

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-02/11-01/11**
Date: **6 September 2012**

THE APPEALS CHAMBER

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

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

Public Document
With one confidential annex and one public annex

**Document in support of the appeal against the ‘Decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo”’
(ICC-02/11-01/11-212)**

Source: Defence Team for President Gbagbo

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

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Preliminary comment on the classification of Annex 1

1. Annex 1 is classified as confidential, available only to the parties, in accordance with the provisions of Regulation 23bis of the Rome Statute, since it refers to *inter partes* communications between the Prosecution and the Defence.

II. FACTS AND PROCEDURAL BACKGROUND

2. Following the second round of presidential elections held on 28 November 2010, the Constitutional Council proclaimed Laurent Gbagbo President of the Republic of Côte d'Ivoire on 3 December 2010;¹ he took the oath of office on 4 December 2010² and took up his functions as President of the Republic thereafter.

3. From 1 December 2010, despite not being in possession of the election results, Alassane Ouattara claimed during a press conference at the Hôtel du Golf that President Gbagbo had lost.³

4. When the Defence sought to ascertain the history of the Prosecutor's relationship with the Ivorian authorities, the Prosecutor declined to respond.⁴

5. On 2 December 2012, the President of the Independent Electoral Commission, Youssef Bakayoko, summoned the members of the Commission in order to take stock of the situation; but he never joined them. Following insistent counsel from the French and American ambassadors, he went to the Hôtel du Golf alone, where, to the surprise of most, including the members of his Commission, he proclaimed Alassane Ouattara President forthwith, without the power or the right to do so and without any ratified results at his disposal.⁵

6. Moments later, Alassane Ouattara appeared in the same room before journalists as the elected President.⁶

¹ ICC-02/11-01/11-129-Anx1.

² ICC-02/11-01/11-129-Anx2.

³ Article entitled, "*Conférence de presse du RHDP: Le candidat Ouattara appelle au respect du verdict des urnes*" [RHDP (Union of Houphouetists for Democracy and Peace) Press Conference: Candidate Ouattara calls for voting results to be respected], Suy Kadhofi, 1 December 2012. Available at: <http://www.avenue225.com/conference-de-presse-du-rhdp-le-candidat-ouattara-appelle-au-respect-du-verdict-des-urnes>.

⁴ Confidential Annex 1.

⁵ Côte d'Ivoire: "*Victoire annoncée mais contestée d'Alassane Ouattara*" [Alassane Ouattara's victory announced, but contested], 3 December 2010, CIV-D15-0001-1238.

⁶ *Ibid.*

7. In January 2011, armed rebel units took control of Abobo, a neighbourhood of Abidjan. In mid-March 2011, rebel columns crossed the demarcation line between the north, which had been under rebel control since 19 September 2002, and the south, which was under the control of the legitimate authorities. The Ivorian army withdrew without joining combat. In a matter of days, rebel columns backed by UNOCI and French forces reached Abidjan, entering its suburbs on 27 March 2011.

8. President Gbagbo had sought refuge in the presidential palace in the Cocody neighbourhood on 25 March 2011. This elderly man, exhausted by months of crisis, was to endure a siege. His physician was on hand to ensure that he took the appropriate medicine to treat his high blood pressure, amongst other conditions. The President was joined by scores of unarmed civilians, who took up abode in the palace gardens. It should be noted that families of officials and staff, among them around twenty children, stayed on the premises of the palace.

9. From 1 to 4 April 2011, the palace came under helicopter-gunship fire, which resumed with greater intensity on 8 April. All official resistance ended and Ivorian army troops ceased all combat nationwide.

10. During the daytime of 10 April 2011, artillery and helicopter-gunship fire further intensified. Many of the palace occupants were killed, and the wounded were treated in very difficult conditions in a makeshift infirmary set up inside the palace.⁷

11. The situation in the palace accordingly worsened as food and medical supplies were depleted; the wounded could not be treated in adequate conditions, particularly since, with every passing hour, the number of victims increased. Medical staff had to contend with a constant stream of people who had sustained wounds as a result of bombing or snipers ensconced in the surrounding areas. Fatigue and stress levels soared amongst those who endured those grim hours.

12. During the night of 10 to 11 April, the bombing continued, with survivors attempting to escape the bombs by fleeing from room to room. At dawn, French special forces launched an assault from the nearby embassy. They were soon replaced by groups of rebels, who entered

⁷ See CIV-D15-0001-1311 (confidential).

the palace. Before President Gbagbo's eyes, men were killed, and others, including his son and physician, were beaten. He himself was humiliated by the assailants.

13. Whilst President Gbagbo was taken to the Hôtel du Golf, Alassane Ouattara's headquarters, the executions of his supporters who had been captured continued.⁸ At the Hôtel du Golf, President Gbagbo was subjected to threats and pressure.

14. On 13 April 2011, further to an agreement between senior French and UN officials, President Gbagbo was transferred to Korhogo in the north of the country and placed under the guard of a rebel military leader, Martin Kouakou Fofié. Martin Kouakou Fofié is the subject of United Nations Security Council sanctions for human rights violations, including arbitrary arrests, extra-judicial executions, sexual violence perpetrated on women, imposition of forced labour and recruitment of child soldiers.⁹

15. The brutal arrest of President Gbagbo, his detention at the Hôtel du Golf and transfer to Korhogo are illegal: no proceedings were instituted against him, no arrest warrant was issued, and no charges were levelled against him by any judge or authority.

16. This worn and traumatised man was incarcerated in a house belonging to one of Guillaume Soro's relatives and only let out on a handful of occasions in eight months. President Gbagbo's gaolers initially feigned that he was being held at the presidential palace in Korhogo, where he was only transferred for a matter of hours to meet former United Nations Secretary-General, Kofi Annan, Desmond Tutu and Mary Robinson in May 2011, and the Special Representative of the United Nations Secretary-General for Côte d'Ivoire, Young-Jin Choi. President Gbagbo was forced to pretend that the conditions of his detention were satisfactory. In fact, the visitors had barely left when the President was escorted back to his place of detention under the guard of commander Fofié's men.

17. On 4 May 2011, Alassane Ouattara was proclaimed President of the Republic by the same Constitutional Council¹⁰ which had proclaimed Laurent Gbagbo President five months

⁸ See CIV-D15-0001-1311 (confidential).

⁹ "Security Council committee concerning Côte d'Ivoire issues list of individuals subject to measures imposed by resolution 1572 (2004)", <http://www.un.org/News/Press/docs/2006/sc8631.doc.htm>.

¹⁰ ICC-02/11-01/11-129-Anx3-tENG.

earlier. Some members of the Constitutional Council reported the threats that they had received at the time.¹¹

18. Throughout his detention, which lasted until 29 November 2011, no arrest warrant or detention order was issued against President Gbagbo.

19. If such a warrant or order had been issued, it would have been against the law, since the Ivorian Constitution and law provide for special proceedings in the event of legal action against a former President of the Republic.¹²

20. The only legal action taken by the Ivorian authorities was the initiation of proceedings against President Gbagbo on 18 August 2011 on the basis of articles 27, 29, 30, 110, 11, 225, 226, 227, 229, 313, 325, 327, 392, 395, 396 and 397 of the Criminal Code; these articles target, *inter alia*, embezzlement, misappropriation of public funds, spreading of false allegations likely to reduce the strength of the currency and collective pillaging.¹³

21. It should be noted that these proceedings were initiated in breach of Ivorian constitutional and legal provisions.¹⁴

22. An application for the termination of the proceedings and the release of President Gbagbo relying on the violation of Ivorian constitutional and legal provisions and on the failure to respect the human rights of Laurent Gbagbo was filed on 19 August 2011; it is still pending.¹⁵

23. Even after 18 August 2011, at no time did any judicial and administrative authorities of Côte d'Ivoire produce any instrument to justify the detention of President Gbagbo.

24. During this arbitrary detention, President Gbagbo was a victim of daily ill-treatment and acts of torture.

¹¹ ICC-02/11-01/11-129-Conf-Anx4. CIV-D15-0001-2423.

¹² ICC-02/11-01/11-129-Corr-tENG, paras. 171-180.

¹³ ICC-02/11-01/11-129-Conf-Anx38.

¹⁴ Special proceedings against a President of the Republic, see ICC-02/11-01/11-129-Corr-tENG, paras. 151-158.

¹⁵ ICC-02/11-01/11-129-Conf-Anx5-tENG.

25. Incarcerated in a room measuring three metres by three, unable to perform the slightest exercise, unable even to walk outside of the house, poorly fed and, most importantly, deprived of the medicine necessary to treat his medical conditions, President Gbagbo rapidly lost strength.¹⁶ In just a few weeks, he was unrecognisable and unable to walk unassisted. Despite his physician's requests, his gaolers refused to provide him with adequate treatment or to have him examined in a clinical environment.

26. To this regime, intended to cause his physical and mental exhaustion, was added psychological pressure: during his eight-month detention, he was denied contact with members of his family and his counsel, who were only able to visit him on very rare occasions, after overcoming substantial hurdles.

27. The President's health had so deteriorated that, according to the few rare visitors, the situation had become critical by October 2011.¹⁷ These were "inhumane detention conditions".¹⁸

28. The physician appointed by the Defence shortly after President Gbagbo's arrival in The Hague¹⁹ stated in his report of 31 March 2012 that President Gbagbo's detention conditions "should be considered a form of ill-treatment as serious as physical abuse and even torture". He noted that: "[i]solation is known to be used to 'break' prisoners".²⁰ He added that the worrying condition of President Gbagbo's health is the result of treatment which "must be regarded as ill-treatment and even torture".²¹

29. He claimed that the current poor state of President Gbagbo's health is the result of such torture and is typical of "hospitalisation syndrome".²²

30. He noted: "[t]he present medical problems derive from the inhuman conditions of his detention."²³

¹⁶ ICC-02/11-01/11-129-Conf-Anx6, ICC-02/11-01/11-129-Conf-Anx7-tENG.

¹⁷ *Idem*.

¹⁸ ICC-02/11-01/11-129-Conf-Anx6; ICC-02/11-01/11-129-Conf-Anx7-tENG.

¹⁹ The physician is highly qualified: see ICC-02/11-01/11-158-Conf-Exp-tENG, paras. 19-22.

²⁰ ICC-02/11-01/11-129-Conf-Anx8.

²¹ *Idem*, point 7(a).

²² *Idem*, point 7(b).

²³ *Idem*, point 8(a).

31. The political and judicial authorities of Côte d'Ivoire,²⁴ and senior UNOCI officials,²⁵ were apprised of this state of affairs, as was the Prosecutor of the International Criminal Court, to whose attention the worrying state of President Gbagbo's health was brought by his counsel on several occasions, including on 28 October and 13 November 2011, when the President's counsel wrote the following:

"[TRANSLATION] As you know, President Laurent Gbagbo was detained without a warrant from 11 April 2011 to 18 August 2011 and his rights have been, to this day, repeatedly breached. On 18 August 2011, he was charged with economic crimes on the basis of allegations by Ivorian authorities. These charges meet neither the substantive nor the formal criteria established by Ivorian law. Accordingly, President Gbagbo's detention from 11 April 2011 to this day is, in legal terms, arbitrary. Moreover, as you are aware, he is at the mercy of his gaoler, commander Fofié, a warlord whose conduct prior to, during and following the electoral crisis is the subject of a number of investigations. Commander Fofié decides arbitrarily who can and cannot visit President Gbagbo, including his counsel. Commander Fofié equally arbitrarily decides on the detention conditions of President Gbagbo, who is prohibited from leaving the house where he is incarcerated. After seven months of living in such conditions, President Gbagbo is in an alarmingly weak mental and physical state. His situation is exacerbated by the fact that he is prohibited from communicating with the outside world";

and requested that he require

"[TRANSLATION] the authorities of Côte d'Ivoire to punish those responsible for these repeated violations of the legal and constitutional provisions of Côte d'Ivoire and of the provisions of international agreements to which Côte d'Ivoire is a party; [...]",

further requesting him to warn

"[TRANSLATION] the Ivorian authorities that [he] would hold them responsible for any deterioration in President Gbagbo's health".

32. They noted that the Prosecutor's "failure to do anything to put an end to this intolerable abuse [would] be perceived as a deliberate attempt on [his] part to conceal the breach of President Gbagbo's rights and his arbitrary detention".²⁶ It should be noted that there is no indication that either Ivorian officials or the ICC Prosecutor have, at any point, taken steps to end these very grave breaches of President Gbagbo's rights. Having submitted the application for a warrant of arrest against President Gbagbo to the Pre-Trial Chamber on 25 October 2011, it was for the Prosecutor to gather all the necessary information and take appropriate steps.

²⁴ ICC-02/11-01/11-129-Conf-Anx25 to ICC-02/11-01/11-129-Conf-Anx36.

²⁵ ICC-02/11-01/11-129-Conf-Anx9, ICC-02/11-01/11-129-Conf-Anx10.

²⁶ ICC-02/11-01/11-129-Conf-Anx11-tENG, ICC-02/11-01/11-129-Conf-Anx12-tENG.

33. On Friday 25 November 2011, President Gbagbo's counsel were informed that the Investigating Judge would be travelling to Korhogo the following Monday, 28 November, to interview their client in the context of the proceedings initiated on 18 August 2011.

34. Despite their difficulty in securing an affordable means of transportation to Korhogo (situated around ten hours' drive away) at such short notice, counsel arrived in time to assist President Gbagbo.²⁷

35. The interview had barely begun when it was postponed to the next day, 29 November. That day, without prior notice, President Gbagbo's counsel were taken to a room where the Indictments Chamber of Abidjan was in session, having gathered in secret to rule on President Gbagbo's transfer to the ICC.

36. It should be emphasised that, although the Ivorian judges informed counsel that they had just received the warrant of arrest and the request for transfer, the transfer had in fact been painstakingly planned. With the assistance of UNOCI, the judges, registrars, administrative staff and security guards had been secretly transported from Abidjan to Korhogo the previous Saturday, 26 November 2011. The transportation had been planned in the preceding days, prior to Pre-Trial Chamber III's decision of 23 November 2011, authorising the Prosecutor to issue a warrant of arrest against President Gbagbo.²⁸

37. Moreover, this operation was preceded by a meeting between Alassane Ouattara and Prosecutor Ocampo.²⁹

38. The purpose of the operation was to catch President Gbagbo's counsel off guard.

39. Their requests – in accordance with Ivorian law – to postpone the hearing by a few days to afford them time to organise themselves and prepare a defence were rejected.³⁰

²⁷ ICC-02/11-01/11-129-Conf-Anx13-tENG.

²⁸ ICC-02/11-01/11-1.

²⁹ *L'Express*, Vincent Hugueux, "Discrète rencontre Ouattara-Ocampo à Paris" [Ouattara and Ocampo's discreet Paris meeting], 27 November 2011; available at: http://www.lexpress.fr/actualite/monde/discrete-rencontre-ouattara-ocampo-a-paris_1055445.html.

³⁰ ICC-02/11-01/11-129-Conf-Anx13-tENG.

40. Similarly, their requests to file a brief identifying the legal arguments that could serve as the basis to challenge the transfer were also rejected.³¹

41. Reduced to silence, the Defence was compelled to attend a travesty of a hearing.³²

42. It is apparent from the documents provided to the Defence on 2 December 2011 that during the hearing, supporters of the operation were in constant contact with ICC representatives.³³

43. During the hearing, commander Fofié's men, heavily armed and looking threatening, guarded the judges.³⁴

44. It was commander Fofié himself who compelled the bench to end the hearing and make a ruling.³⁵

45. At the end of the hearing, the bench assured counsel and President Gbagbo that he would be returned to his place of detention and that he would be able to appeal against the transfer in the coming days.

46. In reality, President Gbagbo was taken directly from the Korhogo courthouse to the airport. Thus he arrived in Rotterdam the following morning, without even a change of clothes.

47. This exhausted man, in parlous health, was transferred to the ICC during the night of 29 to 30 November 2011. Upon arrival, he underwent a certain number of superficial medical examinations. Owing to his weakened state, his initial appearance was postponed to 5 December 2011.³⁶ At this point President Gbagbo was unable to move unaided and to stand up.

³¹ *Ibid.*

³² *Ibid.*

³³ ICC-02/11-01/11-129-Anx1, ICC-02/11-01/11-129-Anx3-tENG, ICC-02/11-01/11-129-Conf-Anx4, ICC-02/11-01/11-129-Conf-Anx5-tENG, ICC-02/11-01/11-129-Conf-Anx12-tENG, ICC-02/11-01/11-12; ICC-02/11-01/11-84.

³⁴ ICC-02/11-01/11-129-Conf-Anx13-tENG.

³⁵ *Ibid.*

³⁶ ICC-02/11-01/11-129-Conf-Anx8, point 3(c).

48. On Monday 5 December 2011, President Gbagbo made his first appearance, during which Pre-Trial Chamber III scheduled the confirmation hearing for 18 June 2012.³⁷

49. Despite decent conditions at the ICC prison and medical attention, the health of President Gbagbo continued to be of great concern. Faced with the inertia of the medical service in the detention centre, his defence team tasked a physician to assess his health.

50. On 27 April 2012, the Defence filed an application for President Gbagbo's interim release³⁸ founded in part on the state of President Gbagbo's health.

51. On 24 May 2012, the Defence filed a challenge to the jurisdiction of the International Criminal Court founded on articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute.³⁹

52. On 15 June 2012, the Pre-Trial Chamber I rendered a 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", also inviting the Prosecutor and the Office of Public Counsel for Victims (OPCV) to file their observations no later than 27 June 2012.⁴⁰

53. On 18 June 2012, without the Chamber's leave,⁴¹ lawyers for the Republic of Côte d'Ivoire filed the "*Observations de la République de Côte d'Ivoire sur la requête en incompétence de la Cour pénale internationale fondée sur les article 12(3), 19(2), 21(3), 55 et 59 du Statut de Rome présentée par la Defence du Président Gbagbo*".⁴²

54. That same day, the OPCV filed an application for access to the confidential annexes of the Defence's challenge to jurisdiction.⁴³ The Defence filed its opposition to the application on 21 June 2012.⁴⁴

55. On 19 June 2012, the Defence moved Trial Chamber I to order additional medical examinations for President Gbagbo.⁴⁵

³⁷ *The Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber III, first appearance, 5 December 2011.

³⁸ ICC-02/11-01/11-105.

³⁹ ICC-02/11-01/11-129. A corrigendum was filed on 29 May 2012, ICC-02/11-01/11-129-Corr-tENG. ("challenge to jurisdiction").

⁴⁰ ICC-02/11-01/11-153.

⁴¹ ICC-02/11-01/11-154-tENG.

⁴² ICC-02/11-01/11-156-tENG.

⁴³ ICC-02/11-01/11-155.

⁴⁴ ICC-02/11-01/11-160.

⁴⁵ ICC-02/11-01/11-158-tENG.

56. On 25 June 2012, the Defence filed a motion arguing that the observations of the lawyers for the Republic of Côte d'Ivoire were inadmissible.⁴⁶

57. On 26 June 2012, the single judge granted the Defence motion, appointing three experts.⁴⁷ The experts filed their report on 19 July 2012.⁴⁸

58. On 27 June 2012, the Prosecutor filed a response to the Defence's challenge to jurisdiction.⁴⁹ The OPCV also filed observations on the challenge to jurisdiction.⁵⁰

59. On 6 July 2012, the Defence moved Pre-Trial Chamber I for authorisation to reply to the observations of the Prosecutor and the OPCV.⁵¹ On 10 July, the Prosecutor responded, opposing the Defence's motion.⁵²

60. On 26 July 2012, recalling the cruciality of the question as to whether a prosecuted person was fit to stand trial and to mount an effective and efficient defence, the single judge decided to grant the parties the "opportunity to submit their observations on the Expert Reports and on the subsequent approach before rendering a decision on Mr Gbagbo's fitness to participate in the proceedings against him".⁵³

61. On 2 August 2012, the single judge postponed the confirmation hearing until the issue of President Gbagbo's fitness to stand trial is resolved.⁵⁴ The single judge further ordered the Prosecution to file by 13 August 2012 any observations it might have regarding the expert reports and the subsequent procedure to be followed, also ordering the Defence to file observations no later than 21 August 2012.⁵⁵

⁴⁶ ICC-02/11-01/11-163-tENG. See, in particular, paras. 32-57.

⁴⁷ ICC-02/11-01/11-164-Conf-tENG, p. 13.

⁴⁸ ICC-02/11-01/11-190-Conf-Exp-Anx1-tENG; ICC-02/11-01/11-190-Conf-Exp-Anx2; ICC-02/11-01/11-190-Conf-Exp-Anx3-tENG.

⁴⁹ ICC-02/11-01/11-167-Conf.

⁵⁰ ICC-02/11-01/11-165.

⁵¹ ICC-02/11-01/11-174-tENG.

⁵² ICC-02/11-01/11-175.

⁵³ ICC-02/11-01/11-196-Conf-tENG, para. 9.

⁵⁴ ICC-02/11-01/11-201, para. 16.

⁵⁵ ICC-02/11-01/11-201, para. 16.

62. On 15 August 2012, Pre-Trial Chamber I issued a decision denying the Defence request for leave to reply, accepting to entertain the observations of the Republic of Côte d'Ivoire and rejecting the Defence's challenge to jurisdiction of 24 May 2012.⁵⁶

63. The Prosecution filed its observations on the expert medical reports and the procedure to be followed on 16 August 2012.⁵⁷

64. On 21 August 2012, the Defence filed an appeal against the Pre-Trial Chamber's decision on the Court's jurisdiction.⁵⁸

65. The common legal representative filed "Observations on the legal principles applicable to the determination of a suspect's fitness"⁵⁹ on 23 August 2012.

66. On 23 August 2012, the Appeals Chamber appointed Judge Anita Ušacka as presiding judge in the matter of the Defence appeal against the Pre-Trial Chamber's decision on the court's jurisdiction.⁶⁰

67. The Defence filed observations on the health of President Gbagbo, his fitness to stand trial and the subsequent proceedings on 4 September 2012.⁶¹

68. On 31 August 2012 the Appeals Chamber issued the following directions:

- i. The victims who were allowed to file observations during the proceedings before the Pre-Trial Chamber pursuant to article 19 of the Rome Statute could submit observations on Mr Gbagbo's document in support of the appeal and on the Prosecutor's response no later than 5 October 2012;
- ii. Côte d'Ivoire was invited, pursuant to rule 103(1) of the Rules, to submit observations on the Defence's document in support of its appeal and the Prosecutor's response no later than 28 September 2012;

⁵⁶ ICC-02/11-01/11-212.

⁵⁷ ICC-02/11-01/11-214-Conf, see *corrigendum* ICC-02/11-01/11-214-Conf-Corr.

⁵⁸ ICC-02/11-01/11-225-tENG.

⁵⁹ ICC-02/11-01/11-228.

⁶⁰ ICC-02/11-01/11-226 OA2.

⁶¹ ICC-02/11-01/11-239-Conf.

- iii. The Defence and the Prosecutor could respond to the aforementioned observations no later than 12 October 2012.⁶²

I. DISCUSSION

Introduction: the principle of legality at the heart of the appeal

69. *In limine*, the Defence wishes to emphasise the crucial issues at stake in the present appeal. A great deal more than procedural matters or legal arguments, the issues raised go to the heart of all international criminal proceedings – the principle of legality without which there can be no legitimate exercise of judicial functions. It is the indissociable corollary of liberty in that any restriction of liberty must be justified and proportionate. This principle therefore protects individuals from the possible excesses of institutions which govern their conduct.

70. Thus, if a court oversteps its jurisdiction, it infringes this principle of legality. This is the central issue at stake in the appeal against the scope of the article 12(3) declaration.

71. Moreover, whilst justice may be blind, it cannot be blind to injustice itself. This is the central issue at stake in the appeal concerning the grave violations of the Accused's human dignity.

72. Yet, as will be demonstrated hereinafter in the Defence's analysis, the Pre-Trial Chamber did not correctly apprehend the importance of these fundamental issues, even though they were highlighted in the Defence's challenge to jurisdiction.

Grounds of the appeal

73. The Defence will advance the following grounds in its subsequent analysis:

1) Grounds pertaining to the observations of Côte d'Ivoire:

- **Ground 1:** the Pre-Trial Chamber erred in law in granting Côte d'Ivoire's application to file observations.

⁶² ICC-02/11-01/11-236 OA2.

- **Ground 2:** the Pre-Trial Chamber erred in law in failing to determine that application in a separate decision, thereby depriving the Defence of the right to appeal the decision or to file a response.

2) Grounds pertaining to article 12(3) of the Rome Statute:

- **Ground 3:** the Pre-Trial Chamber erred in law in adjudging the 18 April 2003 declaration in light of the “situation at hand”.
- **Ground 4:** the Pre-Trial Chamber erred in law in not construing the 18 April 2003 declaration as a unilateral act of the State of Côte d’Ivoire.
- **Ground 5:** the Pre-Trial Chamber erred in law by drawing conclusions from the existence of the documents signed by Alassane Ouattara on 14 December 2010 and 3 May 2011 without first ruling on their legal nature.

3) Grounds pertaining to article 55 of the Rome Statute:

- **Ground 6:** the Pre-Trial Chamber erred in law as to the range of application of article 55(1) of the Statute.

4) Grounds pertaining to article 59(2) of the Rome Statute:

- **Ground 7:** the Pre-Trial Chamber erred in law as to the ambit of the Court’s oversight over compliance with article 59(2) by the national authorities.
- **Ground 8:** the Pre-Trial Chamber manifestly erred in fact by failing to find that article 59(2) had been violated during the procedure of surrender to the Court.

5) Grounds pertaining to the challenge to jurisdiction for grave violations of the Accused’s rights:

- **Ground 9:** the Pre-Trial Chamber erred in law by recharacterising the Defence’s application as an abuse of process claim.
- **Ground 10:** the Chamber erred in law as to the conditions necessary to a finding of lack of jurisdiction

1. Grounds pertaining to the observations of Côte d’Ivoire

74. On 18 June 2012, Côte d’Ivoire filed an application for authorisation to file observations on the Defence jurisdiction motion.⁶³ That same day, without waiting for the Pre-Trial Chamber’s authorisation, even though it is indispensable in the matter at hand, Côte

⁶³ ICC-02/11-01/11-154-tENG.

d'Ivoire filed its observations on the motion.⁶⁴ On 25 June 2012, the Defence filed an application contesting Côte d'Ivoire's right to file observations.⁶⁵ In the impugned decision, the Pre-Trial Chamber accepted to take account of the observations of Côte d'Ivoire.⁶⁶

75. The Defence maintains that the Pre-Trial Chamber erred in law in granting Côte d'Ivoire's application to file observations (Ground 1). Moreover, as to form, the Pre-Trial Chamber erred in law in not determining this application in a separate decision, thereby depriving the Defence on the right to appeal the decision or to file a response (Ground 2).

1.1. Ground 1: the Pre-Trial Chamber erred in law by granting Côte d'Ivoire's application to file observations

76. In the motion wherein it argued the inadmissibility of the application of Côte d'Ivoire,⁶⁷ the Defence emphasises the absence of legal basis for the application. Regulation 24(3) of the Regulations of the Court provides: "States participating in the proceedings may file a response to any document, subject to any order of the Chamber". However, Côte d'Ivoire is not a State participating in the instant proceedings and neither the Statute nor the Rules of Procedure and Evidence provide that it may be considered as such.

77. Thus, rule 59 of the Rules of Procedure and Evidence, which governs participation in proceedings relating to challenges to jurisdiction under article 19 of the Statute, states very clearly who can participate in proceedings:

- (a) those who have referred a situation pursuant to article 13;
- (b) The victims who have already communicated with the Court in relation to that case or their legal representatives.

However, Côte d'Ivoire falls under neither of these two categories as it has not referred a situation to the Court in accordance with article 13, the instant case having been triggered by the *proprio motu* opening of an investigation by the Prosecutor. Moreover, in similar circumstances in the Kenya situation, Pre-Trial Chamber II held, in light of the provisions of article 19 and rule 59 that

the drafters intended to exclude State Parties from proceedings in a scenario such as the one sub judice. Thus, the Republic of Kenya cannot be considered as a participant in the instant proceedings.⁶⁸

⁶⁴ ICC-02/11-01/11-156-tENG.

⁶⁵ ICC-02/11-01/11-163-tENG.

⁶⁶ ICC-02/11-01/11-212, para. 23.

⁶⁷ ICC-02/11-01/11-163-tENG.

⁶⁸ ICC-01/09-02/11-340, para. 11.

This finding appears wholly consonant with the present situation and therefore there is no reason to hold that Côte d'Ivoire is a State participating in the proceedings.

78. By merely referring to its power to determine the procedure to be followed in accordance with rule 58(2),⁶⁹ the Pre-Trial Chamber fails to address any of these arguments. The discretion accorded to the Pre-Trial Chamber by this rule does not authorise it to vest a State with the status of participant in proceedings, in express violation of rule 59 of the Rules of Procedure and Evidence which is as binding on the judges as the Statute.⁷⁰ There was therefore no legal basis for the Pre-Trial Chamber's decision to authorise Côte d'Ivoire to file observations and the Appeals Chamber should withdraw this authorisation on that ground. The Pre-Trial Chamber therefore erred in law, thereby voiding the entirety of its decision.

1.2. Ground 2: the Pre-Trial Chamber erred in law in not determining that application in a separate decision, thereby depriving the Defence of the right to appeal the decision or to file a response

79. The practice at the ICC appears to be that applications to file observations are dealt with in separate decisions.⁷¹ By not following the practice, the Chamber bypassed the normal procedure.

80. In fact, by reserving its determination of the issue and setting it out only in the decision on the substantive issue of jurisdiction, the Pre-Trial Chamber deprived the Defence of the procedural safeguards provided in the applicable instruments. Thus, the Defence was first denied the opportunity to appeal against the decision, as it might have sought to do under article 82(1) of the Statute. It was not able to submit its arguments.

81. The Defence wishes to emphasise that although it is able to lodge an appeal against the decision on jurisdiction herein, this is only a partial remedy for the violation of its procedural rights. The essence of an appeal is to be able to challenge a decision in order to highlight its adverse effects. However, by granting Côte d'Ivoire's application and immediately taking account of its observations, the Pre-Trial Chamber negated the purpose of the appellate

⁶⁹ ICC-02/11-01/11-212, para. 22.

⁷⁰ Rome Statute, article 21(1)(a).

⁷¹ See, for example, ICC-02/04-01/05-333; ICC-01/05-01/08-401; ICC-01/05-01/08-504; ICC-01/09-35; ICC-02/11-01/11-50; ICC-01/04-01/07-2823-tENG; ICC-01/09-01/11-84; ICC-01/09-02/11-87; ICC-01/04-01/06-1289 OA 11; ICC-01/09-01/11-49.

proceedings, for, even if the Appeals Chamber were to find for the Defence, it could not direct the Pre-Trial Chamber to “forget” the observations of Côte d’Ivoire.

82. Nonetheless, the intervention of the Appeals Chamber on this point is primordial. Over and beyond its procedural aspect, this issue goes to the respect in which the Court is held. In acting as it did, the Pre-Trial Chamber implicitly endorsed the “power play” by Côte d’Ivoire, which did not have the right to participate in the proceedings according to the Court’s instruments. The Appeals Chamber itself has ruled:

The Applicant is neither a party nor a participant to the proceedings, and unless the Single Judge grants leave to participate in the proceedings, in accordance with rule 103(1) of the Rules, the Applicant has no procedural standing to submit any observations [...] to the Chamber. [...] the “submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so”.⁷²

83. In any event, Côte d’Ivoire should have waited for the bench’s permission before filing its observations.

84. In the instant case, the Pre-Trial Chamber was unable to do so because Côte d’Ivoire had already filed its observations. If this had not occurred, a decision on whether Côte d’Ivoire could file observations should have been rendered in the first instance; the decision should have been rendered beforehand to enable Côte d’Ivoire actually to file its observations, which would have afforded the Defence the opportunity to appeal or respond. The Appeals Chamber should not validate Côte d’Ivoire’s circumvention of the procedure, which is a procedural error by that State. The Pre-Trial Chamber therefore committed an error of law which voids its decision, since the decision was rendered having regard to improperly submitted observations by Côte d’Ivoire.

2. Grounds pertaining to article 12(3)

85. The Defence is advancing three grounds pertaining to the Pre-Trial Chamber’s treatment of article 12(3) declarations: erroneously taking into account the “situation at hand” (Ground 3), erroneously construing the 18 April 2003 declaration⁷³ (Ground 4) and the scope erroneously afforded to the documents of 14 December 2010 and 3 May 2011 (Ground 5).

⁷² ICC-01/05-01/08-602 OA 2, para. 9, cited in ICC-01/09-01/11-84, para. 5 and ICC-01/09-02/11-87, para. 7.

⁷³ “Declaration Accepting the Jurisdiction of the International Criminal Court by the Republic of Côte d’Ivoire dated 18 April 2003”, ICC-02/11-01/11-129-Anx16-tENG.

2.1. Ground 3: the Pre-Trial Chamber erred in law by considering the 18 April 2003 declaration in light of the “situation at hand”

86. In the impugned decision, the Pre-Trial Chamber commences its analysis of article 12(3) by endorsing the Defence’s argument that “a declaration made under article 12(3) of the Statute cannot be equated with a ‘referral’”.⁷⁴ Nonetheless, it does not draw the appropriate inference from this observation, creating permanent confusion and a non-existent link between the “situation” which ensues from a referral, and acceptance of jurisdiction, which precedes it. The Appeals Chamber will note that the Pre-Trial Chamber proceeds in two stages, both brief, as evidenced by the dozen or so paragraphs in which it deals with this crucial issue.

87. It first states:

[W]hile 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 predetermined by the ICC legal framework.⁷⁵

To support its statement, the Pre-Trial Chamber cites the fact that rule 44 of the Rules of Procedure and Evidence recalls that an article 12(3) declaration “has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation”.⁷⁶

88. It then concludes the following:

“Contrary to the Defence submission, the Chamber is of the view 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.”⁷⁷

It appears to take this as the legal test applicable to article 12(3) declarations.

89. The Defence challenges the validity of this legal test in that it is not founded on the Statute and arises from confusion at various levels.

90. The first instance of confusion is found in the scope of rule 44. In the view of the Defence, the general statement that a declaration should be consistent with the “objective

⁷⁴ ICC-02/11-01/11-212, para. 57.

⁷⁵ ICC-02/11-01/11-212, para. 59.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

parameters of the situation at hand” cannot be inferred, as the Pre-Trial Chamber does, merely by referring to rule 44. This rule only mentions “crimes referred to in article 5”, and does not refer to any other criteria, such as temporal or geographical scope. Thus, rule 44 is clear: its only restriction regarding the scope of acceptance of jurisdiction by a State concerns crimes, and there is no other.

91. This sole restriction is indeed logical in that article 12 as a whole deals with the Court’s *ratione materiae* jurisdiction. Article 12(1) provides in this regard that “[a] State which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”.⁷⁸ Similarly, article 12(2)(a) mentions the territory on which “the conduct in question occurred” and article 12(2)(b) mentions “[t]he State of which the person *accused of the crime* is a national”.⁷⁹

92. In the matter at hand, the Defence has never argued that the scope of the 18 April 2003 declaration should be restricted with regard to the crimes being prosecuted. It relies solely on the temporal scope of the declaration. It is therefore evident that contrary to what is asserted, rule 44 cannot serve as a basis for broad oversight by the Chamber, taking account of all the objective parameters of the situation, of the limitation of the context for acceptance of jurisdiction by a State.

93. The second instance of confusion, which is even more fundamental, is found in the reference to the “situation”. The Chamber’s reference in this regard misapprehends the nature of the article 12(3) declaration. Hence, the acceptance of jurisdiction filed pursuant to this article precedes the existence of any “situation” within the meaning of the Statute – a notion which only exists as from the referral made pursuant to article 13. Moreover, article 12(3) does not use the word “situation” and only refers to acceptance for specific crimes. Admittedly, rule 44 uses the term, but only incidentally, with emphasis being laid on the crimes, as stated above.

94. By way of illustration in the matter at hand, it was only on 3 October 2010, when the Pre-Trial Chamber authorised the Prosecutor to open an investigation in Côte d’Ivoire under articles 13 and 15 of the Statute, that the existence of a “situation”, with its own parameters,

⁷⁸ Emphasis added.

⁷⁹ Emphasis added.

was identified,⁸⁰ being subsequently extended on 22 February 2011, as indeed the same Pre-Trial Chamber recalls.⁸¹ Yet, the acceptance of jurisdiction predates these determinations regarding the situation by nearly seven years. However, if, as the Pre-Trial Chamber does, a nexus is made between the determination of the scope of acceptance and conformity with the parameters of a situation, the consequence would be that the 2003 declaration would have lacked a framework for nearly seven years and would have existed in a sort of virtual world. Moreover, if the Prosecutor had opened an investigation on 19 April 2003, a Pre-Trial Chamber considering the matter at the time would never have had to consider whether the declaration covered events in 2010 and would certainly have validated – again following the Chamber’s reasoning – the idea that the scope of the declaration covered events linked to the negotiated end to the crisis following the attempted coup d’état of 19 September 2002.⁸² Lastly, it is worth imagining a scenario in which the democratic transition of 2003 was peaceful, and for reasons completely unconnected with internal political tensions in Côte d’Ivoire, for example, because of an invasion by a neighbouring country, crimes falling within the jurisdiction of the Court were committed in 2010. Applying its own standard, the Pre-Trial Chamber would then have found that the same situation did not exist in 2010 as in 2003 and therefore would have found that the 2003 declaration did not concern the events of 2010. these three scenarios illustrate the perverse consequences of the application of the Pre-Trial Chamber’s standard: a single acceptance of jurisdiction, with identical wording, issued on the same date, would be of varying scope depending on when the Court would effectively decide to exercise its jurisdiction, or depending on the different material to be found in the country at a given time. Such uncertainty cannot have been intended by the drafters of the Statute and this further illustrates the confusion caused by the Pre-Trial Chamber.

95. Moreover, already anticipating the possibility of confusion in its initial application, the Defence explained the difference between the situation and the acceptance of jurisdiction thus:⁸³

[T]he declaration serves to define the *framework for accepting jurisdiction* under which the Court may exercise its prerogatives and accordingly precedes any issues to be considered in determining the *situation*, within the meaning of the Statute, which in turn determines the context in which the Court may exercise its jurisdiction. This clarification is important because it implies that the situation, as determined by the Court depending on the evidence submitted by the Prosecutor, should not exceed the *framework for accepting jurisdiction* arising out of the declaration made pursuant to article 12(3).

⁸⁰ ICC-02/11-14.

⁸¹ ICC-02/11-01/11-212, para. 63.

⁸² *Infra*, Ground 4.

⁸³ ICC-02/11-01/11-129-Corr-tENG, para. 64.

96. Put differently, the Pre-Trial Chamber approaches the problem in reverse. It is not the declaration of jurisdiction which should conform to the parameters of the situation, but the situation which may not overstep the parameters of the declaration. Any other finding would again be antithetical to the nature of an acceptance of jurisdiction under article 12(3) which, whilst being a simulacrum of ratification of the Statute, cannot entail more obligations than ratification itself. Hence, if a State were to ratify the Statute after the Treaty entered into force on 1 July 2002, the Court would be unable to exercise its jurisdiction for crimes committed before “the entry into force of this Statute for that State”,⁸⁴ regardless of whether there is a pre-existing factual situation.

97. Furthermore, article 11 of the Statute clearly demonstrates that the temporal scope of acceptance of jurisdiction is at the discretion of the State. It provides:

If a State becomes party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

98. The foregoing demonstrates that the test adopted by the Pre-Trial Chamber has no legal basis in the Statute. What is more, the Chamber misapprehends the very logic of the Statute by making the scope of a declaration dependent on a hypothetical situation, whereas without acceptance there can be no situation to determine, since it would not be possible to make a referral under article 13. Accordingly, the reasoning of the Pre-Trial Chamber, which bases the 18 April 2003 declaration on the determination of the existence of a single situation between 2002 and 2010⁸⁵ (which, *obiter*, the Defence has never contested), whereas this is manifestly irrelevant in that it produces a perverse result as has been demonstrated before, cannot be validated by the Appeals Chamber, which should set aside the decision for lack of legal basis. The Pre-Trial Chamber erred in law, thereby invalidating its entire decision.

2.2. Ground 4: the Pre-Trial Chamber erred in law by not construing the 18 April 2003 declaration as a unilateral act of the State of Côte d’Ivoire

99. Once it is accepted that the “situation” is not the relevant means of determining the scope of the declaration of acceptance, the next step is to identify what criteria are relevant to

⁸⁴ Rome Statute, article 11(2).

⁸⁵ ICC-02/11-01/11-212, para. 63.

its interpretation. On this issue, once again, the Pre-Trial Chamber did not offer a satisfactory solution.

100. Thus, in spite of the Defence's logical arguments on this issue in its initial application, intended to assist the Pre-Trial Chamber to perform its judicial function in the best conditions, the bench deals with the matter in only one paragraph.⁸⁶

In any event, the Chamber notes that Côte d'Ivoire did not seek to define the scope of the situation in relation to which it accepted jurisdiction by means of its Declaration of 18 April 2003, other than referring to the initial events of 19 September 2002. Furthermore, nothing in the Declaration of 18 April 2003 indicates any attempt by Côte d'Ivoire to restrict the scope by temporal or other limitations to the crimes to be investigated in Côte d'Ivoire after those events. The words of the Declaration of 18 April 2003, whereby Côte d'Ivoire recognised the jurisdiction of the Court for "une durée indéterminée", when given their ordinary meaning, make it clear that Côte d'Ivoire accepted the jurisdiction of the Court over events from 19 September 2002 onwards.

101. The Pre-Trial Chamber's position might appear logical at a cursory glance. However, it soon becomes apparent that the argument's framework is in fact on very shaky ground. The entire reasoning appears to hinge on the "ordinary meaning" given to the terms of the declaration. However, behind this tree of common-sense lurks the entire forest of the rules of interpretation of international law, which the Pre-Trial Chamber completely ignores.

102. Thus, on what basis does the Chamber invoke this rule of interpretation? Although the Statute mentions rules of interpretation with regard to crimes,⁸⁷ it contains no rules for the other statutory provisions. This implies that the rules of interpretation applicable to an article 12(3) declaration must be sought elsewhere.

103. In this regard, the Defence's initial application advanced the idea that such acceptance of jurisdiction is a unilateral declaration on the part of the State, which is likely to give rise to legal obligations, a category of acts long recognised under international law.⁸⁸ The principal consequence of such a legal characterisation is that it is the intention of the State in question which must have primacy.⁸⁹ Furthermore, these declarations are subject to other rules of interpretation as set forth by the International Law Commission in the *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*:

⁸⁶ *Ibid.*, para. 63.

⁸⁷ Rome Statute, article 22.

⁸⁸ See, for example, Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986, I.C.J. Reports 1986, p. 573, available in English at <http://www.icj-cij.org/docket/files/69/6447.pdf>.

⁸⁹ *Ibid.*, para. 39.

Principle 3. To determine the legal effects of such declarations, it is necessary to take account of their content, **of all the factual circumstances in which they were made**, and of the reactions to which they gave rise;

Principle 7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. **In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.** In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, **together with the context and the circumstances in which it was formulated.**⁹⁰

104. It is evident that (1) it is primordial to consider the context of such a declaration at the time it is made; and (2) any ambiguities must be resolved in favour of a restrictive interpretation. When it applies these principles of interpretation to the matter at hand, the Defence draws the following conclusions.

105. As to the context: the Defence demonstrated in its initial application⁹¹ that the 18 April 2003 declaration was made in the context of the end to the crisis negotiated by the protagonists following the attempted coup d'état of 19 September 2002, which culminated in the signature of the Marcoussis Agreement on 24 January 2003.⁹² Under this agreement, the acceptance of the jurisdiction of the ICC was connected to an amnesty for less serious crimes.⁹³ In this context, as the Defence pointed out in its initial application, "the drafters of the declaration cannot conceivably have intended the acceptance of jurisdiction to be prospective. In this regard, the Defence wishes to underscore that it does not dispute the actuality of a political crisis which has continuously held Côte d'Ivoire in its grip, even prior to 19 September 2002 and as far back as the 1999 coup d'état. The Defence will confine itself here to showing that the *intention* of the declaration's drafters *at the time of drafting* was to encompass a particular and readily identifiable aspect of this crisis which lasted from 19 September 2002 until the signature of the Marcoussis Agreement on 24 January 2003".⁹⁴

106. As to ambiguity: the Defence challenges the false obviousness of the assertion of the "ordinary meaning" of the expression "for an unspecified period of time" in the 2003 declaration. The Defence contends that this expression applies not to the commission of new crimes, but to the ICC's exercise of jurisdiction. Put differently, whilst the factual framework

⁹⁰ International Law Commission, "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations", adopted in 2006, Yearbook of the International Law Commission, 2006, Vol. II, Part 2, p. 387 [emphasis added].

⁹¹ ICC-02/11-01/11-129-Corr, paras. 83-89.

⁹² ICC-02/11-01/11-129-Anx17.

⁹³ *Ibid.*

⁹⁴ ICC-02/11-01/11-129-Corr-tENG, para. 87.

of the declaration is restricted, as stated above, the Court has unlimited temporal jurisdiction over the crimes committed within this factual framework. This interpretation is moreover consistent with the language used in article 12(3), which refers to consent to “the exercise of jurisdiction by the Court”. It is therefore specifically to the exercise of jurisdiction that the expression refers and not to the substance of this exercise of jurisdiction, which is left to the State. On what basis would the interpretation of the Chamber be more “ordinary” than that advanced by the Defence? At the very least, this alternative interpretation creates ambiguity regarding the meaning of the declaration, which should have been construed following the most restrictive interpretation.

107. In the final analysis, it emerges that the Pre-Trial Chamber’s interpretation is devoid of legal basis and the Appeals Chamber is prayed to set aside the decision on this point. In so doing, it will properly deal with the conduct of the Pre-Trial Chamber which, instead of recognising and dealing with the legal difficulties arising from the mechanism of article 12(3), refuses to answer the questions raised by the Defence. The only indication that the Pre-Trial Chamber considered the Defence’s arguments is the sole instance of the expression “contrary to the Defence submission”,⁹⁵ which cannot replace legal reasoning. Yet, the very nature of the challenge to the jurisdiction of the Court by the Defence requires an in-depth examination by the bench and should drive it to demonstrate why the Defence’s arguments are inadmissible, rather than merely affirming its own opinion. This obligation is all the more binding as, in the matter at hand, the Defence is not merely another participant in the proceedings. The Defence is the participant without which there would be no proceedings and it is therefore primarily on the basis of its arguments that the challenge should be considered. This refusal on the part of the Pre-Trial Chamber to engage in judicial dialogue even though this is the linchpin of procedural dialectics is even more glaring when the Pre-Trial Chamber considers the issue of the documents of 14 December 2010 and 3 May 2011. It constitutes an error of law which invalidates the Pre-Trial Chamber’s decision.

2.3. The Pre-Trial Chamber erred in law by making findings as to the existence of the documents signed by Alassane Ouattara on 14 December 2010 and 3 May 2011 without first ruling on their legal nature

108. Having considered that the 18 April 2003 declaration enabled the Court to exercise jurisdiction in relation to the crimes committed up to April 2011, the Pre-Trial Chamber

⁹⁵ ICC-02/11-01/11-212, para. 60.

considered that it was “unnecessary to address the validity of the letters of 14 December 2010 and 3 May 2011⁹⁶ or the question of the capacity of Mr Ouattara to bind Côte d’Ivoire on those particular dates.⁹⁷ Nonetheless, the bench goes on to say:⁹⁸

However, 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 Côte d’Ivoire with the Court, are further evidence that Côte d’Ivoire has accepted the exercise of jurisdiction of the Court in relation to the situation as set out above.

109. The Defence is at pains to understand the coherence of these two considerations. Having found that the 18 April 2003 declaration provided a legal basis for the exercise of jurisdiction by the Court, it might appear understandable for the Chamber to elect not to address the grounds raised by the Defence in relation to Alassane Ouattara’s capacity to commit Côte d’Ivoire. However, this bars it subsequently from ruling on the legal nature or even the scope of the other documents and of course to attribute these documents to Côte d’Ivoire, such attribution being dependent on the preliminary question of Alassane Ouattara’s capacity to commit the country, which is exactly what is challenged by the Defence.

110. Yet, this is exactly what it proceeds to do, by holding that these documents are proof of the intention of Côte d’Ivoire to recognise the jurisdiction of the Court. The Pre-Trial Chamber therefore appears implicitly, even unconsciously, to consider that Alassane Ouattara was authorised to represent Côte d’Ivoire, whereas it states a few lines previously that it does not wish to determine the issue.

111. Yet, the Defence had furnished the judges with all the information required for such an evaluation by demonstrating that Laurent Gbagbo had been proclaimed President on 3 December 2010 by the Ivorian Constitutional Council,⁹⁹ the only institution under the country’s Constitution empowered to make such a proclamation.¹⁰⁰ Moreover, on 22 December 2010,¹⁰¹ the Constitutional Council held that Alassane Ouattara’s oath of office was “null and void”. It was only on 4 May 2011 that the Constitutional Council, reversing its opinion in violation of the Constitution,¹⁰² proclaimed Alassane Ouattara President.¹⁰³ It therefore appears that Alassane Ouattara, who held no position in the

⁹⁶ See ICC-02/11-01/11-129-Anx14-tENG; ICC-02/11-01/11-129-Anx15-tENG.

⁹⁷ ICC-02/11-01/11-212, para. 66.

⁹⁸ *Ibid.*

⁹⁹ ICC-02/11-01/11-129-Anx1.

¹⁰⁰ Constitution of Côte d’Ivoire, 1 August 2000, article 94 (3): “[TRANSLATION] The Constitutional Council shall announce the final results of presidential election results”, ICC-02/11-01/11-129-Anx20.

¹⁰¹ Opinion No. CI-2010-A-035/22-12/CC/SG of 22 December 2010 concerning the oath of office of Alassane Ouattara and the ensuing acts, ICC-02/11-01/11-129-Anx21-tENG.

¹⁰² ICC-02/11-01/11-129-Anx20, article 98: “[TRANSLATION] The decisions of the Constitutional Council are not amenable to any form of appeal or review. They shall be binding on all administrative, judicial and military authorities and all natural and legal persons.”

¹⁰³ See Opinion No. CI-2011-EP-036/04-05/CC/SG, 4 May 2011, proclaiming Alassane Ouattara President of the Republic of Côte d’Ivoire (ICC-02/11-01/11-129-Conf-Anx22).

government at the time, could not be considered to be a representative of Côte d'Ivoire when he signed the letters of 14 December 2010 and 3 May 2011. In other words, he was not empowered either constitutionally or legally to commit Côte d'Ivoire; whether or not he did win the elections is another matter.

112. The Pre-Trial Chamber should have dealt with these matters before stating that these documents originated from Côte d'Ivoire and constituted "proof" of that country's intention. In spite of the protestations of the Pre-Trial Chamber, this statement is of undeniable legal import. Once again, the Pre-Trial Chamber refused to examine and assess the material presented by the Defence and merely expresses an (implicit) opinion on the issues raised.

113. The Defence accordingly moves the Appeals Chamber to void the Pre-Trial Chamber's holding as unfounded in law. To so rule would serve as a warning in respect of the strategy of Côte d'Ivoire, whose representatives act as if it were a State Party to the Statute when it is not, for example by attempting to present the bench and the parties with the *fait accompli* of Côte d'Ivoire's participation in the proceedings. Such a strategy is also used in the 3 May 2011 letter to the Prosecutor, wherein Alassane Ouattara states: "[TRANSLATION] I hereby confirm that I wish your Office to undertake independent and impartial investigations in Côte d'Ivoire into the most serious crimes committed since 28 November 2010 on Ivorian territory [...]".¹⁰⁴ This language, which exhorts the Prosecutor to investigate, is akin to nothing more than a "referral by stealth"¹⁰⁵ and betrays the desire of the current authorities in Côte d'Ivoire to exploit the ICC as a court of convenience, with no risk of sanction.

114. The Defence further questions the true motives underlying the Pre-Trial Chamber's reference to such documents, including the "referral by stealth" of 3 May 2011, and whether it does not attach greater weight to the arguments of Côte d'Ivoire than to those of the Defence, thereby bolstering the national authorities' sense of impunity, as the facts of the treatment meted out to President Gbagbo during his arrest and detention make abundantly clear. This error of law voids the holding that the International Criminal Court has competence to try President Gbagbo.

3. Ground pertaining to article 55(1)

115. The Defence hereby advances a ground concerning the Pre-Trial Chamber's disposal of the matter of the violation of article 55(1), namely that it erred in law as to the range of application of article 55(1) of the Statute (Ground 6).

¹⁰⁴ ICC-02/11-01/11-129-Anx15-tENG.

¹⁰⁵ ICC-02/11-01/11-129-Corr-tENG, paras. 105-108.

3.1. Ground 6: The Pre-Trial Chamber erred in law as to the range of application of article 55(1) of the Statute

116. In its initial application, the Defence argued a violation of the rights of President Gbagbo enshrined in article 55(1) of the Statute. The article provides:

In respect of an investigation under this Statute, a person: [...]

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; [...]

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.¹⁰⁶

117. The Defence substantiated the argument by providing the Pre-Trial Chamber with a detailed and exhaustive account of the ill-treatment endured by President Gbagbo from the time of his arrest on 11 April 2011 until his transfer to the Court on 29 November 2011. President Gbagbo's experience during that period, as recounted above,¹⁰⁷ amounts to far more than mere isolated acts and violations of Ivorian law alone. It is a sordid litany of grave, systematic and deliberate violations of internationally recognised human rights and President Gbagbo's human dignity during his eight-month incarceration.

118. The abuses impact, in every respect, the lives of detainees amenable to process, and beyond that, every human being. Accordingly, the Defence has demonstrated that the conditions of his arrest by armed men who did not wield any police authority undeniably constitute arbitrary arrest, since no grounds were advanced in support.¹⁰⁸ The unlawful arrest was followed by unlawful arbitrary detention. He was detained without being brought before a judge or afforded access to counsel,¹⁰⁹ in a northern town under the control of a warlord who belongs to Alassane Ouattara's inner circle and is under investigation by the UN for human rights violations. He was kept in detention without a warrant or judicial decision and in violation of Ivorian law. Absent any warrant, the charges levied against him, as late as 18 August 2011, are no justification for his detention under Ivorian law.¹¹⁰ All such acts are in violation of the human rights recognised by all international instruments.¹¹¹

¹⁰⁶ Rome Statute, article 55(1).

¹⁰⁷ See facts and procedural background, *supra*.

¹⁰⁸ ICC-02/11-01/11-129-Corr-tENG, paras. 109-304.

¹⁰⁹ ICC-02/11-01/11-129-Corr-tENG, paras. 116-139.

¹¹⁰ ICC-02/11-01/11-129-Corr-tENG, paras. 159-180.

¹¹¹ *Ibid.*, paras. 181-197.

119. Furthermore, the conditions of detention, whether considered in isolation or cumulatively, undoubtedly constitute inhuman treatment or torture –¹¹² acts which have attracted the most universal condemnation not only in human rights law but also in international criminal law, as applied by this Court, and which are among the “unimaginable [crimes] that deeply shock the conscience of humanity”.¹¹³

120. It was therefore a broken man who was transferred to the Court on 29 November 2011, as the physician appointed by the Defence shortly after President Gbagbo’s arrival in The Hague confirmed in his report of 31 March 2012: “it is my conclusion that denial of any of these conditions should be considered a form of ill-treatment to break as serious as physical abuse an even torture. Isolation is known to be used to ‘break prisoners’”.¹¹⁴ The physician noted: “it is my medical opinion that Mr. Laurent Gbagbo is in a bad general health state, physically and psychologically, not because a specific medical illness but from an imposed mental and physical inactivity that must be regarded as ill treatment and even torture”,¹¹⁵ adding: “I have examined Mr. Laurent Gbagbo, and concluded that the present medical problems derive from inhuman conditions of his detention, specifically the denial of physical, psychological and social activities”.¹¹⁶

121. The Pre-Trial Chamber’s response to this eight-month litany of human misery – distilled here in a few lines but described in thirty pages in the initial application – runs to a mere four paragraphs. To dispense with a determination on the torture and ill-treatment, the Bench circumscribed the range of application of article 55(1).

122. Firstly, it took the view that the expression “[i]n respect of an investigation under this Statute”, “must be understood to encompass any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest. Conversely, an investigation conducted by an entity other than the Prosecutor, and which is not related to proceedings before the Court, does not trigger the rights under article 55 of the Statute.”¹¹⁷

¹¹² *Ibid.*, paras. 198-234.

¹¹³ Rome Statute, Preamble.

¹¹⁴ ICC-02/11-01/11-105-Conf-Exp-Anx8, point 5-i.

¹¹⁵ *Ibid.*, point 7-a.

¹¹⁶ *Ibid.*, point 8-a.

¹¹⁷ ICC-02/11-01/11-212, para. 96.

123. Secondly, it found that “with respect to the allegations of the Defence, the Chamber considers it decisive that the alleged violations of article 55(1) of the Statute were not perpetrated by the Prosecutor or by the Ivorian authorities on behalf of the Prosecutor or any organ of the Court”,¹¹⁸ concluding its “analysis” of the Defence arguments with the assertion that “[t]he Chamber is, however, of the view that, in the absence of relevant evidence indicating that measures taken by the Ivorian authorities were adopted on behalf of the Prosecutor of the Court, the Defence allegations are purely speculative in nature”.¹¹⁹

124. The Appeals Chamber should not uphold the two limbs of this test.

125. As to the definition of investigation, there is no statutory indication that the safeguards afforded by article 55(1) apply only to the course of action of the Prosecutor or those national authorities at his or her request. The expression “[i]n respect of an investigation under” is unambiguous. The initiation of an investigation suffices for a person to enjoy article 55(1) protection. This interpretation finds further justification in the duty cast on the bench to interpret the Statute in accordance with internationally recognised human rights¹²⁰ and is not readily reconciled with the restrictive criterion required by the Pre-Trial Chamber, since the protection of human rights lies at the heart of the Rome Statute.

126. In this respect, the Defence moves the Chamber to adopt a broader definition of the concept of “[investigation] under”. If, in the event of a *proprio motu* referral by the Prosecutor, which was the case here, it were to determine that only a formal decision of the Chamber to authorise an investigation triggers article 55(1) protection, this would occasion unequal protection in respect of those other modes of referral (Security Council and State Party) which do not ensue from a formal decision on the initiation of an investigation. Nonetheless, even accepting the more restrictive definition, it would appear at the very least, that 3 October 2010, the date on which the investigation was authorised, marks the start of article 55(1) protection. It was entirely possible for the Chamber to have made such a finding.

127. To require the violations to have been perpetrated at the Prosecutor’s behest is, in the Defence view, also an unconscionable restriction of the range of application of article 55(1). So, to rephrase it in clearer terms, the Pre-Trial Chamber’s contention amounts to asserting

¹¹⁸ *Ibid.*, para. 97.

¹¹⁹ *Ibid.*, para. 98.

¹²⁰ Rome Statute, article 21(3).

that only those cases where the Prosecutor requests the torture or ill-treatment of a person fall within the fold of article 55(1). It is inconceivable that the drafters of the Statute intended to confine the ambit of the article to such an extent. Indeed, it is unimaginable that the Prosecutor of the first international criminal court tasked with prosecuting the gravest of crimes would require a person to be tortured. The statutory protection was clearly conceived as protection against the national authorities, aimed at shielding a person under investigation from ill-treatment. Any other conclusion would, it bears repeating, be antagonistic to the duty to apply the Statute in accordance with internationally recognised human rights.

128. Furthermore, article 55(1) must be construed in accordance with its spirit and specifically its object and purpose. The appellate bench of the ICC has acknowledged that the interpretation of the Rome Statute is governed by the Vienna Convention on the Law of Treaties of 23 May 1969, specifically the provisions of articles 31 and 32. It held that the principal rule of interpretation is set out in article 31(1), which reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²¹

129. The Defence wishes to underscore, *obiter*, that the test advocated by the Pre-Trial Chamber casts an insurmountable burden of proof. Indeed, how would the Defence gain access to the communications between the national authorities and the Office of the Prosecutor given the strict disclosure rules governing it? The Defence further draws the Appeals Chamber’s attention to its fruitless requests for disclosure of communications between the Prosecutor and the Ivorian authorities.¹²² The Defence has therefore done its utmost to demonstrate that the violations of President Gbagbo’s rights did indeed take place in connection with an investigation initiated by the Prosecutor.

130. In the case at bar, the Defence has demonstrated that the relationship between the Prosecutor and the Ivorian authorities can be traced back to December 2010 and that, as early as January 2011, Alassane Ouattara envisioned President’s Gbagbo’s transfer to the ICC.¹²³ Moreover, the Defence has furnished much material to show the desire on the part of the Ivorian authorities to prolong President Gbagbo’s detention so as to allow the Prosecutor himself to investigate and institute proceedings, and therefore with the sole aim of keeping

¹²¹ ICC-01/04-168 OA3, para. 33.

¹²² See confidential Annex 1.

¹²³ ICC-02/11-01/11-129-Corr-tENG, para. 243.

him available to the Court. This brazen intention is apparent in its decision to only prosecute him for economic crimes and avoid any difficulty in relation to the charges which were to be brought against him before the ICC.¹²⁴ In the eyes of the Ivorian authorities, who were in constant communication with the Prosecutor, there was not a shred of doubt as to President Gbagbo's transfer to the ICC.¹²⁵ As concerns the Prosecutor, the Defence has shown that as of January 2011, his office turned its interest to President Gbagbo, as the ensuing months confirmed. It therefore cannot readily be argued that (1) there was no investigation and that (2) the detention of Laurent Gbagbo bore no relation to such investigation. He therefore was entitled to the protection of article 55(1) of the Rome Statute.

131. In this regard, the Defence moves the Appeals Chamber to set aside the Pre-Trial Chamber's rulings on article 55(1) as manifestly unfounded in law. To rule otherwise would endorse a regime of blatant irresponsibility.

132. Under that regime, despite his knowledge of President Gbagbo's conditions of detention, to which the Defence had drawn his attention on numerous occasions,¹²⁶ the Prosecutor declined to wield the leverage resulting from his close ties to the Ivorian authorities to attempt to end the grave violations of President Gbagbo's rights. The Appeals Chamber should not countenance the pre-eminent figure of the Court being exempted from a modicum of due diligence to ensure that the national authorities respect the fundamental rights of any person under investigation by the Court, where circumstances so allow. It is largely the Prosecutor who interacts with national authorities and therefore who bears prime responsibility for safeguarding such persons' rights.

133. In that regime, the State, too, is absolved of responsibility. The Pre-Trial Chamber, which invoked the hypothetical risk of manipulation of the procedure provided by article 12(3) to arrogate to itself oversight over its purview,¹²⁷ declined to entertain the matter when presented with evidence of such manipulation. Thus, application of the test adopted by the Pre-Trial Chamber allowed Côte d'Ivoire to remain untroubled with regard to the ill-treatment of President Gbagbo and the violations of his rights, whilst publicly claiming that his detention was pending his surrender to the Court.

¹²⁴ *Ibid.*, para. 248.

¹²⁵ *Ibid.*, para. 251.

¹²⁶ ICC-02/11-01/11-129-Corr-tENG, paras. 262-267.

¹²⁷ ICC-02/11-01/11-212, para. 59.

134. Finally, in that regime, the Pre-Trial Chamber bench, the foremost guarantor of a fair trial in respect for human rights, abdicated the responsibility inherent in its function of overseeing effective implementation of the safeguards mandated by article 55(1). Such refusal to give effect to the protection of the fundamental rights enshrined in the Rome Statute, discerned here in relation to the application of article 55(1) of the Statute, was also apparent in its disposal of article 59(2). In so doing, the Pre-Trial Chamber committed a serious error of law, which voids its decision.

4. Grounds pertaining to article 59(2) of the Statute

135. The Defence hereby advances two grounds pertaining to the Pre-Trial Chamber's analysis of the violations of article 59(2) of the Statute: namely, that the Pre-Trial Chamber erred in law as to the ambit of the Court's oversight over compliance with article 59(2) by the national authorities (Ground 7) and that the Pre-Trial Chamber manifestly erred in fact in failing to find that article 59(2) had been violated during the procedure of surrender to the Court (Ground 8).

4.1. Ground 7: The Pre-Trial Chamber erred in law as to the ambit of the Court's oversight over compliance with article 59(2) by the national authorities

136. In its initial application, the Defence raised numerous violations of article 59(2) of the Statute, which mandates:

A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and
- (c) The person's rights have been respected.

137. Before turning to the substantive arguments of the Defence, the Pre-Trial Chamber confined the ambit of its oversight of the article's provisions in two respects: its temporal sphere and the nature of the rights to be respected.

138. With respect to the temporal dimension, it determined:¹²⁸

The 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 the grounds for any such prior detention. Consequently, the argument of the Defence that compliance with article 59 of the Statute should be examined with respect to the period from 11 April 2011, when Mr Gbagbo was first taken into custody by Côte d'Ivoire, cannot be sustained.

¹²⁸ ICC-02/11-01/11-212, para. 101.

139. The Defence wishes to underline that the Pre-Trial Chamber's remarks appear to misconceive the arguments set forth in its motion. At no time did the Defence contend that article 59(2) must apply to the entire period preceding surrender to the Court. What it did argue was that the "arrest" to be considered for the purposes of article 59(2)(b) was the physical apprehension of the person, *irrespective of when it was effected*, which in President Gbagbo's case was 11 April 2011.¹²⁹

140. Moreover, the text of article 59(2)(b) does not prescribe the time of arrest, merely its conformity with the proper process. Hence, the Defence sees no reason for strict construction of the provision, which would have the further effect of creating discrimination between the protection of the rights of those persons already in custody at the time of issuance of the warrant of arrest and those who are not and who alone would enjoy the Pre-Trial Chamber's oversight over of the lawfulness of their arrest.

141. In other words, it is a matter of stating a straightforward, almost self-evident principle: arrest is the physical act of placing a person in detention and not the legal fiction advanced by the Pre-Trial Chamber in its claim that "as of that moment [notification of the warrant of arrest], the Chamber considers Mr Gbagbo to have been arrested pursuant to the warrant of arrest issued by this Court".¹³⁰ The Pre-Trial Chamber, so eager to invoke "ordinary meaning" in relation to Côte d'Ivoire's acceptance of jurisdiction of the Court so as to extend jurisdiction to earlier events, is less so when application of the same rule of interpretation would afford greater protection to the Accused and increase the breadth of his rights.

142. Such desire to limit the protected rights is also manifest in the second limitation imposed by the Pre-Trial Chamber on the ambit of its oversight, as regards the rights within the purview thereof. Thus, it held that: "the Chamber is of the view 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".¹³¹

143. However this restrictive test of oversight over "basic safeguards" finds no statutory or jurisprudential foundation or justification. Although the Statute is silent as to the ambit of the

¹²⁹ ICC-02/11-01/11-129-Corr-tENG, para. 272.

¹³⁰ ICC-02/11-01/11-212, para. 102.

¹³¹ ICC-02/11-01/11-212, para. 104.

Court's oversight, the jurisprudence has delineated it. Hence, in a leading decision in *Lubanga*, which the Pre-Trial Chamber cites in the case at bar, the Appeals Chamber held:¹³²

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, as the Prosecutor rightly observes, on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority. Its task is to see that the process envisaged by Congolese law was duly followed and that ***the rights of the arrestee were properly respected***.¹³³

144. The Defence struggles to comprehend how the concept of unconditional respect for the “person’s rights”, which the Appeals Chamber quite rightly deduced from the text of article 59(2), is transformed by the pen of Pre-Trial Bench into the restrictive concept of “basic safeguards”. Equally striking in the instant case is the Pre-Trial Chamber’s disregard for the Pre-Trial Chamber’s ruling in *Lubanga*, which was nonetheless sustained on appeal and which affirmed that the primacy of national jurisdictions in the interpretation and application of national law “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”.¹³⁴

145. It is therefore clear that the Pre-Trial Chamber unduly and unfoundedly reduced the range of its oversight over national authorities’ compliance with article 59(2) criteria. Accordingly, the Defence moves the Appeals Chamber to set aside the rulings on the violation of article 59(2) on the ground of manifest error of law, both as regards the refusal to consider arrest antecedent to the issuance of the warrant of arrest and the adoption of a restrictive test for oversight over respect for rights. It must be noted that were this restrictive test to be adopted, it would preclude any meaningful oversight by the Court over national proceedings. In the instant case, the test has further resulted in a *de facto* refusal of the Pre-Trial Chamber fully to discharge the responsibility nonetheless cast by article 59(2). Hence, the Pre-Trial Chamber erred in law, thus rendering its decision void.

¹³² ICC-01/04-01/06-772, OA4, para. 41.

¹³³ Emphasis added.

¹³⁴ ICC-01/04-01/06-512, p. 6.

4.2. Ground 8: The Pre-Trial Chamber manifestly erred in fact in failing to find that article 59(2) had been violated during the procedure of surrender to the Court

146. Having adopted the restrictive test discerned above, which it does not once define, the Pre-Trial Chamber proceeded to apply it with distinct perfunctoriness. In fact, the Pre-Trial Chamber seems to attach greater weight to the Ivorian authorities' claims of action taken than to any actual action they took. Thus, the Pre-Trial Chamber noted that the Indictments Division [*Chambre d'Accusation*] "made specific reference"¹³⁵ to the arguments of Counsel for President Gbagbo, that the Indictments Division "ruled on the issues" raised and hence that "to the extent that the challenges raised by the Defence were entertained by the national court",¹³⁶ there are no reasons to accept the Defence request.

147. The Pre-Trial Chamber's appraisal of the national proceedings was therefore somewhat summary. Indeed, from the decision of the Abidjan Indictments Division, it is apparent that the sole reasoning put forward in response to the arguments from President Gbagbo's Counsel consisted of stating that "[t]he objections raised by the Defence are, in light of the evidence in the record of the proceedings, unfounded".¹³⁷ More generally, how was the Pre-Trial Chamber able to presume that in the proceedings – which, judging from the material in the record, lasted less than five hours, from the time of the purported "arrest" of President Gbagbo at 13:25 on 29 November 2011¹³⁸ to his flight's departure that same day at 18:21–¹³⁹ the Abidjan Indictments Division was in all seriousness able to adjudge the arguments advanced by Counsel? This question is particularly relevant since in accordance with the procedural provisions, counsel sought additional time to mount a defence, which was denied, as was the possibility of filing a brief.¹⁴⁰

148. The impression of a superficial analysis is supported by the fact that when the Pre-Trial Chamber refers to "the information available to the Chamber", it ultimately only makes mention of the decision of the Abidjan Indictments Division. The Chamber therefore wilfully discounted all of the material furnished by the Defence. Thus, by adopting the restrictive test, the Pre-Trial Chamber failed to demonstrate how the violations adverted to by the Defence, such as notification to Counsel of the commencement of proceedings only minutes before its

¹³⁵ ICC-02/11-01/11-212, para. 105.

¹³⁶ ICC-02/11-01/11-212, para. 106.

¹³⁷ ICC-02/11-01/11-12-Conf-Exp-Anx4-tENG, p 7.

¹³⁸ ICC-02/11-01/11-12-Conf-Exp-Anx3-tENG.

¹³⁹ ICC-02/11-01/11-12-Conf-Exp-Anx7-tENG.

¹⁴⁰ ICC-02/11-01/11-129-Corr-tENG.

start,¹⁴¹ the presence of armed men in the courtroom,¹⁴² the presence of third parties during deliberations¹⁴³ or denial of the right of appeal¹⁴⁴ are consonant with the accused's "basic safeguards".

149. It would seem that for the Pre-Trial Chamber celerity of the surrender process is the overriding goal of the proceedings which form the subject-matter of article 59, as evidenced by the precedence it affords to celerity when setting forth the content of that article.¹⁴⁵ Yet, the exigencies of expeditiousness cannot trump respect for the person's rights or the other requirements of article 59, such as compliance with national law.

150. Tellingly, in this respect, the Pre-Trial Chamber ignores the Defence argument that the Indictments Division had recourse to article 59 of the Statute as legal foundation for the surrender. However it was precluded from doing so, since Côte d'Ivoire has not ratified the Rome Statute, whose provisions therefore have no force of law in the Ivorian legal system. This conclusion is supported by the fact the Ivorian Constitutional Council explicitly stated that the Rome Statute was inconsistent with the Constitution.¹⁴⁶ Hence, recourse to article 59 violates the very provisions of that article, which prescribes that the proceedings must conform to national law. However, there is no provision in Ivorian law to authorise the surrender of a person to the ICC: neither article 59 nor the provisions concerning cooperation can be directly invoked and the reference to article 59 by the Abidjan Indictments Division is therefore a violation of that same article. The Defence is sympathetic to the difficulties confronting the Pre-Trial Bench in its adjudication of such reasoning. The bench, as is often the case, is left to contend with the drafting inconsistencies of the Rome Statute. Nonetheless, it behoves the judiciary to entertain and adjudicate rather than ignore such knotty issues.

151. From the foregoing it is clear that the Pre-Trial Chamber failed to discharge its duty to oversee national authorities' compliance with the provisions of article 59. It committed a manifest error of fact and abused its discretion in failing to consider all of the material available in its appraisal of the situation and in failing to find that the Ivorian authorities acted in flagrant violation of all of the requirements of article 59(2). Accordingly, the Appeals

¹⁴¹ ICC-02/11-01/11-129-Corr-tENG, para. 276.

¹⁴² *Ibid.*, para. 277.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, para. 280.

¹⁴⁵ ICC-02/11-01/11-212, para. 100.

¹⁴⁶ Constitutional Council Decision No. 002/CC/SG of 17 December 2003 on the conformity of the Rome Statute with the Ivorian Constitution, Annex 2.

Chamber should set aside the rulings pertaining to the violation of article 59(2) set forth in the the decision.

5. Grounds pertaining to the challenge to jurisdiction on account of grave violations of the rights of the Accused

5.1. Ground 9: the Pre-Trial Chamber erred in law in recharacterising the Defence motion as an abuse of process claim

152. The Pre-Trial Chamber took the view that that limb of the Defence application grounded in the violation of President Gbagbo's rights could not be considered a jurisdictional challenge¹⁴⁷ and proceeded to label it as an "abuse of process" claim.¹⁴⁸

153. The Defence has two observations to make in this regard. Firstly, the Defence is cognisant of the Appeals Chamber's ruling in *Lubanga* that the argument that rights violations may occasion the non-assumption of jurisdiction by the Court is, *stricto sensu*, not a jurisdictional challenge.¹⁴⁹ However, the Defence submits that the matter is not entirely settled. In *Bemba* such a motion was entered and adjudged admissible in relation to an application for interim release.¹⁵⁰ It emerges therefrom that the precise legal foundation of a claim of violation of rights is uncertain. Hence the decision of the Defence, in this instance, to argue such claim under the head of jurisdiction, a solution, which to its mind, seemed more reasonable and logical.¹⁵¹ There is no specific procedure in the Statute to address violations of individual rights.

154. The Defence moves the Appeals Chamber prospectively to determine the legal basis which may be invoked for motions grounded in grave violations of the person's rights. As to substance, the Defence concurs with the jurisprudence in *Lubanga* which satisfied an inescapable requirement for the legitimacy of any judicial institution by allowing motions founded on grave violations of rights.

¹⁴⁷ ICC-02/11-01/11-212, para. 88.

¹⁴⁸ *Ibid.*, para. 90.

¹⁴⁹ ICC-01/04-01/06-772, para. 24.

¹⁵⁰ ICC-01/05-01/08-80-Anx.

¹⁵¹ See *infra*, Ground 10.

5.2. Ground 10: The Pre-Trial Chamber erred in law as to the conditions necessary to a finding of lack of jurisdiction

155. Having recharacterised the second limb of the motion as claiming abuse of process on its part, the Pre-Trial Chamber considered that it needed to entertain its substance, given “the seriousness of the allegations made by the Defence”.¹⁵²

156. Before turning to the violations of President Gbagbo’s human rights, the Pre-Trial Chamber set out the test to be met for the Court to find that it lacks jurisdiction (stay of proceedings). To that end, it drew on the decision aforesaid, and now leading case, issued by the Appeals Chamber in *Lubanga* to hold that a finding of lack of jurisdiction is only possible where the violation of fundamental rights is: “(i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court. Conversely, when a violation of the suspect’s fundamental rights, however grave, is established, but demonstrates no such link with the Court, the exceptional remedy of staying the proceedings is not available.”¹⁵³

157. The Defence disputes the validity of this restrictive test.

158. Firstly, the Defence is of the view that the Pre-Trial Chamber adopted an excessively broad construction of the Appeals Chamber decision, which at no point in setting forth the principle of lack of jurisdiction for grave violations of the person’s rights explicitly states the need for such a close nexus between the rights violations and misdeeds by persons associated with the Court. While the Appeals Chamber does make reference to “breaches of the fundamental rights of the suspect or the accused by his/her accusers”¹⁵⁴ at the very start of its observations, it is only in connection with specific examples of statutory safeguards for the rights of the Defence; this does not mean that it makes rights violations the touchstone of the test. Subsequently, the Appeals Chamber makes no such reference, concluding the chapter on the violation of the person’s rights with a clear and unambiguous statement of the following principle:

Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous

¹⁵² ICC-02/11-01/11-212, para. 90.

¹⁵³ ICC-02/11-01/11-212, para. 92.

¹⁵⁴ ICC-01/04-01/06-772, para. 37.

crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.¹⁵⁵

159. No mention was made of the need to ascribe the violation at issue to a person specifically connected to the Court.

160. Admittedly, the Appeals Chamber judgment later adverts to the relationship between the national authorities and the Prosecutor.¹⁵⁶ However, it merely comments without adopting the Pre-Trial Chamber's test. It should be noted that the language employed by the Appeals Chamber is, in any event, much more nuanced than that of the Pre-Trial Chamber in the impugned decision, with its reference instead to the "process of bringing the appellant to justice" and the absence of evidence of "impropriety" on the part of the Prosecutor, thereby affording the Defence greater latitude in establishing the facts.

161. Having regard to torture, the Pre-Trial Chamber in *Lubanga* held that concerted action was unnecessary and the requisite nexus with the proceedings before the Court was slight.¹⁵⁷ The Appeals Chamber implicitly endorsed that approach by not disputing or directly addressing the matter, the Pre-Trial Chamber having found in that case that torture was not shown.¹⁵⁸

162. If understood correctly by the Defence, the applicable test is as follows: (1) the violations must have taken place in the process of bringing the person to justice, necessitating a nexus with ICC proceedings, although such violation need not be ascribable to a person connected to the Court; (2) the violations must be such as to render a fair trial impossible; and (3) in the event of torture, the gravity of such conduct means that the sole nexus required is that the ill-treatment "in some way"¹⁵⁹ took place in connection with the process of surrender to the Court, although such nexus need not be specifically determined.

163. In the instant case, the Defence has demonstrated the wholesale and constant cooperation between the Ivorian authorities and the organs of the Court, be they the Prosecutor during the investigation or the Registry during President Gbagbo's surrender to the

¹⁵⁵ *Idem*, para. 39 [emphasis added].

¹⁵⁶ *Ibid.*, para. 42.

¹⁵⁷ ICC-01/04-01/06-512, p. 10.

¹⁵⁸ ICC-01/04-01/06-772, para. 42.

¹⁵⁹ *Ibid.*

ICC.¹⁶⁰ Furthermore, the impact of the violations of President Gbagbo's rights on the proceedings and the ensuing impossibility of holding a fair trial are undoubted, since the postponement of the confirmation hearing is essentially due to President Gbagbo's current state of health as a result of his detention in Khorogo. In this respect, the Defence has demonstrated that, as regards the law, the ill-treatment suffered in Khorogo constitutes torture and inhuman and degrading treatment. Accordingly, the Pre-Trial Chamber should have found that the Court lacks jurisdiction.

164. Should the Appeals Chamber find that the test established by the Pre-Trial Chamber in the case at bar duly reflects the Appeals Chamber judgment in *Lubanga*, the Defence respectfully prays the Appeals Chamber to reconsider its position in *Lubanga* by allowing the challenge to jurisdiction and relieving the Defence from establishing concerted action between the national authorities and the organs of the Court. Indeed, the objective so eloquently put by the Appeals Chamber in *Lubanga* of "the need to sustain the efficacy of the judicial process as the potent agent of justice" warrants the adoption of a more liberal principle in the most serious cases, which include the present cause. Clearly, it is important that this principle first and foremost shields accused persons from possible violations by the Court's organs. However, this is unlikely to suffice to entrench the Court's legitimacy as a "potent agent of justice" for the long term, for the perception that the Court turns a blind eye to grave violations by States Parties of the rights of the accused would only breed disillusionment as to the Court's real capacity to assert the authority necessary for it to be effective.

165. Accordingly, the Defence moves the Appeals Chamber to set aside the Pre-Trial Chamber's ruling as to the test applicable to the jurisdictional challenge on the ground of manifest error of law.

III. CONCLUSION

166. Specificities aside, the various grounds of appeal clearly turn on two issues.

167. The first concerns the exercise of judicial functions. The Pre-Trial Chamber makes unsubstantiated assertions and sometimes fails to respond to the Defence's arguments. Yet, jurisdictional challenge proceedings are intended to serve the accused and lie at the heart of

¹⁶⁰ ICC-02/11-01/11-129-Corr-tENG, paras. 300-302.

his fundamental right to respect for his human dignity and liberty. The Pre-Trial Chamber was duty-bound to show greater circumspection towards the requirement for judicial debate. The Defence has contributed to this dialogue by systematically and specifically providing the material necessary to the Bench to arrive at the fairest solution. However the impugned decision appears at times to have been drafted as if the Defence had failed to advance any argument. The Appeals Chamber should not countenance this attitude on the part of the Pre-Trial Chamber and should thus set aside the impugned decision in its entirety.

168. The second concerns the regime of general irresponsibility which the Pre-Trial Chamber instituted by devising increasingly restrictive tests. By accretion, the Pre-Trial Chamber's various rulings, whether they dispose of lesser or more fundamental points, coalesce into this regime. Thus, the Chamber allowed Côte d'Ivoire to submit observations on the Defence motion, absent any legal foundation. Above all, the Pre-Trial Chamber has systematically taken an approach to matters *sub judice* that avoids ruling on the substance of the irregularities and violations of rights perpetrated by Côte d'Ivoire. As regards the organs of the Court, the Pre-Trial Chamber's sole guiding principle appears to that of absolving the organs concerned of any responsibility. Ultimately, the only protagonist to bear any responsibility is President Gbagbo; this is all the more striking in that he is also denied any remedy for the violations of his rights or even any acknowledgment of the violations in the first place. Whilst justice cannot be blind to injustice, she must also be measured, as the scales she holds so attest. Armed only with the sword, she would no longer be justice. In furtherance of the restoration the balance necessary to the due discharge of the judicial functions, the Appeals Chamber must also set aside the impugned decision in its entirety.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

Having regard to article 82(1)(a) of the Rome Statute;

Having regard to article 19(2) of the Rome Statute;

Having regard to articles 12(3), 21, 55 and 59 of the Rome Statute;

Having regard to rules 44, 45 and 184 of the Rules of Procedure and Evidence;

Having regard to article 83(2) of the Rome Statute;

To find that:

- The Pre-Trial Chamber erred in law in granting Côte d'Ivoire's application to file observations (Ground 1);

- The Pre-Trial Chamber erred in law in failing to determine Côte d'Ivoire's application in a separate decision, thereby depriving the Defence of the right to appeal the decision or to reply (Ground 2);
- The Pre-Trial Chamber erred in law in adjudging the 18 April 2003 declaration with reference to the "situation at hand" (Ground 3);
- The Pre-Trial Chamber erred in law in failing to construe the 18 April 2003 declaration as a unilateral act of the Ivorian State (Ground 4);
- The Pre-Trial Chamber erred in law by drawing conclusions from the existence of documents signed by Alassane Ouattara on 14 December 2010 and 3 May 2011 without first adjudging their legal nature (Ground 5);
- The Pre-Trial Chamber erred in law as to the range of application of article 55(1) of the Statute (Ground 6);
- The Pre-Trial Chamber erred in law as to the ambit of the Court's oversight over compliance with article 59(2) by the national authorities (Ground 7);
- The Pre-Trial Chamber erred in fact in failing to find that article 59(2) had been violated during the procedure of surrender to the Court (Ground 8);
- The Pre-Trial Chamber erred in law in recharacterising the Defence motion as an abuse of process claim (Ground 9);
- The Pre-Trial Chamber erred in law as to the conditions necessary to a finding of lack of jurisdiction (Ground 10).

Accordingly,

- **To set aside** the impugned decision in its entirety;

- **To rule** that the International Criminal Court lacks jurisdiction in the case of *The Prosecutor v. Laurent Koudou Gbagbo*.

In the alternative,

- **To find** that Laurent Gbagbo's fundamental rights were violated.

Accordingly,

- **To allow** the jurisdictional challenge;
- **To rule** that the Court cannot exercise its jurisdiction in such circumstances.

[signed]

Emmanuel Altit

Lead Counsel for Mr Laurent Gbagbo

Dated this 6 September 2012, at The Hague, The Netherlands