Trial Chamber could not have reasonably reached the conclusions it did on the available evidence. As has been stated previously, absent any clear error, the Appeals Chamber defers to the findings of the Pre-Trial Chamber*".³²

23. The Office submits that in its Document in Support of the Appeal, the Defence simply reiterates the same arguments as litigated before the Pre-Trial Chamber and fails to demonstrate legally or factually that the Pre-Trial Chamber erred in dismissing its Challenge. Accordingly, all ten grounds should be dismissed *in limine*.

³⁰ See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'" (Appeals Chamber), No. ICC-01/04-01/10-283, 14 July 2011, par. 21.

³¹ *Idem.*, par. 31.

³² *Ibid.*.

2. In the alternative, the Defence's appeal shall be dismissed since the appellant fails to demonstrate any discernible error in the Impugned Decision

24. If the Appeals Chambers determines that the Defence's appeal should not be dismissed *in limine*, the Office submits that the appeal has to be rejected in its entirety since the appellant fails to demonstrate any discernible error in the Impugned Decision.

25. For the sake of efficiency, the Office will not respond to each of the ten grounds separately but will address: a) the grounds related to the observations of Côte d'Ivoire (Grounds 1 and 2); b) the grounds related to article 12(3) of the Rome Statute (Grounds 3 to 5) and c) the grounds related to articles 55(1) and 59(2) of the Rome Statute (Grounds 6 to 10).

a) Grounds 1 and 2: Grounds related to the observations of Côte d'Ivoire

26. Should the Appeals Chamber consider that the Defence's contentions on the ruling admitting the observations of Côte d'Ivoire constitute an error, the Office submits that the Defence should have pleaded the existence of a "procedural error" rather than an "error of law". Indeed, the part of the Impugned Decision at stake concerns merely the procedural steps to be followed during the admissibility proceedings. In this regard, although article 82(1)(a) of the Rome Statute does not explicitly mention "procedural error" as a valid ground of appeal, the Appeals Chamber did acknowledge that:

"46. [...] article 82 (1) (a) of the Statute does not, as does article 81 (1), spell out the grounds on which appeals under the provision may be based. Nevertheless, absence of statutory grounds does not preclude a party from raising any grounds, either substantive or procedural, that may be germane to the legal correctness or procedural fairness of the Chamber's decision. The Appeals Chamber has previously [...] stated as follows:

“32. Neither the Statute nor the Rules of Procedure and Evidence provide for what grounds can be raised on appeal pursuant to article 82 (1) (a) of the Statute.

33. Article 81 (1) (a) and (b) of the Statute, which provides for appeal against decisions of acquittal or conviction, specifies three categories of grounds of appeal that may be raised by the Prosecutor and four grounds of appeal that may be raised by the convicted person or the Prosecutor acting on behalf of such a person. In the absence of specification of any grounds the parties are at liberty to raise any relevant ground of appeal including the grounds as specified under article 81 (1) (a) and (b).

34. The Prosecutor in his document in support “submits that it is appropriate to import into Article 82 the categories of error in Article 81 that can be meaningfully transposed to interlocutory appeals, namely the core errors in Article 81 (1) (a): procedural error, error of fact or error of law”

[...]

47. Other decisions of the Appeals Chamber on interlocutory appeals also make reference to the grounds of appeal listed in article 81 (1) of the Statute. These decisions indicate that an appellant may raise procedural errors in an appeal brought under article 82 (1) (a) of the Statute. Accordingly, in this case Counsel for the Defence is entitled to rely on procedural errors as the basis for impugning the Pre-Trial Chamber’s decision; his failure to attack its findings on admissibility does not per se render the Appeal inadmissible.”

27. However, while the Defence is entitled to plead “procedural errors”, the Appeals Chamber still requires, for such errors to lead to a reversal of the Impugned Decision, that they “*materially affect the decision*”.³³

³³ See the “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), No. ICC-02/04-01/05-408, 16 September 2009, par. 48. See also the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), No. ICC-01/09-02/11-274 OA01, 30 August 2011, par. 85 and the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), No. ICC-01/09-01/11-307 OA01, 30 August 2011, par. 87.

28. In this regard, the Appeals Chamber itself held that:

“rule 58 of the Rules of Procedure and Evidence stipulates the procedure to be followed when filing a request or application under article 19 of the Statute. It requires that this request be transmitted to the Prosecutor and the person concerned, who shall be given an opportunity to make written submissions. Save for these express stipulations, the Pre-Trial Chamber enjoys broad discretion in determining how to conduct the proceedings relating to challenges to the admissibility of a case.”³⁴

29. Recognising said broad discretion to the Pre-Trial Chamber, the Appeals Chamber also clarified that it *“will not interfere with the Pre-Trial Chamber’s exercise of discretion to make a determination proprio motu on the admissibility of a case merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber. The function of the Appeals Chamber in respect of appeals brought under article 82 (1) (a) of the Statute is to determine whether the determination on the admissibility of the case or the jurisdiction of the Court was in accord with the law. In the case of a proprio motu determination under the second sentence of article 19 (1) of the Statute, the Appeals Chamber’s functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber’s exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is*

³⁴ See the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, *supra* note 33, paras. 87 and 121 and the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, *supra* note 33, par. 89.

*exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion".*³⁵

30. These constitute *"the minimum requirements for a consideration of the merits of grounds of appeal"*.³⁶ Therefore, if an appellant fails to meet these minimum criteria, the Appeals Chamber has no other choice than dismissing the relevant grounds of appeal. Indeed, an appellant *"is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision"*.³⁷

31. In the present instance, the Office opposes the interpretation of the Defence and contends, together with the Pre-Trial Chamber,³⁸ that in proceedings relating to a challenge to the jurisdiction of the Court, said Chamber *"shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings"*. Moreover, in the present proceedings it cannot be argued that Côte d'Ivoire does not have an interest in participating by way of filing observations. Therefore, and although being at odds with the strategy of Côte d'Ivoire consisting in filing a leave to submit observations and filing said observations less than 4 hours later, the initial request for leave still being pending, the Office is of the view that the observations of Côte d'Ivoire were warranted by the very nature of the proceedings and were undoubtedly covered by the discretionary powers of the Pre-Trial Chamber when deciding on the proper conduct of said proceedings.

³⁵ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", *supra* note 33. See also the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 33, par. 89. See also the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings' (Appeals Chamber), No. ICC-01/05-01/08-962-Corr, 26 October 2010, paras. 103-104.

³⁶ See the "Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", No. ICC-01/05-01/08-962-Corr, 26 October 2010, paras. 104, 133 and 135.

³⁷ *Idem.*, paras. 103-104.

³⁸ See the Impugned Decision, *supra* note 17, par. 22.

32. Last but not least, should the Appeals Chamber find that the Pre-Trial Chamber erred as far as the observations of Côte d'Ivoire were concerned, the Office contends that this error "*was inconsequential and did not materially affect[ed] the correctness of the overall finding*"³⁹ and as such would amount for the Appeals Chamber to pronounce itself on *obiter dicta*, which the Appeals Chamber already considered "*inappropriate*".⁴⁰

33. Incidentally, the conclusion of the Defence according to which the jurisprudence of Pre-Trial Chamber II "*semble s'appliquer parfaitement à la présente situation*"⁴¹ is misleading. Indeed, in the quoted decision Pre-Trial Chamber II was ruling on a request by the Kenyan Government to be represented during the confirmation of the charges hearing and not on a request to submit written observations on an admissibility challenge. Furthermore, the Chamber was clearly exercising its discretionary powers pursuant to rule 58 of the Rules of Procedure and Evidence when deciding that this presence was not necessary.⁴² The Office sees no reasons why another chamber, acting in totally different circumstances, at its own discretion, on specific issues which cannot be transposed to the present instance, ought to adopt similar conclusions.

34. Accordingly, the Office respectfully requests the Appeals Chamber to reject Grounds 1 and 2 since the Defence has not demonstrated that the Chamber erred and in any event because said alleged error does not materially affect the Impugned Decision.

³⁹ See the Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, No. ICC-01/04-01/07-1497, 25 September 2009, par. 37.

⁴⁰ *Idem.*, par. 38.

⁴¹ See the Document in Support of the Appeal, *supra* note 19, par. 77.

⁴² See the "Decision on the 'Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings'" (Pre-Trial Chamber II), No. ICC-01/09-02/11-340, 20 September 2011, par. 5.

b) Grounds 3 to 5: Grounds related to article 12(3) of the Rome Statute

35. According to the Defence, the Pre-Trial Chamber erred when considering that it was empowered to determine whether the declaration dated 18 April 2003 was consistent with the objective parameters of the situation at hand.⁴³ Moreover, it contends that the Pre-Trial Chamber erred in refusing to interpret the declaration dated 18 April 2003 as a unilateral act⁴⁴, as well as in considering that it was unnecessary to address the validity of the letters signed by Mr. Ouattara or his capacity to bind Côte d'Ivoire.⁴⁵

36. Notwithstanding the number of paragraphs contained in the Impugned Decision and the length thereof,⁴⁶ the Office is of the view that the Pre-Trial Chamber did not err when deciding that the Declaration dated 18 April 2003 is to be interpreted as a general acceptance of the jurisdiction of the Court with no restriction whatsoever⁴⁷ and that *"it will be ultimately for the Court to determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation at hand"*.⁴⁸

37. The Office abundantly demonstrated that the Declaration dated 18 April 2003 and lodged with the Registrar pursuant to article 12(3) of the Rome Statute triggers the jurisdiction of the Court as regards the Ivorian authorities for an undetermined period of time and does not intend to repeat its observations on this issue.⁴⁹ Therefore, the Office will limit its observations to certain points raised by the Defence, while reiterating in full its previous submissions on the issue.⁵⁰

⁴³ See the Document in Support of the Appeal, *supra* note 19, paras. 88-98.

⁴⁴ *Idem*, paras. 99-107.

⁴⁵ *Ibid.*, paras. 108-114.

⁴⁶ *Ibid.*, paras. 86 and 100.

⁴⁷ See the Impugned Decision, *supra* note 17, par. 67.

⁴⁸ *Idem.*, par. 60.

⁴⁹ See the "Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court", *supra* note 15, paras. 16-35.

⁵⁰ *Idem.*

38. The Office opposes the conclusion of the Defence according to which the test applied by the Pre-Trial Chamber does not have a legal basis and is the consequence of a certain number of confusions made by said Chamber.⁵¹ Indeed, although clearly not in agreement with the jurisprudence and founding texts of the Court, the Defence does not provide any arguments in order to demonstrate that the Pre-Trial Chamber either misapplied substantive law⁵² or could have reached other conclusions on the basis of the available evidence.⁵³

39. Moreover, concerning Ground 5, the Pre-Trial Chamber made it clear that the letters signed by Mr. Ouattara have no actual relevance on its determination of the Defence Challenge.⁵⁴ Accordingly, this alleged error simply does not affect the Impugned Decision.

40. Therefore, the Office respectfully requests the Appeals Chamber to dismiss Grounds 3 and 4 since the Defence did not demonstrate that the Pre-Trial Chamber erred in interpreting or misapplied article 12(3) of the Rome Statute and rule 44 of the Rules of Procedure and Evidence and to dismiss Ground 5 since the alleged error does not affect the Impugned Decision.

c) Grounds 6 to 10: Grounds related to articles 55(1) and 59(2) of the Rome Statute

41. The Defence contends that in order to avoid having to rule on the alleged torture and inhuman treatment suffered by Mr. Gbagbo, the Pre-Trial Chamber purposively limited the scope of article 55(1) of the Rome Statute.⁵⁵ The Defence

⁵¹ See the Document in Support of the Appeal, *supra* note 19, par. 89.

⁵² See the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", No. ICC-01/04-169 OA01, 13 July 2006, par. 23.

⁵³ See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'", *supra* note 30, par. 31.

⁵⁴ See the Impugned Decision, *supra* note 17, par. 66.

⁵⁵ See the Document in Support of the Appeal, *supra* note 19, par. 121.

specifies that the test adopted by the Pre-Trial Chamber in the Impugned Decision should not be endorsed by the Appeals Chamber,⁵⁶ insofar as it would *de facto* give national authorities *carte blanche* to torture a person against whom a warrant of arrest has been issued by the International Criminal Court, pending his or her surrender to the Court,⁵⁷ which would be contrary to internationally recognised human rights on the one hand,⁵⁸ and to the object and purpose of the Statute on the other hand.⁵⁹ Alternatively, the Defence argues that it would place an insurmountable burden of proof on the Defence.⁶⁰

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 8.⁶¹ Nonetheless, the Office reiterates in full its previous submissions on the issue.⁶²

43. Moreover, the Office notes that the Defence seems to contradict itself in order to serve its contentions. Indeed, when dealing with article 12(3) grounds, it argues that the declaration signed by the then President Gbagbo in 2003 cannot trigger the jurisdiction of the Court for events that took place some seven years later.⁶³ However, when dealing with alleged inhuman treatments which took place, according to the Defence prior to Mr. Gbagbo's surrender to the Court on 11 April 2011, the reverse demonstration seems possible.⁶⁴

44. The Office also notes that independently of the length of the developments of the Pre-Trial Chamber on the issue,⁶⁵ the Defence argues a legal error without

⁵⁶ *Idem*, paras. 122-124.

⁵⁷ *Ibid.*, par. 127.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, par. 128.

⁶⁰ *Ibid.*, par. 129.

⁶¹ See the "Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court", *supra* note 15, par. 40. See also the Prosecution Response, *supra* note 22, paras. 55-77.

⁶² *Idem.*, paras. 40-58.

⁶³ See the Document in Support of the Appeal, *supra* note 19, par. 94.

⁶⁴ *Idem.*, paras. 117 and 124.

⁶⁵ See the Document in Support of the Appeal, *supra* note 19, par. 121.

advancing any legal argument to ground its contentions, therefore merely disagreeing with the conclusions of the Pre-Trial Chamber with regard to the scope of article 55 of the Rome Statute.

45. Indeed, the Office contends that the Pre-Trial Chamber did not err as far as the scope of article 55 of the Rome Statute is concerned and cannot but reiterate its original observations on the Defence Challenge⁶⁶ insofar as the alleged violations of the suspect's rights were committed prior to the opening of an investigation within the meaning of article 55 of the Rome Statute and that Mr. Gbagbo had been arrested and detained by the Ivorian authorities on the basis of charges related to economical crimes, which have no link with the crimes falling under the jurisdiction of the Court.

46. Furthermore, with regard to the alleged contact between the Ivorian authorities and the Office of the Prosecutor, the Office is sceptical as to the extent of the arguments of the Defence, which only contends that it provided ample proofs of the links between the Prosecution and the Ivorian authorities.⁶⁷ The Office merely sees a list of newspaper articles and other media production which cannot in any event ground such serious allegations.

47. With regard to the specific grounds related to article 59(2) of the Rome Statute, although the Defence argues that it never intended to state that article 59(2) of the Rome Statute applies to the whole period preceding the surrender of Mr. Gbagbo to the Court,⁶⁸ the arguments contained in the Document in Support of the Appeal equal this contention. Indeed, according to the Defence, the Pre-Trial Chamber erred in stating that “[t]he stipulations of article 59 of the Statute cannot be applied to the period of time before the receipt of the custodial State of the request for arrest and surrender, even in cases where the person may already have been in the custody of that State, and regardless of

⁶⁶ See the “Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court”, *supra* note 15, paras. 41-43.

⁶⁷ See the Document in Support of the Appeal, *supra* note 19, par. 130.

⁶⁸ *Idem.*, par. 140.

the grounds for any such prior detention”⁶⁹, and, in doing so, narrowed groundlessly the application of its judicial monitoring of the criteria of article 59(2) of the Rome Statute, not allowing the Court to review effectively the national proceedings, including the arrest of Mr. Gbagbo which took place on 11 April 2011.⁷⁰ Interestingly enough, although grounds 7 and 8 deal with the exact same issue, namely the impossibility of the implementation of article 59 of the Rome Statute in the present situation, the Defence argues on the one hand that the decision should be “quashed” because the Pre-Trial Chamber erred in law in interpreting the scope of article 59(2) of the Statute,⁷¹ and, on the other hand, that in ruling on the issue the Chamber failed to take into consideration all the necessary facts justifying that the Appeals Chamber merely rejects the findings of the Pre-Trial Chamber dealing with the violation of article 59(2) of the Statute.⁷²

48. This strategy of the Defence only reveals an incapacity to demonstrate the criteria established both by the Rome Statute and by the jurisprudence of the Appeals Chamber and more precisely the existence of an alleged error materially affecting the Impugned Decision *i.e.* but for the legal error, the Impugned Decision would have been substantially different.

49. In this regard, the Office cannot but reiterate its initial observations on the Defence Challenge⁷³ and in particular that in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in its decision dated 3 October 2006,⁷⁴ Pre-Trial Chamber I considered the circumstances under which alleged violations of a suspect’s rights can have an impact on the ability of the Court to exercise its jurisdiction. The relevant findings of the Chamber can be summarised as follows:

⁶⁹ See the Impugned Decision, par. 128.

⁷⁰ See the Document in Support of the Appeal, *supra* note 19, par. 145.

⁷¹ *Idem.*

⁷² *Ibid.*, par. 151.

⁷³ See the “Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court”, *supra* note 15, paras. 40-58.

⁷⁴ See the “Decision on the Defence challenge to the jurisdiction of the Court pursuant to article 19(2)(a) of the Statute” (Pre-Trial Chamber I), No. ICC-01/04-01/06-512, 3 October 2006.

“‘in accordance with the law of the State’ [under article 59(2) of the Rome Statute] means that it is for national authorities to have primary jurisdiction for interpreting and applying national law; however, [...] this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which, like those here, are referred directly back to that national law by the Statute;”⁷⁵

[...]

“article 59(2) of the Statute does not impose any obligation on the competent DRC authorities to review the lawfulness of the arrest and detention of Thomas Lubanga Dyilo prior to 14 March 2006 insofar as that detention was related solely to national proceedings in the DRC;”⁷⁶

“any violations of Thomas Lubanga Dyilo’s rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities”;⁷⁷

[...]

“whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused; [...] to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal”.⁷⁸

50. Said findings were confirmed on 14 December 2006⁷⁹ by the Appeals Chamber which in turn clarified certain issues regarding the scope of the application of the abuse of process doctrine, as follows:

⁷⁵ *Idem.*, p. 6 (We underline).

⁷⁶ *Ibid.* (We underline).

⁷⁷ *Ibid.*, p. 9 (We underline). The Chamber refers to diverse international jurisprudence, in particular: ECHR, *Stocké v Germany*, Application No. 11755/85, 19 March 1991, paras. 51 to 54; ECHR, *Klaus Altmann v. France*, Application No. 10689/83, 4 July 1984, Decisions and Reports (D.R.) 27, p. 234; ICTR, *The Prosecutor v. Laurent Semanza*, No. ICTR-97-20-A, 31 May 2000, par. 79 and ICTR, *The Prosecutor v. André Rwamakuba*, No. ICTR-98-44-T, 12 December 2000, par. 30.

⁷⁸ *Ibid.*, p. 10 (We underline).

⁷⁹ See the “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” (Appeals Chamber), No. ICC-01/04-01/06-772 OA4, 14 December 2006.

*“Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial. The power to stay proceedings should be sparingly exercised [...]. Room for its exercise is provided where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course”;*⁸⁰

[...]

*“Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.”*⁸¹

51. Regarding the alleged manifest legal error consisting for the Pre-Trial Chamber in considering that *“it is necessary to entertain the Defence request [related to the alleged violation of Mr. Gbagbo’s rights between his arrest on 11 April 2011 and his transfer to the Court on 29 November 2011] in light of the Chamber to stay the proceedings in case of abuse of process”*, the Defence does not even attempt to base this alleged error in legal terms.⁸² It simply invites the Appeals Chamber to determine, for the future, which legal basis to invoke in case of similar requests.⁸³

52. Notwithstanding the fact that the Defence itself acknowledges the absence of any legal error when specifying that it agrees with the jurisprudence developed in the *Lubanga* case,⁸⁴ the Office cannot see any merit in having entertained within the framework of this interlocutory appeal the Defence contentions on this issue.⁸⁵

⁸⁰ *Idem.*, paras 30 and 31 (We underline).

⁸¹ *Ibid.*, par. 39.

⁸² See the Document in Support of the Appeal, *supra* note 19, par. 153.

⁸³ *Idem.*, par. 154.

⁸⁴ See the Document in Support of the Appeal, *supra* note 19, par. 154.

⁸⁵ *Ibid.*, par. 164.

53. The Office therefore reiterates its previous submissions on the issue⁸⁶ and contends that Pre-Trial Chamber I did not commit any legal errors when establishing that it could “*not proceed to a determination of any particular violation of Mr Gbagbo’s fundamental rights during his detention*” and “[i]t is therefore, unnecessary to address the remaining requirements for abuse of process.”⁸⁷

54. Accordingly, the Office respectfully requests the Appeals Chamber to dismiss grounds 6 to 10 since the Defence has not demonstrated that the Pre-Trial Chamber erred in interpreting articles 55(1) and 59(2) of the Rome Statute.

FOR THESE REASONS, the Principal Counsel respectfully requests the Appeals Chamber to:

- dismiss *in limine* the Defence’s appeal.

In the alternative,

- dismiss the Defence’s appeal since the appellant has not demonstrated the existence of any discernible error in the Impugned Decision.



Paolina Massidda
Principal Counsel

Dated this 5th day of October 2012

At The Hague, The Netherlands

⁸⁶ See the “Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court”, *supra* note 15, paras. 48-58.

⁸⁷ See the Impugned Decision, par. 112.