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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

**Public redacted version
With public Annex I**

**Corrigendum to Prosecution Response to Defence motion for a declaration on lack
of jurisdiction of the Court based on Articles 12(3), 19(2), 21(3), 55 and 59 of the
Rome Statute**

Source: Office of the Prosecutor

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

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INTRODUCTION

1. The Defence requests the Chamber to declare that it does not have jurisdiction to deal with the period of time or facts as set out in the warrant of arrest against Laurent Gbagbo ("Suspect") or document containing the charges, claiming that there was no valid declaration of acceptance of jurisdiction made by the Republic of Côte d'Ivoire ("CIV") for the relevant period.¹ The Defence further asserts that the International Criminal Court ("Court") should not exercise jurisdiction because the Suspect allegedly suffered torture and other forms of ill-treatment during his period of detention prior to his transfer to the Court and violations related to his transfer to the Court, making a fair trial impossible² ("Defence Motion").
2. The Defence Motion should be rejected. There was in fact a valid declaration of acceptance of jurisdiction made pursuant to Article 12(3) of the Statute for the relevant period and there has been no violation of the Suspect's rights or procedural impropriety before this Court warranting invalidation of the Court's jurisdiction.

CONFIDENTIALITY

3. This filing is submitted as confidential because it refers to information contained in court documents currently classified as confidential. A public redacted version will be submitted.

PROCEDURAL BACKGROUND

4. On 18 April 2003, the Minister of Foreign Affairs on behalf of the government of CIV made a declaration pursuant to Article 12(3) of the Statute accepting the Court's jurisdiction "*pour une durée indéterminée*" to investigate and

¹ ICC-02/11-01/11-129-Corr, p.78-79.

² ICC-02/11-01/11-129-Corr, p.79.

prosecute individuals responsible for crimes committed in its territory since 19 September 2002.³

5. The President of CIV, Mr Ouattara, wrote to the Court on 14 December 2010⁴ and again to the Prosecutor on 3 May 2011,⁵ confirming in his new capacity the government's declaration of 18 April 2003 and its ongoing intention to cooperate with the Court.
6. On 23 June 2011, the Prosecutor filed his 'Request for authorisation of an investigation pursuant to article 15', in which he requested authorisation from the Chamber to commence an investigation into the situation in the CIV in relation to post-election violence in the period following 28 November 2010.⁶
7. On 3 October 2011, Pre-Trial Chamber III issued its 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' ("Article 15 Decision").⁷
8. On 25 October 2011, the Prosecutor requested an arrest warrant against the Suspect in relation to post-election violence occurring after 28 November 2010.⁸
9. On 23 November 2011, the Chamber issued an arrest warrant for the Suspect on four counts of crimes against humanity as requested.⁹
10. On [REDACTED], the Registry transmitted the arrest warrant and request for surrender of the Suspect to the competent CIV authorities.¹⁰
11. [REDACTED].¹¹ [REDACTED].¹²

³ ICC-02/11-01/11-129-Anx16.

⁴ ICC-02/11-01/11-129-Anx14.

⁵ ICC-02/11-01/11-129-Anx15.

⁶ ICC-02/11-3.

⁷ ICC-02/11-14. A corrigendum of the Article 15 Decision (ICC-02/11-14-Corr) was subsequently filed on 15 November 2011.

⁸ ICC-02/11-01/11-87-Conf-Exp-Red2. See also ICC-02/11-01/11-9-Red, para.4.

⁹ ICC-02/11-01/11-1.

¹⁰ ICC-02/11-01/11-12-Conf-Exp, p.3; ICC-02/11-01/11-12-Conf-Exp-Anx1.

12. On 5 December 2011, the Suspect appeared before the Court pursuant to Article 60(1) and Rule 121(1).¹³

SUBMISSIONS

I. Valid acceptance of the Court's jurisdiction pursuant to Article 12(3)

13. The Defence raises a two-fold challenge to the CIV acceptance of ICC jurisdiction. First, it contends that the original acceptance in 2003 was not open-ended and does not suffice to accept jurisdiction in 2011. Second, it contends that the 2010 and 2011 CIV statements continuing to accept ICC jurisdiction are invalid because President Ouattara who purported to act for the government was not the lawful President, and that the Suspect was the lawful President.
14. The Prosecution disagrees on both counts. First, the original acceptance of jurisdiction was, by its very terms, not confined to the events at the time the acceptance was made. Rather, it was of unspecified duration. In any event, as Pre-Trial Chamber III concluded, the Chamber does not have to decide if the 2003 communication alone sufficed to confer continuing jurisdiction on this Court for crimes committed in 2010 or 2011 because the additional letters of 2010 and 2011 make it clear that jurisdiction relates to events occurring in 2010 and 2011. Second, notwithstanding the Suspect's protestation that he is the head of state of CIV, the government of CIV disagrees. President Ouattara, and not the Suspect, is generally recognized internationally and within CIV itself as the duly elected head of state. It is not up to this Court to resolve the electoral disagreement, nor does it have the political authority or the competence to overrule the judgment of the CIV or the States that recognize and accept the Ouattara government.

¹¹ ICC-02/11-0111-12-Conf-Exp, p.4; ICC-02/11-01/11-12-Conf-Exp-Anx3.

¹² ICC-02/11-01/11-12-Conf-Exp.

¹³ ICC-02/11-01/11-T-1-ENG.

15. The procedural history demonstrates that there was a valid declaration of acceptance of jurisdiction pursuant to Article 12(3) of the Statute for the relevant period, namely the declaration of acceptance of 18 April 2003 and the letters of December 2010 and May 2011. Pre-Trial Chamber III so found in its Article 15 Decision, concluding that *“the Court has jurisdiction over crimes allegedly committed in Côte d’Ivoire since 19 September 2002, on the basis of the Declaration of acceptance of 18 April 2003 and the letters of December 2010 and May 2011.”*¹⁴
16. In his letter of 14 December 2010, President Ouattara referred in particular to crimes and abuses committed since March 2004¹⁵ and in his subsequent letter of 3 May 2011, he referred in particular to events following the Presidential elections of 31 October 2010 and 28 November 2010.¹⁶ However, Pre-Trial Chamber III stated that the initial declaration *“explicitly indicates its unspecified duration”* and the two subsequent letters, although referring to crimes committed in 2004 and 2010, *“do not seek to restrict or amend the scope of the 2003 Declaration but, instead, they specifically confirm the acceptance by the Republic of Côte d’Ivoire of the ICC’s jurisdiction as regards crimes allegedly committed in the recent past”*.¹⁷ At the same time, Pre-Trial Chamber III concluded that *“since Côte d’Ivoire has confirmed its acceptance of jurisdiction in 2010 and 2011, the Chamber does not need to assess whether the Declaration made in 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011.”*¹⁸
17. Indeed, the Prosecution was authorized to start its investigation in Côte d’Ivoire with respect to crimes within the jurisdiction of the Court, committed

¹⁴ ICC-02/11-14-Corr, para.15.

¹⁵ ICC-02/11-140-Corr, para.11; ICC-02/11-01/11-129-Anx14.

¹⁶ ICC-02/11-14-Corr, para.12; ICC-02/11-01.11-129-Anx15.

¹⁷ ICC-02/11-14-Corr, para.14.

¹⁸ ICC-02/11-14-Corr, para.15. Whilst the Chamber does not need to decide if Article 12(3) enables declarations to contemplate future crimes, which Defence asserts it does not, the Prosecution observes that the Court’s jurisprudence already confirms that declarations can contemplate future crimes. For instance, refer to the Article 15 Decision, para. 212, Pre-Trial Chamber III in this case gave authorization for investigations not only for events in 2010 but also for ongoing crimes related to the situation. Similar arguments were made by Defence in *The Prosecutor v. Mbarushimana* and dismissed by Pre-Trial Chamber I, in the context of a State referral: ICC-01/04-01/10-451, paras.40-42. Moreover, Defence in this case concedes that the same situation between 2002 and 2010 could be said to exist (ICC-02/11-01/11-129-Corr, para.65) referring to the prior decision by the Chamber confirming this (ICC-02/11-36).

since 28 November 2010 including ongoing crimes that may be committed in the future.¹⁹

18. Pre-Trial Chamber III found that the initial Declaration was signed by the Minister of Foreign Affairs who had the authority to sign a valid declaration for CIV.²⁰ When referring to President Ouattara's letters of 14 December 2010 and 3 May 2011,²¹ Pre-Trial Chamber III stated that: *"the subsequent confirmation of the validity of this Declaration in the abovementioned letters of 14 December 2010 and 3 May 2011 demonstrates the intention of the newly-elected authorities to cooperate with the Court."*²²
19. President Ouattara had the authority to bind CIV in issuing the letters of 2010 and 2011. Pre-Trial Chamber III recognized his authority as President, stating that he wrote his letter of 2010 and 2011 *"in his capacity as newly elected President of Côte d'Ivoire"*.²³ His authority was also recognized internationally, and internally.²⁴ The Defence asserts, in the face of overwhelming contrary internal and international opinion, that the Suspect instead was the rightly elected President of Côte d'Ivoire.²⁵ Defence seeks to rely upon initial statements of the internal Constitutional council, but as the Defence concedes, this body later confirmed that President Ouattara was the rightful winner of the Presidential elections.²⁶
20. As President Ouattara mentions in his letter of 14 December 2010, his electoral victory was proclaimed by the Independent Electoral Commission on 2 December 2010, and the Special Representative of the UN Secretary-General certified the electoral results, which were also recognized by members of the international community including the UN Security Council, the USA, France, the African Union, the Economic Community of West

¹⁹ ICC-02/11-14-Corr, para.212.

²⁰ ICC-02/11-14-Corr, para.14.

²¹ ICC-02/11-14-Corr, paras.11-12.

²² ICC-02/11-14-Corr, para. 14.

²³ ICC-02/11-14-Corr, para.11.

²⁴ ICC-02/11-01/11-129-Corr, para. 13.

²⁵ ICC-02/11-01/11-129-Corr, para. 2.

²⁶ ICC-02/11-01/11-129-Corr, paras. 99-100, para.140; ICC-02/11-01/11-129-Conf-Anx22.

African States and the European Union.²⁷ The Defence does not contest any of these facts.²⁸

21. The intent of the State of CIV, including as to the relevant period of time for which it accepts the Court's jurisdiction, can also be discerned from subsequent statements of intent by the government.²⁹ The Defence concedes that: "*l'élément essentiel est le consentement et donc l'intention de l'Etat*".³⁰ In fact, the CIV government has continued to demonstrate its ongoing intent to recognize the Court's jurisdiction in line with its initial declaration of 2003 and its subsequent letters of 2010 and 2011, including by the recent statement made by the CIV's Prime Minister before the Court's Assembly of State Parties on 15 December 2011³¹ and in its recent observations to this Court.³²

II. No violation of the Suspect's rights or procedural impropriety in the proceedings before the ICC warranting non-assumption of jurisdiction

22. As a separate basis for challenging jurisdiction, the Suspect contends that he was mistreated while in custody in CIV on unrelated charges, and that there was some irregularity in the process of surrendering him to this Court. Again

²⁷ ICC-02/11-01/11-129-Anx14.

²⁸ ICC-02/11-01/11-129-Corr, para.96.

²⁹ See Article 31 of the Vienna Convention on the Law of Treaties (1969), which provides that "any subsequent agreement" or "subsequent practice" shall also be taken into account as part of the general rules of treaty interpretation.

³⁰ ICC-02/11-01/11-129-Corr, para.68. See also *The Prosecutor v Tadic*, IT-91-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, pp.29-30. The Appeals Chamber dealing with a defence challenge to jurisdiction based on an argument of state sovereignty held that matters can be taken out of a State's jurisdiction and that evidence of the consent of a state to the exercise of jurisdiction by an international court was important evidence that the sovereign rights of that state had not been violated. The Appeals Chamber cited the Trial Chamber saying the Trial Chamber was fully justified in writing:

"[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused – Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction' (Decision at Trial, at para. 41)".

³¹ See http://www.gouv.ci/actualite_1.php?recordID=1942. Allocution de SE. Soro Kigbafori Guillaume, Premier Ministre, Ministre de la Défense, A l'occasion de l'Assemblée Générale des Etats Parties au Traité de Rome, 15 December 2011.

³² ICC-02/11-01/11-156 and ICC-02/11-01/11-154.

the Prosecution disagrees. Contrary to the Defence argument, there have been no violations of the Suspect's rights or procedural improprieties in the proceedings before the Court, and certainly none that warrant invalidation of the Court's jurisdiction.

1. Prior detention of the Suspect in the CIV is not relevant to these proceedings

23. Contrary to the Defence's assertion, the Suspect's prior period of detention in the CIV is not relevant to these proceedings.³³

1.1. Prior detention was not part of the process of bringing the Suspect to justice before this Court and did not result from any concerted action between the Prosecution and national authorities

24. When dealing with a similar challenge in the *Lubanga* case, the Appeals Chamber held that "[a]t issue is the process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court. The Pre-Trial Chamber determined that it is in relation to this process that breaches of the rights of the suspect or the accused may provide grounds for halting the process. And none was shown".³⁴ (Emphasis added).
25. The Suspect's prior detention in the CIV was in relation to separate national proceedings and did not form part of the process of bringing him to justice for crimes that form the subject-matter of proceedings before the Court. The CIV authorities confirmed that the Suspect was being held by them for economic crimes and not for crimes for which he was charged by the Court.³⁵ As the Appeals Chamber remarked in the *Lubanga* case: "[i]t is worth reminding that the crimes for which Mr. Lubanga Dyilo was detained by the Congolese authority

³³ ICC-02/11-01/11-129-Corr, paras. 109-274.

³⁴ ICC-01/04-01/06-772 OA4, para.44.

³⁵ ICC-02/11-01/11-129-Corr, para.16; ICC-02/11-01/11-129-Conf-Anx38.

*were separate and distinct from those which led to the issuance of the warrant for his arrest".*³⁶

26. The Appeals Chamber in the *Lubanga* case also upheld the Pre-Trial Chamber's approach in finding that the appellant had to show that any serious violations of his rights resulted from concerted action between the Prosecutor and national authorities, derailing the process to such an extent that it would be antagonistic to the ends of justice to put him on trial. The Appeals Chamber further said that the court should consider "*whether a fair trial remained possible in the particular circumstances of the case*".³⁷
27. Neither the Prosecution nor any other organ of the Court was involved in the Suspect's initial arrest or detention by the CIV authorities before the transmission by the Registry of the Court's arrest warrant or request for his surrender to the Court on 25 November 2011. There was no concerted action between the Prosecutor and the CIV authorities to detain the Suspect in order to ensure that he would be available for surrender to the Court. The Suspect was not detained by the CIV authorities at the Prosecution's behest and was not in the Court's constructive custody.³⁸ Nor did the Prosecution have any control over the CIV authorities or their conduct of national proceedings, including the detention of the Suspect.
28. As the Appeals Chamber in the *Lubanga* case held: "*[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the [national] authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose*".³⁹ Similarly, and contrary to unsupported Defence assertions,⁴⁰ the mere fact that the Office of the Prosecutor was in contact with the CIV authorities in connection with its own activities does not suggest any concerted action or involvement of the

³⁶ ICC-01/04-01/06-772 OA4, para.42.

³⁷ ICC-01/04-01/06-772 OA4, paras.25 and 40.

³⁸ ICC-02/11-01/11-129-Corr, paras.235-267.

³⁹ ICC-01/04-01/06-772 OA4, para.42.

⁴⁰ ICC-02/11-01/11-129-Corr, paras.236-240.

Prosecution in the national authorities' investigations or their detention of the Suspect for that purpose. The mere fact that the CIV authorities requested the Prosecution to investigate the potential commission of international crimes during events in Côte d'Ivoire in 2010,⁴¹ and any knowledge they had of Prosecution's investigations into those events as a result of the publicly-issued Article 15 Decision, also do not suggest any concerted action between the Prosecution and the national authorities with respect to the national investigation or the detention of the Suspect.

29. Further, and contrary to the Defence allegations, the communications between the Registry and CIV authorities related to the practical steps to effect the arrest and surrender of the Suspect to the Court for crimes as charged by the Court, as required under Rule 184.⁴²
30. Thus, the detention in Côte d'Ivoire of Gbagbo or any alleged events connected to it cannot have any bearing on the Court's jurisdiction. As the Suspect's detention by the CIV authorities prior to the Registry's request for his arrest and surrender on 25 November 2011 is unconnected to the proceedings before this Court and did not result from any concerted action, any alleged ill-treatment during that prior detention cannot form a proper basis to challenge the Court's jurisdiction.

1.2. No duty of care for that prior period of detention

31. The Defence is also incorrect when it asserts that the Office of the Prosecutor owed a duty of care to the Suspect and was responsible for him as soon as it possessed information that could lead it to investigate him,⁴³ or when it was formally authorized to investigate the situation in Côte d'Ivoire.⁴⁴ The prior detention did not relate to the proceedings before this Court and accordingly

⁴¹ ICC-02/11-01/11-129-Anx15; ICC-02/11-01/11-129-Corr, paras.241-254.

⁴² ICC-02/11-01/11-129-Corr, para.302.

⁴³ ICC-02/11-01/11-129-Corr, para. 235.

⁴⁴ ICC-02/11-01/11-129-Corr, paras.255-257.

is not an issue that can be properly placed before the Chamber. The Rome Statute does not vest the Court with the authority to assess whether the Suspect's prior detention was in compliance or not with any applicable legal standards or national law.

32. While the Suspect was in CIV custody, the Prosecution had neither duty nor authority to supervise his detention and treatment. The contrary Defence argument is predicated on, first, the fallacious assumption that, had he not been in CIV detention, the Suspect would have been in the Prosecution's custody to ensure his availability for investigations.⁴⁵ In fact, the Prosecution could not have requested the Suspect's detention in order to immobilize him during the investigation.⁴⁶ The legal regime of the Court does not permit the Prosecutor to request a person's provisional detention pending the issuance of an arrest warrant.
33. The Defence further contends that the Prosecution's duty of care was in any event triggered when it received information regarding the Suspect's alleged ill-treatment in CIV detention.⁴⁷ Even if the Prosecution received information regarding ill-treatment by the CIV authorities, that would not have imposed any duty on the Prosecution to safeguard the Suspect's welfare or made the Prosecution answerable for mistreatment that thereafter was allegedly meted out against him. Nor was it required that the Prosecution act more expeditiously in order to prevent any alleged ongoing violations.⁴⁸ To the contrary, it would have been abusive to rush to the conclusion that an arrest warrant should be requested against the Suspect, given the complexity of the case and the statutory duty of objectivity under Article 54(1)(a). The Prosecution has a duty not to seek a warrant of arrest or summons until it has reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. In any event, in this case the Prosecution did act

⁴⁵ ICC-02/11/01/11-129-Corr, paras. 258-260.

⁴⁶ ICC-02/11-01/11-129, paras.258-267. See ICC-01/04-01/07-1335-Conf-Exp, para.55. [REDACTED].

⁴⁷ ICC-02/11-01/11-129, paras. 258-267.

⁴⁸ ICC-02/11-01/11-129, para.27.

with considerable expeditiousness in bringing its application for an arrest warrant.

34. The Prosecution further disagrees with the Defence assertions⁴⁹ that its obligations under Article 55 to protect the rights of persons in an investigation obligated the Prosecution to prevent the alleged abuse of those rights by CIV authorities during their own investigations. By its very terms, Article 55 provides rights to persons “in respect of an investigation under this Statute”; it does not apply to investigations or prosecutions by another entity, unrelated to this Court, and thus has no bearing on the Suspect’s prior detention while the national authority conducted a separate investigation into unrelated economic crimes.

2. Exceptional remedy of stay of proceedings is inapplicable to this case

35. The Defence request for the Court to deny its own jurisdiction in this case is essentially a request to permanently halt or stay the current proceedings. As in *Lubanga*, the Defence is claiming that alleged violations of the Suspect’s rights should deprive the Court of jurisdiction. But as the Appeals Chamber established in that case, and as Defence concedes,⁵⁰ the remedy of a stay of proceedings (temporary or permanent) is exceptional and will only be granted if the alleged violation reaches a high gravity threshold and makes a fair trial before this Court impossible.
36. As the Appeals Chamber stressed “[n]ot every infraction of the law or breach of rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.”⁵¹ As a consequence, the “power to stay proceedings should be sparingly exercised”.⁵² The Appeals Chamber emphasized

⁴⁹ ICC-02/11-01/11-129, paras.255-261.

⁵⁰ ICC-02/11-01/11-129-Corr, paras. 297-298.

⁵¹ ICC-01/04-01/06-772 OA4, para.30.

⁵² ICC-01/04-01/06-772 OA4, para.31.

that the remedy of a stay of proceedings applies only where: (a) “either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course”;⁵³ (b) “the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed”;⁵⁴ or (c) “[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process.”⁵⁵

37. In particular, the Appeals Chamber explained that, in light of Article 21(3): “[u]nfairness 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”.⁵⁶ However, the Appeals Chamber later clarified that this statement was made in the context of Defence allegations that the appellant was “*illegally detained and ill-treated by the [national] authorities and that the Prosecutor had illegally colluded with these authorities, in contravention of the rights of the appellant*”.⁵⁷ (Emphasis added).

38. Thus, the test has two limbs: (i) there must have occurred illegal conduct such as to make it otiose, repugnant to the rule of law, to put the accused on trial (significant violation) and (ii) an organ of the Court must have colluded or been involved in that illegal conduct (concerted action).

39. As already discussed, there was no such illegal collusion in this case. In relation to the Suspect’s detention prior to the issuance of the Chamber’s Article 58 decision, neither the Prosecutor nor the Court was in any way connected or involved in the Suspect’s detention. In relation to the period

⁵³ ICC-01/04-01/06-772 OA4, para. 31.

⁵⁴ ICC-01/04-01/06-772 OA4, para.39.

⁵⁵ ICC-01/04-01/06-1486 OA13, para.76.

⁵⁶ ICC-01/04-01/06-772 OA4, para.39.

⁵⁷ ICC-01/04-01/06-1486 OA13, paras. 78-79. See also Lord Bridge in *Bennett v Horseferry Road Magistrate’s Court*, House of Lords, 24 June 1993, 3 All ER (All England Law Reports), p.155 (quoted by the Appeals Chamber in ICC-01/04-01/06-772 OA4, para. 29).

following the Article 58 decision, while organs of the Court were involved in the process surrounding the Suspect's detention, there is no evidence of torture or serious mistreatment of the Suspect that in some way related to the "*process of bringing the appellant to justice for the crimes that form the subject-matter of the proceedings before the Court*".⁵⁸

40. The Prosecution does not concede – and in fact would dispute – the factual basis for the Suspect's claim that he was seriously mistreated in CIV custody, the first limb of the test.⁵⁹ It is, however, not necessary to reach that issue, because there was no involvement of the Court or any of its organs in the detention of the Suspect before the Article 58 decision.

3. *There has been no violation of Article 59(2) warranting non-assumption of jurisdiction*

41. Relying on Article 59(2), the Defence also contends that irregularities in the arrest proceedings in CIV prohibit this Court from exercising jurisdiction in the case. The Prosecution submits that there was no such violation of Article 59(2) in this case. Moreover, any alleged violation of Article 59(2), as submitted by Defence,⁶⁰ would also not constitute "*illegal conduct...such as to make it otiose, repugnant to the rule of law to put the accused on trial*",⁶¹ warranting non-assumption of jurisdiction or recourse to the exceptional remedy of a stay of proceedings.

⁵⁸ ICC-01/04-01/06-772 OA4, para.10 and 44; ICC-01/04-01/06-532, p.10.

⁵⁹ The Prosecution addressed the deficiencies in the Defence's 'medical evidence' of alleged ill-treatment and torture, in its response to the Defence's application for provisional release. See ICC-02/11-01/11-137-Conf, paras. 51-52, 54-63, See also ICC-02/11-01/11-129, paras. 209, ICC-02/11-01/11-152, paras. 24 to 37, in which the Chamber reviewed the Suspect's medical status and did not consider that any health issues warranted postponement of the confirmation hearing.

⁶⁰ ICC-02/11-01/11-129-Corr, paras.268-291.

⁶¹ ICC-01.04-01/06-772 OA4, para.30.

3.1. Prior period of detention is not relevant to the Chamber's assessment under Article 59(2)

42. Contrary to the Defence assertion, there is no obligation or power of the Court or of the national authorities who conducted the arrest proceedings prior to transfer of the Suspect, to review the legality of the Suspect's prior period of detention for the national proceedings unrelated to the process before this Court, pursuant to Article 59(2) or Rule 184.⁶² Article 59(2) only deals with arrest proceedings in the custodial State following a request for arrest and surrender made by this Court. As Pre-Trial Chamber I confirmed in the *Katanga* case, Article 59(2) of the Statute "*is only applicable to those proceedings that take place after the transmission by the Registrar of the relevant cooperation request for arrest and surrender*".⁶³
43. The Prosecution accordingly submits that a review by the Chamber of the period of detention of the Suspect by the CIV authorities that is unrelated to the process of bringing him to justice for crimes that form the subject-matter of the proceedings before this Court would exceed the proper scope of the Court's jurisdiction.

3.2. Scope of the Chamber's review under Article 59(2)

44. Article 59(2) does not provide or even imply that the Chamber shall remedy perceived defects in the national proceedings that are not attributable to this Court or any of its organs.
45. The Appeals Chamber rejected a similar argument made in the *Lubanga* case: the Defence in that case had argued that under Article 59 the Pre-Trial

⁶² ICC-02/11-01/11-129-Corr, paras.272-274, 287-288. See ICC-01/04-01/06-512, p.6. See also for example the description of the elements of the review under Article 59(2) in Schlunck, "Article 59 – Arrest proceedings in the custodial State" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) pp.767-768 – stating that "*The arrest proceedings are governed by the law of the custodial State. Article 59 does not tackle the criteria of proper process. Basically it means that the warrant be duly served of the person arrested*" and referring to "*the suspect's right to be informed about the charges and the grounds for the detention*".

⁶³ ICC-01/04-01/07-443-Conf-Exp, p.10. See also the Appeals Chamber decisions ICC-01/04-01/06-772 OA4, para.41 and ICC-01/04-01/06-824 OA7, paras.121-122.

Chamber was charged with reviewing the correctness of the decision of the national authority to sanction the enforcement of the warrant of arrest.⁶⁴

46. The Appeals Chamber rejected that position in conclusive terms: *“No such role is cast on the Court. 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.”*⁶⁵ Further, the Court *“does not sit in the process... on judgment as a court of appeal on the identificatory decision of the [national] judicial authority. Its task is to see that the process envisaged by [national] law was duly followed and that the rights of the arrestee were properly respected”*.⁶⁶
47. Pre-Trial Chamber I in the *Lubanga* case, whose approach on this issue was upheld by the Appeals Chamber, also emphasized that although a Chamber is not precluded from exercising a degree of jurisdiction over how the national authorities interpret and apply national law when that interpretation and application relate to matters which are referred directly back to that national law, *“the words ‘in accordance with the law of the State’ means that it is for national authorities to have primary jurisdiction for interpreting and applying national law”*. The CIV authorities were obliged to determine whether in the execution of the Court’s request for cooperation the Suspect’s rights were respected and the arrest carried out with due regard for proper process.⁶⁷

⁶⁴ ICC-02/11-01/11-129-Corr, para.276.

⁶⁵ ICC-01/04-01/06-772 OA4, para.41.

⁶⁶ ICC-01/04-01/06-772 OA4, para.41.

⁶⁷ ICC-01/04-01/06-512, p.6.

3.3. A proper procedure was adopted and the rights of the Suspect respected pursuant to Article 59(2)

48. In this case, the arrest and surrender process was duly followed and the rights of the Suspect for that purpose respected as required under Article 59(2).

(a) Notification of arrest warrant and statutory rights, and appearance before competent judicial authorities with lawyers present

49. As the Defence concedes, the Registry delivered the arrest warrant for the Suspect to the CIV authorities on 25 November 2011.⁶⁸

50. The Defence further concedes that on 29 November 2011 the Suspect appeared before a national judicial organ, with his lawyers present, for arrest proceedings in relation to the arrest warrant, pursuant to and consistent with Article 59.⁶⁹ Indeed, during the entire proceedings, the Suspect was assisted by counsel.

51. The proceedings complied with the requirements of Article 59; the authorities determined that the Suspect was the person sought, [REDACTED].⁷⁰ He also was given the opportunity to make a request for interim release, as envisaged under Article 59(3), as the Defence itself acknowledges.⁷¹ [REDACTED].⁷² Contrary to what the Defence suggests, the Pre-Trial Chamber was not required to recommend that the Suspect be granted provisional release.⁷³

⁶⁸ ICC-02/11-01/11-129-Corr, para.269.

⁶⁹ ICC-02/11-01/11-129, paras.271

⁷⁰ [ICC-02/11-01/11-12-Conf-Exp; ICC-02/11-01/11-12-Conf-Exp-Anx4.

⁷¹ ICC-02/11-01/11-129-Corr, paras. 276 and 289.

⁷² ICC-02/11-01/11-12-Conf-Exp. As alluded to by Defence. See also ICC-02/11-01/11-129-Corr, para.289.

⁷³ ICC-02/11-01/11-129-Corr, para.289.

(b) It was not open to the Suspect's lawyers to question the legality or enforcement of the ICC arrest warrant

52. Contrary to the Defence allegation that it was unable to prepare a defence for its client,⁷⁴ in fact the defence to a surrender request is limited, since the national surrender proceeding is not the time to challenge this Court's criminal case. Thus, the particular allegations that the surrender procedure violated his rights are ill-founded.

53. The Defence asserts that the surrender hearing was defective because the Suspect's counsels were not given an opportunity to make arguments challenging the legality of the transfer before the CIV authorities.⁷⁵ However, under Article 59(4) it was not open to the CIV authorities to consider whether the arrest warrant was properly issued in accordance with Article 58(1)(a) and (b). To be sure, the Suspect can contest the legitimacy of the warrant before this Court, but this Court should not be asked to terminate the pending proceedings on the ground that the CIV authorities wrongly accepted this Court's duly-issued warrant as facially valid.⁷⁶

54. Moreover, Annex 13 of the Defence Motion indicates that the primary complaints made by the Defence before the national authorities concerned the Suspect's prior period of detention from 11 April 2010.⁷⁷ As has previously been explained, this issue is not relevant to the proceedings before this Court, and as such, was not a relevant consideration for the national authorities pursuant to Article 59.

⁷⁴ ICC-02/11-01/11-129, para.276.

⁷⁵ ICC-02/11-01/11-129-Corr, para.276.

⁷⁶ ICC-01/04-01/06-772 OA4, para.41.

⁷⁷ ICC-02/11-01/11-129-Anx13, pp.7-8. See also ICC-02/11-01/11-129-Corr, paras.272-274.

(c) There was no violation of Article 59 in that the CIV authorities did apply relevant CIV laws applicable during the arrest and surrender proceedings

55. Contrary to Defence assertions, it is evident from the record of the proceedings and decision regarding the arrest and surrender of the Suspect that the CIV authorities applied national laws, did determine whether in the execution of the Court's request for cooperation the Suspect's rights were respected, and that the arrest and surrender was being carried out with due regard for proper process.⁷⁸

56. The Defence alleges *inter alia* that the Suspect's rights were violated because he only received notice of the arrest proceedings on 29 November 2011.⁷⁹ The Defence asserts that Article 197 of the CIV Code de procédure pénale ('CIV Code') applies and requires that all parties be given more notice before a hearing takes place. The Defence further asserts that Article 199 of the CIV Code applied and required that the arrest and surrender proceedings be conducted in private or closed session and not in public. The Defence alleges that the presence of members of the United Nations Operation in Côte d'Ivoire ("UNOCI"), and Commander Fofié and members of his troops during the proceedings meant the proceedings were conducted in public, in violation of the Suspect's rights under Article 199.⁸⁰ And, it claims that the CIV court failed to issue a reasoned decision, as it is obligated to do.

57. As Pre-Trial Chamber I in the *Lubanga* case emphasized, the national authority has primary jurisdiction to interpret and apply the relevant national laws.⁸¹ Moreover, the Appeals Chamber confirmed that the Court does not act as a court of appeal vis-à-vis the process conducted by the national authorities

⁷⁸ ICC-01/04-01/06-512, p.6; ICC-02/11-01/11-129-Anx4.

⁷⁹ ICC-02/11-01/11-129-Corr, para.291.

⁸⁰ ICC-02/11-01/11-129-Corr, para. 277. Article 199 of the Penal Code: « Les débats se déroulent et l'arrêt est rendu en Chambre du conseil. Après le rapport du conseiller, le Procureur-Général et les conseils des parties qui en ont fait la demande présentent des observations sommaires. La Chambre d'Accusation peut ordonner la comparution personnelle des parties ainsi que l'apport des pièces à conviction. »

⁸¹ ICC-01/04-01/06-512, p.6.

and any ensuing decision. Rather, its task is to see that the process envisaged by national law was followed and the Suspect's rights respected.⁸²

58. Pre-Trial Chamber I's assessment in that case was correctly limited to verifying that there was no material breach of Article 59(2) of the Statute in the procedure followed by the national authorities during the execution of the Court's cooperation request.⁸³ In this instance, the breaches alleged by the Defence of Articles 197 or 199 of the CIV Code do not amount to "material breaches" of Article 59(2) of the Rome Statute.
59. Further, the *Procès-Verbal* to which the Defence refers indicates that contrary to its allegation,⁸⁴ a reasoned decision was given pursuant to Article 59 by the competent judicial authority. This decision set forth the basis for validating the correctness of the procedure for arrest and surrender. It also provided the basis for rejecting the request for interim release and the arguments made by the Suspect's counsel concerning whether the proper process had been followed in the arrest proceedings.⁸⁵
60. Nevertheless, the Prosecution notes that the CIV has filed observations in response to the Defence Motion.⁸⁶ If the Chamber considers that information from the CIV authorities regarding their applicable laws and the modalities of the transfer is required, then it would be appropriate for the Chamber to invite the CIV authorities to make observations directly on these specific issues.⁸⁷

⁸² ICC-01/04-01/06-772 OA4, para.41.

⁸³ ICC-01/04-01/06-512, p.6.

⁸⁴ ICC-02/11-01/11-129-Corr, para.278.

⁸⁵ ICC-02/11-01/11-12-Conf-Exp-Anx4.

⁸⁶ ICC-02/11-01/11-154 and ICC-02/11-01/11-156.

⁸⁷ The Prosecution observes that, as the CIV has argued (ICC-02/11-01/11-154), the Chamber is empowered to authorise the CIV to make observations in response to the Defence Motion. The Prosecution refers to Regulation 28 of the Regulations of the Court and observes that this practice of seeking the national authorities observations on jurisdictional challenges (including where relevant compliance with Article 59(2) procedures) has been adopted in other cases for instance in *Prosecutor v. Bemba* (ICC-01/05-01/08-T-20-CONF-ENG CT2, p.2, 1.7-p.4, 1.8) and *Prosecutor v. Mbarushimana* (ICC-01/04-01/10-377). The Prosecution also refers by analogy to Rule 59(1)(a) whereby those who have referred a situation pursuant to Article 13 are to be informed of any challenge to jurisdiction or admissibility and may make representations in writing to the Chamber. Although the CIV authorities are not a referring State Party within the meaning of Article 13, they are a relevant

(d) Proper procedure was also adopted after the Suspect's transfer to the Court

61. [REDACTED].⁸⁸ [REDACTED]⁸⁹ [REDACTED].⁹⁰ [REDACTED].⁹¹
[REDACTED].⁹² [REDACTED].⁹³

62. Accordingly, the period of detention and processes as described were appropriate and compliant with the Statute, Rules and Regulations of the Court.

3.4. The Chamber is not required to determine whether the Rome Statute violated CIV law

63. The Defence asserts that the Rome Statute violates CIV constitutional law, repeating that no valid ratification was made under Article 12(3) by the CIV, so that arrest and surrender proceedings based on Article 59 violated the Suspect's rights under CIV law.⁹⁴ However the question of whether CIV constitutional or domestic law is consistent with the Rome Statute is not relevant to the Court's own determination of its jurisdiction in this case. The Court is only required to assess whether the CIV, as a State not Party to the Statute, made a valid declaration under Article 12(3) of the Statute.

64. Further, a declaration made under Article 12(3) of the Statute by a State that is not a party to the Statute is an act of acceptance of the application of the Rome Statute as a treaty and binds the State, even if for a limited purpose and specific time period.⁹⁵ Rule 44(1) refers to the requirement that the Registrar

State that can be invited to provide clarity to the Chamber on the specific issues raised in the challenge insofar as it relates to the interpretation and application of CIV national law.

⁸⁸ ICC-02/11-01/11-12-Conf-Exp, p.4; ICC-02/11-01/11-12-Conf-Exp-Anx6.

⁸⁹ ICC-02/11-01/11-12-Conf-Exp, p.5; ICC-02/11-01/11-12-Conf-Exp-Anx14.

⁹⁰ ICC-02/11-01/11-12-Conf-Exp, p.6; ICC-02/11-01/11-12-Conf-Exp-Anx15.

⁹¹ ICC-02/11-01/11-12-Conf-Exp, p.5; ICC-02/11-01/11-12-Conf-Exp-Anx15.

⁹² ICC-02/11-01/11-12-Conf-Exp, p.6; ICC-02/11-01/11-12-Conf-Exp-Anx15.

⁹³ ICC-02/11-01/11-12-Conf-Exp-Anx15.

⁹⁴ ICC-02/11-01/11-129-Corr, para. 279.

⁹⁵ Thus, although not a party to the Rome Statute, the Government of CIV has, as a consequence of the declaration, accepted to be bound by the provisions of the treaty for that purpose, thereby bringing into application Article 27 of the Vienna Convention of the Law of Treaties (1969) which prohibits a party to a treaty from invoking its internal law as justification for non-compliance. Article 18 of the Vienna Convention further

inform a State that makes a declaration under Article 12(3) that the declaration *“has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5...and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply”*.⁹⁶

CONCLUSION

For all the reasons set out above, the Prosecution requests that the Pre-Trial Chamber reject the Defence’s Motion in its entirety.



Fatou Bensouda, Prosecutor

Dated this 28th day of June 2012

At The Hague, The Netherlands

requires signatories to refrain from acts which would defeat the object and purpose of a treaty; CIV being a signatory to the Rome Statute.

⁹⁶ On the drafting history of Rule 44 see John Holmes, ‘Jurisdiction and Admissibility’ in R.Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp.326-327.