Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-02-11-01/11**
Date: **28 September 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 CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v.LAURENT GBAGBO

Public Document

Response to the Lauren 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)"

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

The Office of the Prosecutor
Fatou Bensouda

Counsel for the Appellant
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims
Paolina Massidda
Sarah Pellet

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Daniel Preira

INTRODUCTION

1. Mr. Laurent Gbagbo ("the Appellant") asks the Appeals Chamber[1] to overturn 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) ("Decision"), of Pre-Trial Chamber I ("Chamber").[2]

2. The Appellant raises ten purported errors related to the manner in which the Chamber:

   (i) granted the Republic of Côte d'Ivoire ("CIV") the right to make observations in response to the Appellant's original challenge to jurisdiction (issues 1 and 2);

   (ii) approached the CIV's declaration of 18 April 2003, and letters of 2010 and 2011 (issues 3 to 5);

   (iii) interpreted article 55(1) of the Rome Statute (issue 6);

   (iv) approached issues concerning compliance under article 59 (issues 7 and 8);

   (v) qualified part of the Appellant's original challenge to jurisdiction as a motion based on abuse of process (issue 9); and

   (vi) determined the necessary conditions for being able to find an exception to jurisdiction (issue 10).

   The Appellant also seeks from the Appeals Chamber a declaration that the International Criminal Court ("Court") has no jurisdiction in this case on the basis of the alleged violation of the fundamental rights of Mr. Gbagbo.[3] ("Appellant's Application").

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[1] ICC-02/11-01/11-240.
[2] ICC-02/11-01/11-212.
[3] ICC-02/11-01/11-240, p.45.

3. The Prosecution requests that the Appeals Chamber reject the Appellant's Application in its entirety as the Appellant has failed to demonstrate any discernible error in the Decision.

BACKGROUND

4. On 1 October 2003, the CIV lodged a declaration under article 12(3) of the Statute dated 18 April 2003, accepting the jurisdiction of the Court over crimes committed on its territory since the events of 19 September 2002 ("Declaration of 18 April 2003"). The CIV indicated that the Declaration of 18 April 2003 was made for an unspecified period of time into the future ("*pour une durée indeterminée*").

5. On 14 December 2010, the President, Prosecutor and Registrar of the Court received a letter from Mr. Alassane Ouattara ("Mr. Ouattara"), which confirmed the continuing validity of the Declaration of 18 April 2003 and committed the CIV to full and immediate cooperation with the Court, in particular with respect to crimes and abuses committed since March 2004 ("2010 Letter").

6. On 3 May 2011, Mr. Ouattara again wrote to the Prosecutor, referring to the serious crisis that had followed the presidential elections of 31 October 2010 and 28 November 2010 "during which it is unfortunately reasonable to believe that crimes falling under the jurisdiction of the [Court] have been committed". In light of the gravity of the crimes, he requested the assistance of the Court to ensure that perpetrators would not go unpunished ("2011 Letter").

7. On 3 October 2011, Pre-Trial Chamber III, following a request of the Prosecutor,[4] authorised the commencement of an investigation in the CIV ("First article 15 Decision")[5] pursuant to article 15 of the Rome Statute ("Statute"). It concluded that the Court had "jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002, on the basis of the

[4] ICC-02/11-3.
[5] ICC-02/11-14.

Declaration of acceptance of 18 April and the letters of December 2010 and May 2011."[6] Pre-Trial Chamber III further indicated that since the CIV had confirmed its acceptance of jurisdiction in 2010 and 2011, the Chamber did not need to assess whether the Declaration of 18 April 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011.[7] The majority of Pre-Trial Chamber III considered that the relevant timeframe for the authorized investigation was "with respect to crimes within the jurisdiction of the Court committed since 28 November 2010 and with respect to continuing crimes that may be committed in the future […] insofar as they are part of the context of the ongoing situation in Côte d'Ivoire".[8]

8. On 23 November 2011, Pre-Trial Chamber III issued a warrant for the arrest of the Appellant for crimes against humanity allegedly committed on the territory of the CIV between 16 December 2010 and 12 April 2011.[9]

9. On 25 November 2011, the Registry transmitted the arrest warrant and request for surrender of the Appellant to the competent CIV authorities.[10]

10. On 29 November 2011, the Appellant was notified of the arrest warrant and appeared before the CIV judicial authorities in the presence of his legal counsel.[11] On the same day he was surrendered to The Netherlands and detained in the Court's detention unit.[12]

11. On 9 December 2011, the Appellant lodged an appeal to the CIV Cour Suprême challenging the CIV judicial decision of 29 November 2011 to surrender him to the Court.[13]

12. On the basis of additional information provided by the Prosecutor as to potentially relevant crimes committed between 2002 and 2010, on 22 February

[6] *Ibid*., para. 15.
[7] ICC-02/11-14, para. 15.
[8] ICC-02/11-14, para.212.
[9] ICC-02/11-01/11-1.
[10] ICC-02/11-01/11-12-Conf-Exp, p.3; ICC-02/11-01/11-12-Conf-Exp-Anx1.
[11] ICC-02/11-01/11-12-Conf-Exp, p.4; ICC-02/11-01/11-12-Conf-Exp-Anx3.
[12] ICC-02/11-01/11-12-Conf-Exp.
[13] ICC-02/11-01/11-129-Conf-Anx22.

2012 the Chamber expanded its authorisation for an investigation in the CIV to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010 ("The Second article 15 Decision").[14]

13. On 15 March 2012, the situation in the CIV was reassigned to Pre-Trial Chamber I.[15]

14. On 29 May 2012, the Appellant filed his challenge to the jurisdiction of the Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Statute ("Challenge to Jurisdiction").[16] The Appellant requested that the Chamber find that: (i) the Declaration of 18 April 2003 is not relevant to the period covered by the allegations against the Appellant between 16 December 2010 and 12 April 2011; and (ii) the 2010 Letter and 2011 Letter have no legal value so cannot broaden the ambit of the Court's jurisdiction beyond that accepted in the Declaration of 18 April 2003. Accordingly, the Appellant requested the Chamber to find that the Court "lacks jurisdiction for the period and events referred to in the warrant of arrest issued for [the Appellant]… on 23 November 2011 and in the Document Containing the Charges filed by the Prosecutor on 16 May 2012".[17] In the alternative, the Appellant sought a finding from the Chamber that the Appellant's rights under articles 55 and 59 of the Statute were infringed during his eight-month detention in the CIV and in the course of his transfer to the Court on 29 November 2011, and that these violations render a fair trial impossible.[18] Accordingly, the Appellant requested the Chamber "to entertain the challenge to jurisdiction" and to rule that the "Court cannot exercise its jurisdiction in such circumstances".[19]

[14] ICC-02/11-36, para.37.
[15] ICC-02/11-37.
[16] ICC-02/11-01/11-129.
[17] *Ibid.*, p.74.
[18] *Ibid.*, p.74.
[19] *Ibid.*, p.74.

15. On 15 June 2012 the Chamber set deadlines for the Prosecutor and Office of Public Council for Victims ("OPCV") to respond to the Appellant's Challenge to Jurisdiction.[20]

16. On 18 June 2012, the CIV requested leave to submit observations on the Appellant Challenge to Jurisdiction, under regulation 24(3) of the Regulations of the Court ("Regulations") ("CIV's Request to Respond"). On the same day, the CIV submitted its observations on the Appellant Challenge to Jurisdiction,[21] requesting the Chamber, *inter alia*, to rule that: (i) the Declaration of 18 April 2003, as confirmed by the 2010 Letter and 2011 Letter, confers jurisdiction on the Court to adjudicate crimes committed in the context of the situation that has existed in the CIV since 19 September 2002;[22] (ii) the alleged violations of the Appellant's rights that purportedly took place during his detention and subsequent transfer to the Court should not be considered issues of jurisdiction;[23] and (iii) the violations alleged by the Appellant are factually unfounded.[24]

17. On 25 June 2012, the Appellant objected to the CIV's Request to Respond, and requested that the observations filed by the CIV be disregarded ("Appellant's Objection to CIV Observations").[25]

18. The OPCV submitted its observations on the Appellant's Challenge to Jurisdiction on 27 June 2012, requesting the Chamber to reject the requests advanced by the Appellant.[26]

19. On 28 June 2012 the Prosecutor submitted her observations on the Appellant's Challenge to Jurisdiction, requesting the Chamber to reject it in its entirety.[27]

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[20] ICC-02/11-01/11-153.
[21] ICC-02/11-01/11-156.
[22] *Ibid.*, p.26.
[23] *Ibid.*
[24] *Ibid.*
[25] ICC-02/11-01/11-163, paras.33-51, p.17.
[26] ICC-02/11-01/11-165, p.30.
[27] ICC-02/11-01/11-167-Corr, p.24.

20. On 6 July 2012, the Appellant sought leave to reply to the observations submitted by the Prosecutor and the OPCV ("Appellant's Request to Reply").[28]

21. The Prosecutor filed her response objecting to the Appellant's Request to Reply on 10 July 2012.[29]

22. On 15 August 2012, the Chamber issued its Decision, rejecting the Appellant's Request to Reply and Appellant's Challenge to Jurisdiction, and granting the CIV's Request to Respond.[30]

SUBMISSIONS

Standard of Review

23. The Appellant is alleging that the Pre-Trial Chamber made nine errors of law and one error of fact.

24. In relation to questions of law, the Appeals Chamber has held that it "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision."[31]

25. In relation to errors of fact, the Appeals Chamber "will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals

[28] ICC-02/11-01/11-174.
[29] ICC-02/11-01/11-175, para.17.
[30] ICC-02/11-01/11-212.
[31] ICC-02/05-03/09-295 OA2, para.20.

Chamber defers to the Pre-Trial Chamber".[32] The burden on the Appellant is to show that the Pre-Trial Chamber misappreciated facts, disregarded relevant facts or took into account facts extraneous to the *sub judice* issues.[33]

26. The Prosecution requests that the Appellant's Application be rejected in its entirety as it submits that the Appellant has not demonstrated any discernible error of law or fact.

The Prosecution's Response to the First Ground of Appeal

Whether the Chamber erred in law by granting the CIV's Request to Respond[34]

27. The Appellant argues that the Chamber erred in law by allowing the CIV to make observations, when there was no legal basis for doing so, arguing that:

    (i) Regulation 24(3) of the Regulations only grants that right to states participating in the proceedings and rule 59 of the rules similarly limits communication of jurisdiction and admissibility challenges, and the right to make representations, to those states that refer a situation under article 13. The Appellant contends that it was wrong for the Chamber to rely upon these provisions as the CIV did not refer the situation pursuant to article 13 (it was a case initiated *propio motu* by the Prosecutor) and is not a party to the proceedings;[35] and

    (ii) The Chamber cannot rely upon rule 58(2) of the rules as a basis for allowing the CIV's Request to Respond, as rule 59 prevents the Chamber from treating the CIV as a party to the proceedings.[36]

28. The Chamber did not err in law when granting the CIV's Request to Respond. The Appellant misconstrues the Decision, as the Chamber did not authorise the

[32] ICC-01/04-01/10-283 OA, para. 17.
[33] Ibid., para.16.
[34] ICC-02/11-01/11-240, para. 73.
[35] ICC-02/11-01/11-240, paras. 76-77.
[36] ICC-02/11-01/11-240, para.78.

CIV to make observations on the basis of Regulation 24(3) of the Regulations[37] or rule 59 of the rules,[38] and certainly did not treat the CIV as a party or participant to the proceedings.[39] Rather, the Chamber authorised the CIV's Request to Respond pursuant to rule 58(2) of the rules,[40] which is a valid basis for the Chamber to allow States that are not party to the proceedings to make observations where necessary. Pre-Trial Chamber III similarly granted a State that was not party to the proceedings the opportunity to submit observations in the *Prosecutor v Bemba* ("Bemba case"), pursuant to rule 58(2).[41]

29. Rule 58(2) recognises the inherent discretion and power of Chambers seized with a challenge to jurisdiction to "decide on the procedure to be followed [and]…take appropriate measures for the proper conduct of proceedings". The Appellant himself concedes that the Chamber had discretion under rule 58(2), but asserts that rule 59 effectively trumps rule 58(2), and accordingly the Chamber had no discretion to authorise CIV to make observations.[42] However, the Appellant overlooks that rule 59 was not breached because the Chamber did not treat the CIV as a participant to the proceedings.[43] The Appellant is confusing a duty imposed on the Registrar to inform the referring State (rule 59), with a discretion afforded to Chambers of the Court to decide the best manner to determine a challenge (rule 58 (2)).

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[37] ICC-02/11-01/11-240, para. 76.
[38] ICC-02/11-01/11-240, para. 77.
[39] ICC-02/11-01/11-240, para. 77.
[40] ICC-02/11-01/11-212, paras.22-23.
[41] See also *e.g.*, Transcript of hearing of 8 March 2010, ICC-01/05-01/08-T-20-CONF-ENG CT2, p.1, line 13 – p.4, line 2, p.7 line 23 – p.8, line 13, and ICC-01/05-01/08-802, para. 24. At a status conference held pursuant to rule 58(2) to establish the procedure to be followed concerning a Appellant application challenging admissibility, Pre-Trial Chamber III in *The Prosecutor v Bemba* granted the authorities of the Democratic Republic of Congo ("DRC") the opportunity to file their observations in response to the Appellant application. As the state referral in that case is from the Central African Republic, the DRC is not a 'party' to those proceedings.
[42] ICC-02/11-01/11-240, para.78.
[43] ICC-02/11-01/11-240, para.78. As the Chamber was not treating the CIV as a 'party' to the proceedings or according the CIV any such rights, the jurisprudence of Pre-Trial Chamber II cited by the Appellant (ICC-01.09-02/11-340, para.11) is also not relevant. In any event, the Prosecution observes that Pre-Trial Chamber II in that case acknowledged that even if the State of Kenya could not be considered a participant in the instant proceedings as the admissibility challenge was lodged by the Appellant "*this does not mean that a State will never have an interest when it is not the triggering entity of such a challenge*" (ICC-01.09-02/11-340, para.11).

30. In the instant case, the Chamber rightly decided that observations from the CIV would be of "manifest relevance for the determination of the issue *sub judice*",[44] bearing in mind the nature of the arguments raised by the Appellant himself, which include serious allegations that CIV authorities committed acts of torture and violated national procedures in connection with the Appellant's surrender to the Court. [45] There is no error in this conclusion.

The Prosecution's Response to the Second Ground of Appeal

Whether the Chamber erred in law by not first deciding on the CIV's Request to Respond in a separate decision

31. The Appellant asserts that the Chamber erred in law by not addressing the CIV Request to Respond in a separate decision, as this deprived him of the right to respond or to appeal under article 82(1)(d) of the Statute.[46] He contends that the ability to appeal the jurisdiction Decision provides only a partial remedy, because even if the Appeals Chamber allows the appeal on this ground the Pre-Trial Chamber will no longer be able to "forget" the CIV's observations.[47]

32. Contrary to the Appellant's assertions, the Chamber did not err in law, and the Appellant did not suffer any material prejudice, by deciding not to deal with CIV's Request to Respond in a separate decision and by receiving the CIV's substantive observations prior to making its determination on the request, for the following reasons:

    (i) First, the Appellant had an opportunity to object to the CIV's Request to Respond before the Chamber's Decision, and in fact did so, on 25 June 2012. [48]

[44] ICC-02/11-01/11-212, para.22. *See also* ICC-02/11-01/11-236 OA2, para.4. The Appeals Chamber in this instance also deemed it "not only desirable, but rather, essential for the proper determination of this appeal to hear the observations of the [CIV] on [the Appellant's] document in support of the appeal", bearing in mind the Appellant's allegations regarding purported actions or conduct he attributed to the CIV.
[45] ICC-02/11-01/11-129 and ICC-02/11-01/11-240.
[46] ICC-02/11-01/11-240, paras.79-80.
[47] ICC-02/11-01-11-240, paras.81-82.
[48] ICC-02/11-01/11-163, paras.33-51, p.17.

(ii) Second, the Chamber granted the CIV's Request to Respond only after considering the Appellant's Objection to the CIV's Request to Respond, and this fact was articulated in its Decision.[49]

(iii) Third, the Appellant was not deprived of the ability to appeal the admission of the CIV's submissions,[50] which he is doing as part of the current appeal.[51]

(iv) Fourth, and contrary to the Appellant's suggestion,[52] no material prejudice has been caused by the Chamber's approach to the CIV's submissions. The Pre-Trial Chamber is composed of professional judges who are perfectly capable of disregarding the CIV's submissions if the Appeals Chamber considers that they committed an error of law in receiving the observations. Similarly, the Chamber was capable of separately deciding whether in its discretion it should consider the CIV's submissions, irrespective of whether it was technically already in receipt of those observations when it made that determination.[53] Moreover, the Appellant was arguably placed in a better situation, as he was able to appeal the joint Decision directly without having separately to seek leave to appeal pursuant to article 82(1)(d).

The Prosecution's Response to the Third Ground of Appeal

Whether the Chamber erred in law by considering the Declaration of 18 April 2003 in the light of the "concrete situation"

33. The Appellant asserts that the Chamber erred in law in the test it used to determine the temporal scope of the situation.[54] The Chamber relied upon the plain language of the 12(3) Declaration of 18 April 2003, the evidence contained

[49] ICC-02/11-01/11-212, paras. 20-23.
[50] ICC-02/11-01/11-240, paras.80-81.
[51] ICC-02/11-01/11-240, paras.79-84.
[52] ICC-02/11-01/11-240, para. 81.
[53] ICC-02/11-01/11-240, paras. 82-84.
[54] ICC-02/11-01/11-240, paras.87-88.

in the 2010 Letter and 2011 Letter, the First article 15 Decision and – pursuant to rule 44 of the rules – the "objective parameters of the situation" to determine that the Court has jurisdiction over crimes allegedly committed in 2010 and 2011. While the Appellant's claims under this ground of appeal lack clarity, the Appellant seems to argue that the temporal scope of the situation must be defined according to the 12(3) Declaration of 18 April 2003, that the terms of this Declaration must be defined narrowly, and that therefore the Court does not have jurisdiction over crimes occurring after the date of that Declaration.

34. Contrary to the Appellant's assertion,[55] the Chamber did not err in interpreting the Declaration of 18 April 2003 and in defining the temporal scope of the situation to include future crimes.

Article 12(3) and article 13

35. As an initial matter, the Appellant appears to be arguing that a conferral of jurisdiction under article 12(3) cannot be interpreted in the same way as a referral of a situation under article 13, and that as a matter of law a State may not confer prospective jurisdiction under article 12(3) for future crimes.[56] 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

[55] ICC-02/11-01/11-240, paras. 86-89.

[56] The Appellant concedes that a State may confer future jurisdiction under article 12(3), but only for past crimes. But this is illogical. A grant of prospective jurisdiction only makes sense if it refers to future crimes. In any event, there is nothing in article 12(3) and rule 44 of the rules that precludes a State from conferring prospective jurisdiction for future crimes that are part of the same situation.

necessary for the purposes of creating an active "situation" before the Court. The Chamber was clear on this distinction, as the Appellant himself acknowledges, agreeing with the Appellant that "a declaration made under article 12(3) of the Statute cannot be equated with a referral".[57]

37. If the Appellant is arguing, however, that a State Party can confer future jurisdiction with a referral of a situation under article 13, while a non-State Party may not do so under article 12(3), that is simply incorrect. Nothing in article 12(3) indicates that a State may not use this mechanism to confer prospective jurisdiction, particularly since article 12(3) is the only device for a non-State Party to confer jurisdiction on the Court. Rather, the temporal scope of jurisdiction must be defined by the plain terms of the article 12(3) declaration, the intent of the State making the Declaration, and the objective parameters of the situation as defined in rule 44 of the rules.

38. In this sense, the Appellant's efforts to divorce "declaration" from "situation" are futile: rule 44 makes it clear that the inquiry required to define a situation (including its temporal scope) is the same under article 12(3) and article 13. It states that when a State lodges an article 12(3) declaration, the Registrar shall inform that State that the consequence is "the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance *to the situation* ….".[58] The reference to "the situation" in this rule 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.[59] The Appellant seeks to minimize this critical point by claiming, without any support, that the use of the term "situation" in rule 44 is "incidental".[60]

[57] ICC-02/11-01/11-240, para.86.
[58] Emphasis added
[59] As one commentator has noted, the intent of article 12 (3) is "that the Court could exercise jurisdiction with respect to any crime referred to in article 5 arising out of a 'situation' which is referred to it. The adjustment that results from rule 44 of the rules of Procedure and Evidence seems to confirm this, with its reference to 'situation'" (M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, 2005, pp. 84-85).

[60] ICC-02/11-01/11-240, para. 93.

39. Therefore, there is no statutory bar that prevented the CIV from referring prospective crimes within a situation, as it explicitly did in its 18 April 2003 referral.

Temporal scope

40. The Appellant further seeks a restrictive interpretation of the intent of the CIV when making the Declaration of 18 April 2003, and of the temporal scope of the ensuing "situation", as being limited to the precise events taking place at that time.[61] However, as the Chamber pointed out: "*[t]he words of the Declaration of 18 April 2003, whereby [the CIV] recognised the jurisdiction of the Court for 'une durée indeterminée', when given their ordinary meaning, make it clear that [the CIV] accepted the jurisdiction of the Court over events from 19 September 2002 onwards*".[62]

41. As the Chamber observes, the Appellant does not contest Pre-Trial Chamber III's finding [63] that the *same situation* existed in Côte d'Ivoire between 2002 and 2010. This finding supports the Chamber's conclusion that the situation encompasses events subsequent to the Declaration.[64] Further support is provided by the jurisdictional test set out in *The Prosecutor v Mbarushimana*, in which Pre-Trial Chamber I found that "*a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis that was ongoing at the time of referral*".[65]

42. Moreover, while the Appellant himself concedes that is important to determine the intent of the state that makes the article 12(3) declaration, he essentially

[61] ICC-02/11-01/11-240, para.94. *See also* ICC-02/11-01/11-129, paras. 84 and 88.
[62] ICC-02/11-01/11-212, para.61.
[63] ICC-02/11/-01/11-129, para.65. *See* ICC-02/11-36, para.36, Pre-Trial Chamber III in the Second article 15 Decision stated that:

> *in accordance with the Decision of 3 October 2011 […] the violent events in Cote d'Ivoire in the period between 19 September 2002 and 28 November 2010, although reaching varying levels of intensity at different locations and different times, are to be treated as a single situation, in which an ongoing crisis involving a prolonged political dispute and power-struggle culminated in the events in relation to which the Chamber earlier authorised an investigation.*

[64] ICC-02/11/-01/11-212, para.64.
[65] ICC-01/04-01/10-451, para.16.

ignores the observations made by the CIV, which confirm that: (i) the 2010 Letter and 2011 Letter simply reiterate the CIV's acceptance of jurisdiction made in 2003, when the CIV accepted the Court's jurisdiction for an indeterminate duration;[66] and (ii) the CIV intended that the scope of the Declaration of 18 April 2003 encompass crimes committed from 19 September 2002 onward during the duration of the situation.[67]

Rule 44

43. Finally, the Chamber did not state, as the Appellant suggests, that when analysing the scope of a declaration against the objective parameters of the situation, rule 44 of the rules empowers the Chamber effectively to impose its own views in an arbitrary fashion with regard to duration and geography.[68] Instead, the Chamber stated that: "while States may indeed seek to define the scope of its [sic] acceptance, such definition cannot establish arbitrary parameters to a given situation *as it must encompass all crimes that are relevant to it*."[69] (Emphasis added). So ultimately it is for the Court to "determine whether the scope of [a State's] acceptance, as set out in its declaration, is consistent with the objective parameters of the situation at hand".[70]

44. As the Chamber rightly points out, rule 44 of the rules was intended by its drafters to limit a State's discretion in framing the "situation" that may be investigated in accepting the Court's jurisdiction. This was done in order to avoid a State seeking selectively to accept jurisdiction only in relation to certain crimes or certain parties[71] and to ensure that States that choose to stay out of the

[66] ICC-02/11-01/11-156, paras. 1-2, 6-7, 32, 35-36, 40-41.
[67] ICC-02/11-01/11-156, para.44. See also ICC-02/11-01/11-167-Conf, para.21.
[68] ICC-02/11-01/11-240, para.90.
[69] ICC-02/11-01/11-212, para.60.
[70] *Ibid*.
[71] *Ibid*. The Chamber states: "[*i]ndeed, there were concerns that the wording of article 12(3) of the Statute, and specifically the reference to the acceptance of jurisdiction 'with respect to the crime in question', would allow the Court to be used as a political tool by States not party to the Statute who could selectively accept the exercise of jurisdiction in respect of certain crimes or certain parties to a conflict*". Citing S.A.Williams, "Article 12, Preconditions to the Exercise of Jurisdiction", in: O. Triffterer (ed.), *Commentary on the Rome Statute: Observers' Notes, Article by Article* (Germany, 2008), pp.559-560. *See also* J.T.Holmes, 'Jurisdiction and Admissibility', in

treaty not use the Court "opportunistically".[72] As noted above, rule 44 requires the Registrar to remind States that once they accept jurisdiction by making an article 12(3) declaration, this "has as a consequence the acceptance of jurisdiction with respect *to the crimes referred to in article 5 of relevance to the situation*…." (Emphasis added).[73]

45. Accordingly, the Chamber is correct in concluding that "while States may choose to consent or not to the jurisdiction of the Court through declarations provided for in article 12(3) of the Statute, the scope of such declarations is pre-determined by the ICC legal framework".[74]

46. In any event, as the Chamber correctly observed, in this instance, the CIV did not in fact seek to define the precise scope of the situation when it accepted the Court's jurisdiction: "[…] *nothing in the Declaration of 18 April 2003 indicates any attempt by [the CIV] to restrict the scope by temporal or other limitations to the crimes to be investigated in [the CIV] after those events*".[75]

47. Accordingly, no error was made by the Chamber in relation to its interpretation of the Declaration and its proper scope.

The Prosecution's Response to the Fourth Ground of Appeal

Whether the Chamber erred in law by not interpreting the Declaration of 18 April 2003 as a unilateral act of the CIV

Lee (ed.), *The International Criminal Court: Elements of Crimes and rules of Procedure and Evidence* (Translational Publishers Inc., 2001), pp.326-327; W. Schabas, An *Introduction to the International Criminal Court*, (Cambridge University Press, 2011), p.85; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p.288; D.J. Scheffer, "The United States and the International Criminal Court" (1999) 93 AJIL 12, pp.18-20; H. Olasolo, The Triggering Procedure of the International Criminal Court (Martinus Nijhoff Publishers, 2005), pp.138-139.

[72] ICC-02/11-01/11-212, para. 59. Citing R. Wedgwood, "Speech Three: Improve the International Criminal Court, in: Council for Foreign Relations, Toward an International Criminal Court?" (1999), p.69.

[73] ICC-02/11-01/11-212, para. 59.

[74] ICC-02/11-01/11-212, para. 59.

[75] ICC-02/11-01/11-212, para.61.

48. The Appellant argues that: (i) the Declaration of 18 April 2003 should be treated, legally speaking, as a "unilateral act" of a State;[76] (ii) this has as a legal consequence that the intent of those who made the declaration must be interpreted restrictively in light of the circumstances at the time and not for future events (i.e. only in relation to the specific crisis of 19 September 2002 that ended in January 2003);[77] and (iii) the phrase "*pour une durée indeterminée*" in the Declaration of 18 April 2003 is a reference to the exercise of the Court's jurisdiction, not to that jurisdiction applying to new crimes committed.[78]

49. Contrary to what the Appellant contends, the Chamber made no error by not explicitly determining whether or not the Declaration of 18 April 2003 amounted to a "unilateral act" of the CIV.[79]

50. First, the Chamber addressed the Appellant's arguments as to the alleged consequences of the Declaration of 18 April 2003 amounting to a "unilateral act".[80] As described above (at paragraphs 40 and 43 to 47), the Chamber confirmed that

(i) the CIV's Declaration of 18 April 2003 states that the CIV was recognising the Court's jurisdiction for "*une durée indeterminée*", making clear that it accepted the Court's jurisdiction over events from 19 September 2002 onwards and for crimes perpetrated in that time period (and not just for events at the precise time the declaration was made).[81] Accordingly, contrary to the Appellant assertion, there was no ambiguity; and

(ii) the Appellant's proposed restrictive interpretation of the scope of the situation (even if there were factual support for it which there is not) should not be adopted, as rule 44 of the rules limits the discretion afforded to States in defining the 'situation' for investigation when

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[76] ICC-02/11-01/11-240, para.103.
[77] ICC-02/11-01/11-240, paras.104-105.
[78] ICC-02/11-01/11-240, para.106.
[79] ICC-02/11-01/11-240, paras.101-103.
[80] ICC-02/11-01/11-240, para.104.
[81] ICC-02/11-01/11-212, para.61.

accepting the Court's jurisdiction, and acknowledges the Court's power to determine the scope of any acceptance set out in a declaration.[82]

51. Moreover, contrary to what the Appellant contends, and as outlined by the OPCV,[83] the law relating to unilateral declarations of States does not apply in this instance, as *prima facie* "unilateral" acts carried out by States in the context of international justice are excluded from the scope of the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006".[84]

52. Second, there is no applicable principle of interpretation whereby declarations made before this Court should be interpreted narrowly, nor there is any requirement in the Statute to that effect. The practice of other international bodies in fact supports the opposite conclusion: international human rights jurisprudence, for instance, supports adopting a broad, and not restrictive, interpretation of declarations made under article 12(3) of the Statute.[85]

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[82] ICC-02/11-01/11-212, paras.59-60.
[83] ICC-02/11-01/11-165, paras.24-25.
[84] ICC-02/11-01/11-165, paras.32-33. *See* The International Law Commission, Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto, Official Records of the General Assembly, 61st session, Supplement No.10 (A/61/10); The Yearbook of the International Law Commission 1997, Vol. II, Part Two, UN Doc.A/CN.4/SER.A/1997/Add.1 (Part 2), p.65, para.203-204: "203. The Working Group bore in mind that, in the process of treaty formation, amendment, execution, termination, and so on, States carry out acts which, prima facie, are unilateral in character when viewed in isolation (for example, accession, denunciation, reservation, withdrawal). The Working Group nonetheless considered that the *characteristics and effects of such acts are governed by the law of treaties* and do not need to be dealt with further in the context of the new study proposed. 204. Similar arguments were presented in discussing the possible inclusion of *unilateral acts carried out by States in the context of international justice*….The Working Group was inclined to leave this category of acts out of the study taking the view that *such acts have a treaty basis*." (Emphasis added).
[85] ICC-02/11-01/11-165, paras.27-31. See *e.g.*, Inter-American Court of Human Rights ("IACHR"), *Case of Ivcher-Bronstein v Peru, Judgment*, Series C No.54, 24 September 1999, para.48. See also The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts.74 and 75), Advisory Opinion OC-2/82, 24 September 1982, Inter-Am.Cr.H.R. (Ser.A) No.2 (1982), para.29. The Court observed that: "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of contracting States…the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction…".

The Prosecution's Response to the Fifth Ground of Appeal

Whether the Chamber erred in law by drawing conclusions on the 2010 Letter and 2011 Letter without deciding on their legal nature

53. The Appellant contends that the Chamber erred in law by drawing conclusions on the 2010 Letter and 2011 Letter signed by Mr. Ouattara without deciding on their legal nature (including the issue of Mr. Ouattara's ability to bind the CIV when he signed them).[86]

54. The Chamber was correct that there was no requirement in law for it to assess the legal validity of the 2010 Letter and 2011 Letter or Mr. Ouattara's capacity to bind the CIV on those dates, [87] as:

(i) The Chamber had concluded on the basis of the Declaration of 18 April 2003 that the Court had jurisdiction over all alleged crimes since 19 September 2002, including those allegedly committed since 28 November 2010; [88] and

(ii) the Chamber made it clear that it was not relying upon the 2010 Letter and 2011 Letter as a basis for asserting the Court's jurisdiction, but simply referred to both letters as *further evidence*, like other subsequent CIV statements made, of the CIV's acceptance of the Court's jurisdiction. [89]

Thus, the issue of the legal validity of the letters was not relevant to the Chamber's determination. This means that the error alleged, even if accepted, would be inconsequential. This ground of appeal should accordingly also be dismissed.

[86] ICC-02/11-01/11-240, paras. 108-114.
[87] ICC-02/11-01/11-212, para.66.
[88] ICC-02/11-01/11-212, para.65.
[89] ICC-02/11-01/11-212 , para. 66. The Chamber stated: "*[h]owever, it considers it worthwhile to note that, while not necessary from a legal point of view, these letters, together with the subsequent statements and continuous cooperation of [the CIV] with the Court, are further evidence that [the CIV] has accepted the exercise of jurisdiction of the Court in relation to the situation…*".

The Prosecution's Response to the Sixth Ground of Appeal

Whether the Chamber erred in law on the scope of article 55(1) of the Statute

55. The Appellant asserts that the Chamber erred in law when it concluded that: (i) the rights afforded under article 55 only relate to "investigations" conducted by or at the behest of the Prosecutor of the Court and not by an entity other than the Prosecutor which is not related to proceedings before this Court;[90] and (ii) that it is "decisive" that the alleged violations of article 55 were not perpetrated by the Prosecutor or by the CIV authorities at the behest of the Prosecutor or any organ of the Court,[91] and that therefore the Appellant's allegations were purely speculative.[92]

56. The Appellant argues that article 55 rights extend to not only to investigations conducted by or at the behest of the Prosecutor of the Court but also those conducted by the CIV authorities, because: (i) article 55 should be interpreted broadly, in accordance with the Vienna Convention, in light of the provision's aims to protect a suspect's fundamental rights[93] and the Court's alleged duty to protect those rights;[94] (ii) a textual reading of the French version of article 55(1) suggests that a suspect should benefit from article 55 rights from the time the Prosecutor decides to initiate an investigation *propio motu* (i.e. in this case, while the Appellant was in the CIV's custody);[95] and (iii) the Chamber's test requiring proof that measures were taken on behalf of or at the behest of the Prosecutor is insurmountable for Mr. Gbagbo as he was not granted access to all communications between the Prosecution and the CIV.[96]

Meaning of 'investigation' under article 55(1) of the Statute

[90] ICC-02/11-01/11-240, paras.122, 127.
[91] ICC-02/11-01/11-240, para.123.
[92] ICC-02/11-01/11-240, para.124.
[93] ICC-02/11-01/11-240, para.128, .
[94] ICC-02/11-01/11-240, paras.131-134.
[95] ICC-02/11-01/11-240, paras.125-126.
[96] ICC-02/11-01/11-240, paras.129-130.

57. The Chamber correctly interpreted the plain language of article 55(1) of the Statute when it found that: (i) the scope of the rights afforded by this provision only relate to "an investigation under this Statute", namely investigations as conducted by or at the behest of the Prosecutor of the Court;[97] and conversely that (ii) any investigation conducted by an entity other than the Prosecution, which is not related to the proceedings before the Court, does not trigger any rights under article 55.[98]

58. This interpretation is supported by the plain text and structure of the Statute, as article 55 follows other provisions in Chapter V that only deal with "investigations" as conducted by the Prosecutor of the Court, namely the power of the Prosecutor to initiate an investigation (article 53) and the Prosecutor's powers and duties with respect to such investigations (article 54). The drafters also intended that article 55 relate to the investigation phase conducted by the Prosecution.[99]

59. The Appeals Chamber's jurisprudence also supports the view that the reference to "investigation under this Statute" in article 55 must relate to investigations conducted by (or at the behest of) the Prosecutor of the Court:

   (i) First, when interpreting the correlating rules of procedure and evidence in relation to Chapter 5 (investigation and prosecution), the Appeals Chamber observed that this: "pertains to how the Prosecutor should go about collecting evidence during an investigation…"[100]

   (ii) Second, the Appeals Chamber has confirmed that "[m]anifestly, authority for the conduct of investigations vests in the Prosecutor"[101] and that "an investigation is not a judicial proceeding but an inquiry

[97] ICC-02/11-01/11-212, para.96.
[98] *Ibid.*
[99] See *e.g.*, Working Group on a Draft Statute for an International Criminal Court: Report of the Working Group, (A/CN.4/L.491/Rev.2/Add.2, 1994), paras.1-3, 5. In the commentary there is reference to the Prosecutor being "responsible for the investigation and the prosecution of the alleged crime" and that it was considered important to include a provision to guarantee a person's rights during the investigation phase before they are charged with a crime.
[100] ICC-02/05-03/09-295 OA2, para.22.
[101] ICC-01/04-556 OA4 OA5 OA6, para.52

conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible".[102]

60. Thus, an "investigation" under the Statute is the inquiry conducted by the Prosecutor. That is the *only* investigation regulated by Part 5 of the Statute, including article 55. This is only logical: it would be an unwarranted expansion of the Statute, and an infringement of States' sovereign rights, if the Court sought to extend the applicability of the statutory provisions that govern investigations and prosecutions *before the Court* to domestic investigations and prosecutions, which are governed by national law.

61. This is supported by the interpretative principles laid down in article 31(1) of the Vienna Convention, which the Appellant himself considers to be relevant:[103] as the Appeals Chamber has held, the rule governing the interpretation of a section of law is "its wording read in context and light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of a law as a whole read in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty."[104] The object and purpose of the Statute is to put an end to impunity through the effective investigation and prosecution of crimes by this Court, when no State is effectively dealing with them. Part 5 consequently regulates the manner in which *this Court* must conduct investigations and prosecutions related to the crimes defined in article 5 and it is precisely Part 5 of the Statute that provides the "context" of article 55.

62. The Appellant seeks to rely upon the expression "*enquête ouverte*" in article 55(1) of the French version of the Statute to argue that this provision must be interpreted to: (i) enable the Appellant to benefit from its protections from the

[102] ICC-01/04-556 OA4 OA5 OA6, para.45.
[103] ICC-02/11-01/11-240, para.128.
[104] See, *inter alia*, ICC-01/04-168 OA3, para. 33.

time the investigation was opened, in particular from the time the Prosecutor decides to initiate an investigation *propio motu;* and (ii) cover purported violations of article 55 committed by the CIV authorities at that time.[105] However, this argument ignores the plain language also of the French text of article 55(1) of the Statute that stipulates that this provision relates to "une enquête ouverte *en vertu du présent Statut*". Again, it is only the investigation that is conducted by the Prosecution, or at most at the Prosecutor's behest, that qualifies as an investigation under the Statute triggering the article 55 rights.

Implied allegation of error of fact

63. Moreover, the Appellant has not alleged an error of fact in the manner in which the Chamber concluded that there was no evidence that alleged article 55 violations were committed on behalf of the Prosecutor or any other organ of the Court. The Appellant also did not explicitly allege an error of fact as regards the Chamber's factual finding that the Appellant was "arrested and detained by the [CIV] authorities and subsequently charged with economic crimes *in circumstances seemingly unconnected to the proceedings before this Court*".[106]

64. The Appellant nonetheless asserts that: (i) there was a level of collusion between the Prosecution and CIV in relation to his detention in the CIV; and (ii) that his detention by the CIV authorities did have a connection to the Prosecutor's investigations. However, the Appellant fails to identify any discernible error of fact in the Chamber's conclusion that there was no such collusion or connection between the Prosecutor's investigation and his detention by the CIV authorities and does not provide any 'new' arguments or newly discovered evidence of any such collusion or connection.[107] As the

[105] ICC-02/11-01/11-240, paras.125-126.
[106] ICC-02/11-01/11-212, para.97.
[107] ICC-02/11-01/11-240, para.130.

Appeals Chamber has stated, it will not interfere with a Chamber's factual findings unless such findings are proved to be plainly unreasonable.[108]

Access to relevant information regarding communications with the CIV

65. The Appellant alleges that the Prosecution failed to disclose relevant information regarding communications with the CIV, attaching *inter partes* communications with the Prosecution in support of that allegation (which were available to him before the Chamber issued its Decision, and which he failed to bring before the Chamber).[109] Nevertheless, the Prosecution observes that as indicated in its response in Annex 1 to the Application, it provided to the Appellant all relevant information pursuant to rule 77 of the rules or article 67(2) of the Statute.[110] The Appellant fails to demonstrate how and why this was not sufficient and what additional information the Prosecution had in its possession and failed to disclose, or how this alleged lack of disclosure impacted on the impugned Decision. An unsubstantiated claim of lack of disclosure cannot constitute a proper basis for a proper ground of appeal.

The Prosecution's Response to the Seventh Ground of Appeal

Whether the Chamber erred in law in interpreting article 59(2) of the Statute including in the exercise of control by the Court over the CIV's compliance with article 59(2)

66. The Appellant asserts that:

(i) the Chamber misunderstood his arguments as he was not saying that article 59(2) applied to the whole of the period prior to his transfer to the Court, but was arguing that it applied to his treatment at the time

[108] ICC-01/04-01/10-283 OA, para. 17.
[109] ICC-02/11-01/11-240, para.129. In particular refer to the response attached to the email from the Office of the Prosecutor of 25 June 2012 at 09:50.
[110] ICC-02/11-01/11-240-CONF-Anx1, para.2.

of his arrest. However, the Appellant argues that for the purposes of article 59, the relevant "arrest" should not be deemed when the CIV authorities were given notice of the Court's warrant of arrest against him, but when he was first physically placed in custody (i.e. 11 April 2011 by the CIV authorities).[111]

(ii) Second, the Chamber improperly narrowed the scope of its judicial review of the CIV authorities' compliance with article 59(2) and applied the wrong test when concluding that the Chamber is only required to ensure a suspect's "basic safeguards" are respected when arrested.[112]

Relevant "arrest" under article 59

67. The Chamber did not err in law, as the Appellant contends,[113] in deciding that the "arrest" relevant to article 59 of the Statute is the arrest following the request for arrest and surrender issued by the Court.[114] Indeed article 59 is clear that the "arrest" to which it refers is an arrest emanating from a request from the Court. For instance, article 59(4) speaks of a custodial state's "duty to surrender the person *to the Court*" after receipt of the relevant request for arrest or surrender issued by the Court pursuant to article 59(1).

68. The Chamber rightly determined that "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….".[115] Accordingly, the relevant time of "arrest" was when the request for arrest and surrender to the Court was executed and the Appellant was notified of the warrant of arrest and request for arrest and surrender on 29 November 2011.[116] Thus, the "arrest" under article

[111] ICC-02/11-01/11-240, paras.139-141.
[112] ICC-02/11-01/11-240, paras. 142-145.
[113] ICC-02/11-01/11-240, para.139-141.
[114] ICC-02/11-01/11-212, paras.99 and 101.
[115] ICC-02/11-01/11-212, para.101.
[116] ICC-02/11-01/11-212, para.102.

59(2) was not an arrest by an unrelated entity for crimes unrelated to proceedings before this Court (the Appellant's arrest in April 2011 by the CIV authorities for economic crimes allegedly committed in the CIV), but the arrest following the request issued by this Court.[117]

Scope of the Chamber's judicial review under article 59

69. Second, contrary to the Appellant assertion, [118] the Chamber did not err in law (or improperly narrow the scope of its judicial review) when it stated 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.[119] This is consistent with the decision of the Appeals Chamber, cited by the Chamber in its Decision, namely that:

> *The enforcement of a warrant of arrest is designed to ensure, as article 59(2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have been respected. The Court does not sit in the process […] on judgment as a court of appeal on the identificatory decision of the [national] judicial authorities. Its task is to see that the process envisaged by [national] law was duly followed and that the rights of the arrestee were properly respected.*

70. The Appellant misconstrues the Decision when it suggests that by taking this approach, the Chamber failed to "retain[] a degree of jurisdiction" over how the national (CIV) authorities interpreted and applied their national laws.[120]

71. In fact, the Chamber did retain its jurisdiction over how the national authorities interpreted and applied their national laws, in that the Chamber: (i) reviewed the steps taken by the national court in the arrest and surrender proceedings

[117] ICC-02/11-01/11-240, paras. 139
[118] ICC-02/11-01/11-240, para.144. Citing Prosecutor v Lubanga, ICC-01/04-01/06-512, p.6.
[119] ICC-02/11-01/11-212, para.104.
[120] ICC-02/11-01/11-240, para.144. Citing Prosecutor v Lubanga, ICC-01/04-01/06-512, p.6.

and the manner in which it dealt with the Appellant's rights during the national process; and (ii) concluded that the Appellant's challenges were entertained by the national court and he was afforded the basic guarantees of an arrested person during the process, and there were no reasons to impose a stay of proceedings as requested by the Appellant.[121]

72. Moreover, the Chamber's approach is similar to that taken by Pre-Trial Chamber I in the *Prosecutor v Lubanga* ("Lubanga case") which, when assessing alleged violations of article 59 by [DRC] national authorities, limited itself to considering only alleged "material" breaches of article 59.[122] Similarly, the Single Judge of Pre-Trial Chamber III in *Prosecutor v Bemba Gombo* ("Bemba case"), when dealing with allegations of procedural irregularities at the national level stated, relying upon the *Lubanga* jurisprudence, that "the Court is not a court of appeal in relation to the national authorities and…its power to review questions of substance and procedure before national courts is limited. The Single Judge considers that such questions should primarily be raised and pursued before the national authorities as these are better placed than international jurisdictions to deal with such questions and, as the case may be, to provide for an appropriate remedy."[123]

The Prosecution's Response to the Eighth Ground of Appeal

Whether the Chamber committed a manifest error of fact in not finding a violation of article 59(2) during the procedure of transfer to the Court

73. The Appellant alleges that the Chamber committed a manifest error of fact in not finding a violation of article 59 during the procedure of transfer to the Court in that it: (i) applied too superficial a review of the national procedures adopted; and (ii) failed to take into account certain arguments raised by the Appellant's counsel.

[121] ICC-02/11-01/11-212, paras. 105-106.
[122] ICC-01/04-01/06-512, p.11.
[123] ICC-01/05-01/08-80-Anx, para.42.

74. As already advanced, the Appeals Chamber has held that for errors of fact, it is necessary that an appellant demonstrate a "clear error" and that "[t]*he question is not whether the [chamber] could also have reached other conclusions. The question is whether the [chamber] could not have reasonably reached the conclusions it did on the available evidence*".[124]

75. The Appellant has failed to demonstrate that the Chamber made a discernible error of fact, in particular that the Chamber could not have reasonably reached the conclusions it did regarding the question of whether there was a violation of article 59(2) during the procedure of transfer to the Court on the available evidence.

76. The Chamber did refer to the available evidence[125] and its conclusion that the Appellant was afforded the basic guarantees of an arrested person is reasonable bearing in mind the factors highlighted in its review of the process adopted by the national CIV court, including that before authorising the surrender of the Appellant to the Court, the national CIV court: (i) notified the Appellant of the arrest warrant; (ii) satisfied itself of the Appellant's identity; (iii) considered the arguments raised by the Appellant's counsel including alleged irregularities in the arrest procedure in light of his official status and the alleged inapplicability of the Statute in proceedings before Ivorian courts; and (iv) decided on issues raised by the Appellant's counsel.[126]

77. The Appellant misconstrues the Decision Contrary to his assertions, the following allegations were in fact addressed by the Chamber, namely: (i) the timing of when the Appellant's lawyers were told of the transfer;[127] (ii) the presence of armed men in the court including during deliberations;[128] (iii) the argument that the Statute has no legal effect in Ivorian law as it was not

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[124] *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-283 OA, para.31.
[125] ICC-02/11-01/11-212, paras. 70-74, 86, 105-106.
[126] ICC-02/11-01/11-212, paras. 105-106.
[127] ICC-02/11-01/11-212, paras. 74 and 105: "the national court made specific reference to the arguments raised by the counsel for Mr. Gbagbo…".
[128] ICC-02/11-01/11-212, paras. 73, 74 ("the lack of impartiality by the Ivorian Judges during the hearing and in the course of their deliberations) and 105 (see above).

ratified;[129] and (iv) whether the Appellant was deprived of the suspensive effect of an appeal against the surrender decision under Ivorian law[130] (although the Prosecution observes that the Appellant did lodge an appeal under Ivorian law, which is still pending).[131] In any event, these points were not crucial to the Chamber's final determination,[132] as the Chamber rightly stated that the issue is simply whether the Appellant was afforded the basic guarantees of an arrested person.

The Prosecution's Response to the Ninth Ground of Appeal

Whether the Chamber erred in law in qualifying [part of] the request of the Appellant as being based on an abuse of process

78. The Appellant contends that the Chamber erred in law in qualifying his request as being based on an abuse of process.

79. The Appellant requested a permanent stay of proceedings on the grounds of alleged serious violations of the Appellant's fundamental rights. Consistent with the practice before this Court, the Chamber rightly characterised this demand as a challenge based on an ''abuse of process'', as that in essence is the basis for requesting a stay for serious rights violations. As the Appeals Chamber has previously explained: "[t]he doctrine of abuse of process had *ab initia* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay,

[129] ICC-02/11-01/11-212, para.105: "the national court made specific reference to the arguments raised by the counsel for Mr. Gbagbo…including…the inapplicability of the Statute in judicial proceedings before Ivorian courts".
[130] ICC-02/11-01/11-212, para.74 ("the immediate transfer of Mr. Gbagbo to the Hague after the closing of the hearing was inconsistent with the suspensive effect of an appeal against a surrender decision under Ivorian law"); para.105-106.
[131] *See* ICC-02/11-01/11-129-Anx22.
[132] See ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30: The Appeals Chamber has confirmed that a chamber's reasoning does not "necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion". See also *Case of Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, Eur. Ct. H.R., Series A, vol.288, para.61. The European Court of Human Rights has confirmed that a tribunal is not obliged to give a detailed answer to every argument.

illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice."[133]

80. Nevertheless, regardless of how the challenge is characterised, the same principles, as previously enunciated by the Appeals Chamber, apply when requesting a permanent stay of proceedings based on alleged serious rights violations. And these principles were correctly relied upon and applied by the Chamber in this instance,[134] as follows:

(i) First, even though 'abuse of process' (and/or serious rights violations) are not explicit grounds for challenging jurisdiction (under article 17 of the Statute), the Appeals Chamber has held that a court of law is vested with the authority to stop judicial proceedings "*by declining jurisdiction in a judicial cause, where to do otherwise would be odious to the administration of justice*".[135] Moreover, in light of article 21(3), the Appeals Chamber has further held that "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the Appellant or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial".[136]

(ii) Second, a permanent stay of proceedings is a remedy of an exceptional nature and not every infraction of the law or breach of rights of the Appellant will give rise to a finding of abuse of process. In particular: ''the illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial''. [137]

(iii) Third, the relevant jurisprudence states that a chamber can consider a permanent stay of proceedings as a result of abuse of process only when:

[133] ICC-01/04-01/06-772 OA4, para.36.
[134] ICC-02/11-01/11-212, paras.88-92 and 107-112.
[135] ICC-01/04-01/06-772 OA4, para.27.
[136] ICC-01/04-01/06-772 OA4, para.37.
[137] ICC-01/04-01/06-772 OA4, para.30.

i. "[E]ither 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."[138] In other words, a permanent stay of proceedings may only be ordered when the breach of the Appellant's rights makes the fairness of the proceedings against him impossible.[139]

ii. Accordingly, "[a]t issue is the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court."[140]

81. The Appellant has further misconstrued the decision to which he refers from the *Bemba* case, as Pre-Trial Chamber III did not take a different approach but instead relied upon the *Lubanga* jurisprudence in dealing with allegations of procedural irregularities in proceedings before the national authorities, and did not deal with allegations of serious rights violations.[141]

82. The Pre-Trial Chamber's conclusion that the Appellant's request had to be treated as an abuse of process was correct. Also, the Appellant has also failed to demonstrate how the alleged error could invalidate the Decision. Therefore, the ground of appeal must necessarily fail.

[138] ICC-01/04-01/06-772 OA4, para.31.
[139] ICC-01/04-01/06-772 OA4, para.37.
[140] ICC-01/04-01/06-772 OA4, para.44.
[141] ICC-01/05-01/08-80-Anx. See para 72 above.

The Prosecution's Response to the Tenth Ground of Appeal

Whether the Chamber erred in law with respect to the necessary conditions required for finding an exception to jurisdiction

83. The Appellant alleges that the Chamber erred in law in the conditions it stipulates are necessary for finding an exception to exercising jurisdiction, in particular in its finding that the alleged violations of a suspect's rights must be attributable to the Court. The Appellant alleges that: (i) the Chamber has not properly applied the Lubanga jurisprudence; (ii) on the facts there was close cooperation between the organs of the Court and CIV and the Appellant suffered from torture and ill treatment; and (iii) a fair trial before this Court is impossible, as demonstrated by the postponement as ordered by the Chamber, due to the impact on his health of the torture and ill treatment sustained during the prior detention on his health.

84. There is no error in the Pre-Trial Chamber's conclusion that in order for the Court not to exercise jurisdiction on the basis of serious violations of a Appellant's rights making a fair trial impossible, it is necessary that those violations are: "(i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court".

85. To the contrary, the Chamber instead simply followed the approach adopted in the *Lubanga* case. In that case, the Appeals Chamber, when reviewing the approach taken by Pre-Trial Chamber I in response to allegations of "concerted action" between the Prosecution and (DRC) national authorities, highlighted that: "[t]he material before the Pre-Trial Chamber respecting communications between the Prosecutor and the DRC did not reveal any impropriety on the part of the former […]. Mere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose".[142] The Appeals Chamber also

[142] ICC-01/04-01/06-772 OA4, para.42.

emphasised the fact that the crimes for which Mr. Lubanga was detained were "separate and distinct from those which led to the issuance of the warrant for his arrest". [143]

86. Even more crucially, as the Appeals Chamber emphasised: "[a]t issue is the *process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court*. The Pre-Trial Chamber determined that it is in relation to this process that breaches of the rights of the Appellant or the accused may provide ground for halting the process. And none was shown" (Emphasis added).[144]

87. The Appeals Chamber further held that the question is whether a fair trial before this Court becomes impossible because of breaches of fundamental rights of the Appellant or the accused.[145] It is only logical that this must relate to acts attributable *to the Court* for a fair trial before it to be rendered impossible.

88. The Prosecution notes that the Appellant appears to be requesting in the alternative that the Appeals Chamber depart from its prior ruling in *Lubanga* and embrace a wider approach to abuse of process.[146] The Prosecution notes that the Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia ("ICTY") concluded in *Prosecutor v Aleksovski*, after reviewing the jurisprudence of both common and civil law jurisdictions and the International Court of Justice, that while it did have the authority to depart from previous decisions: it should only do so "*for cogent reasons in the interests of justice*".[147] While not binding on this Court, the Prosecution considers that the *Aleksovski* approach to previous case-law emanating from the Appeals Chamber is sound and fosters legal certainty in proceedings before the Court.

89. No such cogent reasons have been provided by the Appellant in this instance. Accordingly the request should be rejected.

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[143] ICC-01/04-01/06-772 OA4, para.42.
[144] ICC-01/04-01/06-772 OA4, para.44. See also ICC-01/04-01/06-512, p.10.
[145] ICC-01/04-01/06-772 OA4, para.37.
[146] ICC-02/11-01/11-240, para. 164.
[147] *Prosecutor v Aleksovski*, Appeal Chamber Judgment, IT-95-14/1-A, 24 March 2000, para.107.

RELIEF SOUGHT

90. For the reasons set out above, the Prosecution requests that the Appeals Chamber reject the Appellant's Application.

Fatou Bensouda, Prosecutor

Dated this 28th September 2012

At The Hague, The Netherlands