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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

**With three Confidential *Ex parte* OPCV only Annexes
and same Public Redacted Annexes**

**Observations on behalf of victims
regarding the Defence Challenge to the Jurisdiction of the Court**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

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

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

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

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

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

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

⁴ See the *“Rectificatif de la Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo (ICC-02/11-01/11-129)”*, No. ICC-02/11-01/11-129-Corr, 30 May 2012 (dated 29 May 2012) (the “Defence Challenge”).

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

⁶ *Idem.*, p. 25.

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

4. On 5 June 2012, the Defence submitted, on a confidential basis, a request for postponement of the date of the confirmation of charges hearing. On 12 June 2012, the Defence submitted a public redacted version of said request.⁸

5. On 8 June 2012, in her capacity of common legal representative, the Principal Counsel of the OPCV (the "Principal Counsel") requested, by email, to be given access to the confidential material related to the Defence Challenge to be able to represent the interests of her clients.⁹

6. In an email sent on the same day, the Defence opposed said request and submitted, in particular, that the Principal Counsel did not demonstrate that the personal interests of her clients are concerned by the confidential material related to the Defence Challenge.¹⁰

7. On 12 June 2012, the Single Judge of the Pre-Trial Chamber I partly granted the Defence request for postponement and decided to postpone the commencement of the confirmation of charges hearing to 13 August 2012.¹¹

8. On 15 June 2012, the Pre-Trial Chamber I issued the "Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court

⁷ *Ibid.*, p. 26.

⁸ See "Version publique expurgée de la requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012 (ICC-02/11-01/11-140-Conf)", No. ICC-02/11-01/11-140-Red2, 12 June 2012.

⁹ See the email sent by the Common Legal Representative to the Senior Legal Advisor to the Pre-Trial Division on 8 June at 16:02.

¹⁰ See the email sent to by the Principal Counsel of the Defence to the Senior Legal Advisor to the Pre-Trial Division on 8 June 2012 at 17:58.

¹¹ See the "Decision on the "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012"" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-152-Red, 12 June 2012, p. 12.

pursuant to article 19 of the Rome Statute”¹², whereby the Chamber decided, *inter alia*, to: (i) appoint the OPCV, for the purpose of proceedings following the Defence Challenge, to represent those victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber;¹³ (ii) invite the OPCV to submit, by 27 June 2012, written observations on the Defence Challenge on behalf of both victims admitted to participate in the proceedings related to the confirmation of charges hearing and victims who have submitted applications to participate in the proceedings in the present case and whose applications have not yet been assessed by the Chamber;¹⁴ and (iii) instruct the Victims Participation and Reparations Section to provide to the OPCV the necessary information in relation to all victims related to the present case whose applications for participation in the proceedings have not been communicated to the Chamber.¹⁵

9. On 18 June 2012, the Principal Counsel submitted a “Request to access documents in relation to the Defence Challenge to the Jurisdiction of the Court”,¹⁶ wherein she requested to order the notification to the OPCV of (i) the Annexes 5, 9, 10 to 12, 25 to 44, 46 to 49 and 52 attached to the Defence Challenge, and (ii) any other document filed confidential in the case record which the Chamber might identify as relevant to article 19 proceedings.¹⁷

10. On 21 June 2012, the Defence filed its “Observations de la Défense du Président Gbagbo au sujet de la requête du Représentant Légal Commun des Victimes demandant l’accès aux annexes confidentielles de la requête de la Défense

¹² See the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-153, 15 June 2012.

¹³ *Idem.*, p. 5.

¹⁴ *Ibid.*, par. 7 and p. 5.

¹⁵ *Ibid.*, par. 8.

¹⁶ See the “Request to access documents in relation to the Defence Challenge to the Jurisdiction of the Court”, No. ICC-02/11-01/11-155, 18 June 2012.

¹⁷ *Idem.*, p. 9.

contestant la compétence de la Cour”¹⁸ wherein it argued, *inter alia*, that the Principal Counsel already had been granted access to all relevant information for the fulfilling of her mandate and that in any event confidential documents cannot be notified to the victims who are not parties to the proceedings but merely participants.¹⁹

11. In accordance with the Chamber’s instructions, the Principal Counsel submits her observations in response to the Defence Challenge on behalf of victims authorised to participate in the proceedings and on behalf of victims having communicated with the Court in relation to the case.

12. As a preliminary remark, the Principal Counsel submits that, to date, she has not been given access to the confidential Annexes to the Defence Challenge. It follows that her capacity to fully investigate the factual circumstances related to the Defence Challenge may be undermined, despite the Defence’s assertions to the contrary.²⁰ The Principal Counsel submits in this regard that the Office of the Prosecutor is in a better position to carry out such an investigation since it has had access to all relevant documents. Consequently, she will present her observations in response to the Defence Challenge based on the material she has been given access to. The Principal Counsel respectfully requests the Chamber to reserve a right to submit additional observations regarding the Defence Challenge, should access to relevant confidential material be granted to her at a later stage of the proceedings.

II. LEGAL SUBMISSIONS

13. The Defence argues first that through the Declaration dated 18 April 2003 the Côte d’Ivoire accepted the exercise of jurisdiction by the Court with respect to the crimes allegedly committed on the territory of the Côte d’Ivoire between 19

¹⁸ See the “Observations de la Défense du Président Gbagbo au sujet de la requête du Représentant Légal Commun des Victimes demandant l’accès aux annexes confidentielles de la requête de la Défense contestant la compétence de la Cour”, No. ICC-02/11-01/11-160, 21 June 2012.

¹⁹ *Idem*, paras. 30-35 and 44-46.

²⁰ *Ibid.* See also *supra* para. 6.

September 2002 and 18 April 2003 only and that the scope of said declaration cannot be interpreted in a broader way.²¹ It is further argued that the letters submitted by Mr. Alassane Ouattara to the Court on 14 December 2010 and 3 May 2011 are not a valid “declaration” within the meaning of article 12(3) of the Rome Statute.²² In addition, the Defence contends that the Court should refuse to exercise its jurisdiction in respect of the Côte d’Ivoire given the illegality of the suspect’s arrest and the detention by the Ivoirian authorities, as well as because of the fact that the suspect was subjected to inhuman treatments and to torture while in detention.²³ In this regard, the Defence requests the Chamber to stay the proceedings.²⁴ Finally, the Defence argues that the Prosecution failed to comply with its prosecutorial duties with due diligence, and in particular to intervene in order to ensure the respect of the suspect’s rights while being in detention before his surrender to the Court.²⁵

1) *On the validity and the scope of the Declaration of 18 April 2003*

14. First and foremost, the Principal Counsel observes that in the decision dated 3 October 2010,²⁶ Pre-Trial Chamber III concluded 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. Indeed, 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*”.²⁷ Accordingly, the Principal Counsel contends that the issue has already been ruled upon.

²¹ See the Defence Challenge, *supra* note 4, par. 52.

²² *Idem.*, paras. 47 to 108.

²³ *Ibid.*, paras. 109 to 234.

²⁴ *Ibid.*, par. 304.

²⁵ *Ibid.*, paras. 235 to 304.

²⁶ See the “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” (Pre-Trial Chamber III), No. ICC-02/11-14, 3 October 2011.

²⁷ *Idem.*, par. 15.

15. Should the Chamber decide to entertain, yet again, the merits of the Defence allegations regarding the validity and the scope of the Declaration of 18 April 2003, the Principal Counsel respectfully presents the following observations.

16. Through its Declaration of 18 April 2003, the Government of the Côte d'Ivoire accepted the Court to exercise its jurisdiction in order to identify, to prosecute and to bring to justice perpetrators of any act committed on the territory of the Côte d'Ivoire as from 19 September 2002.²⁸ The Declaration explicitly specifies that it is valid for an undetermined period of time.²⁹

17. The Principal Counsel submits that the Declaration dated 18 April 2003 obviously demonstrates a clear intention of the Côte d'Ivoire to accept the jurisdiction of the Court with respect to all crimes provided for by the Rome Statute that were presumably committed on the territory of the State since 19 September 2002. Nothing in the Declaration suggests that the intention of the State was to limit the scope of its acceptance of the jurisdiction of the Court whether regarding a specific timeline, or a specific part of the territory or even a specific subject-matter. The Principal Counsel also notes that while questioning the scope of said Declaration, the Defence does not question its validity under either the Ivorian law or international law.

18. Pursuant to article 12(3) of the Rome Statute, "[a non-State Party] *may, by declaration lodged with the Registrar, accept the exercise of jurisdiction of the Court with respect to the crime in question*". In accordance with rule 44(2) of the Rules of Procedure and Evidence, "*a declaration with the Registrar pursuant to article 12, paragraph 3, [...] has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation*". While said provisions enable a non-State Party to accept the jurisdiction of the Court with respect to specific crimes only (*i.e.* the use of

²⁸ See Annex 16 to the Defence Challenge, *supra* note 4.

²⁹ *Idem*.

the terms “crime in question”), they do not bar in any way a non-State Party from accepting the jurisdiction of the Court with respect to all crimes referred to in article 5 of the Rome Statute should they be relevant to the situation in question. In other words, on the one hand, nothing in said provisions bars a non-State Party from lodging a declaration for acceptance of the jurisdiction of the Court with a broader or a general scope of applicability within the context of the situation in question. On the other hand, said provisions do not request a non-State Party to provide, within its declaration of acceptance of the jurisdiction of the Court, either specific information in term of time, territory or subject-matter, or supporting documentation.

19. In this regard, article 12(2) of the Rome Statute provides that the provision only applies “*in the case of article 13, paragraph (a) or (c)*”, thus only when a situation “*is referred to the Prosecutor by a State Party*” or when “[t]he Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15”.³⁰ It follows that a declaration by a non-State Party is only a precondition to the exercise of the jurisdiction of the Court. Therefore, it is the responsibility of the Prosecutor to define the scope of its investigations with respect of specific crimes or specific individuals within the context of a certain situation, respecting the principle of complementarity.

20. Furthermore, as made clear in rule 44 of the Rules of Procedure and Evidence, the consequence of a declaration under article 12(3) of the Rome Statute is the acceptance of the jurisdiction of the Court in relation to “*the situation*”. The jurisprudence of the Court provides guidelines as far as the interpretation of the term “situation” is concerned, for the purpose of determining the jurisdiction of the Court.

21. In particular, in the case of *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I upheld the contention of the Government of the Democratic Republic of the Congo (the “DRC”) according to which “*il revien[t] à la Cour de tirer les*

³⁰ See articles 13(a) and (c) of the Rome Statute.

conséquences juridiques des observations des Autorités".³¹ It then interpreted the DRC referral with a broad approach. The Chamber held then that in terms of territorial scope, the use of the wording "*dans mon pays*" "*makes explicit reference to the DRC country as a whole*".³² Regarding the temporal scope, the Chamber held that the temporal expressions used in the referral, such as the word "*depuis*", "*clearly indicate the object of such referral to be an ongoing situation of crisis*".³³ Furthermore, the Chamber rejected the contention of the Defence according to which the use of past tense in the referral indicated the intention of the DRC to subject to the jurisdiction of the Court only crimes committed prior to the date of referral,³⁴ while considering this as "*an argument of a speculative nature*".³⁵ As to the general scope of a referral, the Chamber held that "*a referral cannot limit the Prosecutor to investigate only certain crimes, e.g., crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.*"³⁶ Thus, the decisive test is whether the crimes "*are sufficiently linked to the situation of crisis which was ongoing at the time of the referral*"³⁷, and accordingly "[i]t is the existence, or non-existence, of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral".³⁸ It even specified that "*by its very nature, the link required for an event to be encompassed in the scope of a situation can stretch over a number of years*".³⁹

³¹ See the "Observations des Autorités congolaises sur l'exception d'incompétence de la Cour pénale internationale soulevée par la Défense dans l'affaire le Procureur contre Callixte MBARUSHIMANA (Décision n° ICC-01/04-01/10 du 16 août 2011)", No. ICC-01/04-01/10-440-Conf-Anx1, 22 September 2011, par. 5. See also the "Decision on the 'Defence Challenge to the Jurisdiction of the Court'" (Pre-Trial Chamber I), No. ICC-01/04-01/10-451, 26 October 2011, par. 21.

³² *Idem.*, par. 26.

³³ *Ibid.*

³⁴ *Ibid.*, par. 23.

³⁵ *Ibid.*, par. 26.

³⁶ *Ibid.*, par. 27.

³⁷ *Ibid.*, par. 16.

³⁸ *Ibid.*, par. 41.

³⁹ *Ibid.*, par. 50.

22. The Principal Counsel submits that said interpretation of the scope of the investigative responsibility of the Prosecutor within a situation should apply by analogy when defining the scope of the jurisdiction of the Court based on a declaration under article 12(3) of the Rome Statute. In particular, the Principal Counsel submits that in the present case when a non-State Party accepts the jurisdiction of the Court in relation to a certain situation in a broad way, *i.e.* without restricting the scope of its declaration in term of territory, time or subject-matter, the investigative responsibility of the Prosecutor within the situation in question cannot be interpreted as being limited to a specific period of time or to specific crimes or to individuals. In addition, in the present instance, the Government of the Côte d'Ivoire – whose legitimacy is not questioned by the Defence – could have specified the scope of its Declaration of 18 April 2003 in term of time, territory or subject-matter at a later stage but never deemed it necessary to do so.

23. Regarding the contention of the Defence according to which said jurisprudence of the Court is not applicable for the purpose of determining the jurisdiction of the Court based on a declaration under article 12(3) of the Rome Statute,⁴⁰ the Principal Counsel submits that the scope of the investigative responsibility of the Prosecutor within a situation shall be interpreted in a similar manner throughout the proceedings, so as to preserve the consistency and the legal certainty of the whole system enshrined by the legal texts of the Court.

24. In addition, a broad interpretation of a declaration to accept the jurisdiction of the Court is supported by international law and jurisprudence. In order to support a restrictive interpretation of a declaration to accept the jurisdiction of the Court, the Defence bases its contentions on the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (the “Guiding Principles”).⁴¹ In this regard, the Principal Counsel submits that the Guiding

⁴⁰ See the Defence Challenge, *supra* note 4, paras 80 and 81.

⁴¹ *Idem.*, paras. 70 and 71.

Principles adopted by the International Law Commission (the “ILC”) on 2006,⁴² apply solely to “purely” unilateral act *“formulated by States in exercise of their freedom to act on the international plan”*.⁴³ While at the very beginning of its work on the topic, in 1997, the ILC considered *“the possible inclusion of unilateral acts carried out by States in the context of international justice [...] in particular [...] the characterization of acceptance of the optional clause in article 36, paragraph 2, of the Statute of ICJ as a unilateral act”*,⁴⁴ the *“unilateral acts carried out by States in the context of international justice”* were finally excluded from the scope of the Guiding Principles because *“such acts have a treaty basis”*.⁴⁵ The ILC was thus of the opinion that treaty based acts should be dealt with pursuant to the law of treaties, instead of the law applicable to unilateral declarations of States.⁴⁶

25. A declaration to accept the jurisdiction of the Court clearly falls within the framework of the Rome Statute, and is thus treaty based. There is also no doubt that it falls *“[with]in the context of international justice”* within the meaning of the ILC’s view. Accordingly, the Guiding Principles are not applicable for the purpose of interpreting a declaration to accept the jurisdiction of the Court under article 12(3) of the Rome Statute.

26. Regarding the Defence reference to the jurisprudence of the International Court of Justice (the “ICJ”) according to which *“consideration must be given to the intention of the government at the time [a declaration] was given”*,⁴⁷ the Principal Counsel submits that the jurisdiction of the ICJ results from a clear reciprocity principle as it

⁴² See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the International Law Commission at its Fifty-eighth session, 2006 (the “Guiding Principles”). The document is available at: http://untreaty.un.org/ilc/texts/9_9.htm.

⁴³ See the Report of the International Law Commission on the work of its fifty-eighth session, UN Doc. A/61/10, p. 367, par. 174.

⁴⁴ See the Yearbook of the International Law Commission 1997, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1997/Add.1 (Part 2), p. 65, par. 204.

⁴⁵ *Idem*.

⁴⁶ *Ibid.*, par. 203.

⁴⁷ See the Defence Challenge, *supra* note 4, paras. 68 and 69.

concerns inter-State settlement of disputes.⁴⁸ However, the reciprocity is not required when a non-State Party lodges a declaration to accept the jurisdiction of the Court under the Rome Statute. Accordingly, the ICJ jurisprudence is not relevant for the purpose of defining the scope of a declaration to accept the jurisdiction of the Court under article 12(3) of the Rome Statute.

27. This approach is supported by the international human rights jurisprudence.

28. The Inter-American Court of Human Rights (the “IACHR”) has interpreted the scope of a declaration of acceptance of jurisdiction from its member States in a broad way, and has limited States’ discretion in this regard. The *rationale* is that “international settlement of human rights cases [...] cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice); since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter”.⁴⁹ As one Judge of the IACHR put it, a human rights Court is “confronted with superior values shared by our community of nations that cannot be left to the mercy of the vicissitudes of the individual ‘will’ of States”.⁵⁰ The IACHR also held that human rights treaties are inherently distinct from general public international law treaties, as they are not aimed at regulating the relations between States, but bear “always in mind the pressing needs of protection of the victims, and requiring, in this way, the humanization of the postulates of classic Public International Law”.⁵¹

⁴⁸ See *inter alia* ICJ, *Fisheries Jurisdiction Case, Spain v. Canada, Jurisdiction of the Court*, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 453, par. 46.

⁴⁹ See IACHR, *Case of Ivcher-Bronstein v. Peru*, Judgment, Series C No. 54, 24 September 1999, par. 48.

⁵⁰ See IACHR, *Case of Serrano-Cruz Sisters v. El Salvador*, Dissenting Opinion of Judge A.A. Cancado Trindade, Series C No. 118, 23 November 2004, par. 6.

⁵¹ See IACHR, *Case of Blake v. Guatemala*, Separate Concurring Opinion of Judge A.A. Cancado Trindade, Series C No. 48, 22 January 1999, par. 8.

29. Although the Rome Statute is not a human rights treaty, it does share with them the above-mentioned “*specific feature*” of aiming at protecting “*superior values shared by our community*”. By the same token, although the Court is not a human rights Court, it also possesses the same feature that distinguishes a human rights Court from a judicial body that aims at solving interstates disputes. Accordingly, the Principal Counsel submits that for the purpose of interpreting the scope of a declaration to accept the jurisdiction of the Court under article 12(3) of the Rome Statute, the approach adopted within the IACHR jurisprudence more adequately reflects the specific nature of the Court as opposed to a permissive stance taken by the ICJ, as far as the latter reflects a voluntarist conception of international law.

30. In the same vein, a member of the UN Human Rights Committee stated that:

“[i]t is the obligation of an international human rights body such as the Committee to interpret a covenant as broadly as possible when it is a matter of recognizing or guaranteeing rights or the international competence to exercise oversight and to interpret it as narrowly as possible when it is a matter of restricting rights or the international competence of oversight bodies”.⁵²

31. Regarding the subject-matter scope of a declaration, for instance, the UN Human Rights Treaty Bodies system provides that a non-State Party wishing to accept the competence of a body to consider complaints or communications from individuals, can only do so with respect to possible violation of all human rights guaranteed by a corresponding international treaty, with no exception. For example, article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the declaration should recognise communications claiming violation “*of any of the rights set forth in this Convention*”.⁵³ In the same vein, a declaration under article 22 of the Convention against Torture shall be made with

⁵² See HRC, *Cifuentes Elgueta v. Chile*, Individual opinion of Committee members Ms. Helen Keller and Mr. Fabian Salvioli (dissenting), Case No. 1536/2006, par. 9.

⁵³ See article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination. The document is available at: <http://www2.ohchr.org/english/law/cerd.htm>.

regard to communications that claim *“a violation by a State Party of the provisions of the Convention”*.⁵⁴

32. The Principal Counsel contends that provided the clear treaty nature of the Rome Statute and pursuant to its article 21, a declaration to accept the jurisdiction of the Court should be interpreted in accordance with the Vienna Convention on the Law of Treaties (the “Vienna Convention”), and in particular *“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”*.⁵⁵

33. It is generally recognised that as an international treaty, the Rome Statute is subject to rules and principles of interpretation that have been codified in the Vienna Convention.⁵⁶ The Appeals Chamber has confirmed the application of the provisions of the Vienna Convention when interpreting the Rome Statute.⁵⁷ In particular, the Appeals Chamber stated that:

“[t]he interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969) [...]. The Appeals Chamber shall not advert to the definition of ‘good faith’, save to mention that it is linked to what follows and that is the

⁵⁴ See article 22 of the Convention against Torture. The document is available at <http://www2.ohchr.org/english/law/cat.htm>.

⁵⁵ See the Vienna Convention on the Law of Treaties, art. 31(1). The document is available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁵⁶ See SCHABAS (W.A.), *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, New York, 2010, p. 387.

⁵⁷ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 13 July 2006, par. 33; the “Separate Opinion of Judge Georgios M. Pikis to the Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”” (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, par. 15; the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”” (Appeals Chamber), No. ICC-01/04-01/06-1486 OA13, 21 October 2008, par. 40; the “Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I” (Appeals Chamber), No. ICC-01/04-01/07-776 OA7, 26 November 2008, par. 82.

*wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-subject of the law read as a whole in conjunction with the section of an enactment on its entirety. Its object may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.*⁵⁸

34. Accordingly, the contention of the Defence that the Vienna Convention is not applicable when interpreting the provisions of the Rome Statute⁵⁹ is without merit and groundless.

35. In conclusion, the Principal Counsel submits that while applying, in accordance with the Vienna Convention, the “ordinary meaning” to the language used in the Declaration of 18 April 2003, it is crystal clear that the Côte d’Ivoire accepted the jurisdiction of the Court with respect to all crimes provided for by the Rome Statute that were presumably committed on its territory since 19 September 2002, with no restriction in term of time, territory or subject-matter. Should the Côte d’Ivoire had wished to accept the jurisdiction of the Court in a narrow manner, as argued by the Defence, it would have had either to explicitly specify the applicable limitations in the text of the Declaration of 18 April 2003, or to amend said Declaration accordingly at a later stage. Thus, the Declaration of 18 April 2003 is to be interpreted as a general acceptance of the jurisdiction of the Court with no restriction whatsoever.

2) *On the validity of letters submitted by Mr. Alassane Ouattara to the Court on 14 December 2010 and 3 May 2011*

⁵⁸ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 13 July 2006, par. 33.

⁵⁹ See the Defence Challenge, *supra* note 4, par. 69.

36. Provided the general character of the acceptance by the Côte d'Ivoire of the jurisdiction of the Court, the questions on whether the letters submitted by Mr. Alassane Ouattara to the Court on 14 December 2010 and 3 May 2011 constitute a valid "declaration" within the meaning of article 12(3) of the Rome Statute and on whether Mr. Alassane Ouattara was a legitimate authority to represent the Côte d'Ivoire, are meritless. Indeed, as far as the Declaration of 18 April 2003 provides for a general acceptance of the jurisdiction of the Court with no restriction in term of time, territory and subject-matter, this Declaration should be considered valid for an undetermined period of time and therefore, no confirmation or approval by the Côte d'Ivoire was needed. The Principal Counsel emphasises that the Defence itself recognises that the Declaration of 18 April 2003 contains no restriction in term of period of validity.⁶⁰ Accordingly, the Declaration of 18 April 2003 is still valid to date as far as the Côte d'Ivoire never sought to withdraw or to amend it in any way.

37. As far as the Defence questions the legitimacy of Mr. Alassane Ouattara to act on behalf of the Côte d'Ivoire,⁶¹ the Principal Counsel observes that by its decision No. CI-2011-EP-036/04-05/CC/SG dated 4 May 2011, the *Conseil Constitutionnel* of the Côte d'Ivoire, which is argued by the Defence to be the highest instance of the country to approve and to validate the results of elections of President,⁶² (i) declared Mr. Alassane Ouattara as President of the Côte d'Ivoire, (ii) approved and validated all previous decisions taken by Mr. Ouattara, and (iii) declared null and void all other decisions that are inconsistent with the current decision.⁶³ It follows that the *Conseil Constitutionnel* recognised, *inter alia*, on the one hand, the validity of the letters submitted by Mr. Alassane Ouattara to the Court on 14 December 2010 and 3 May 2011 and, on the other hand, the invalidity of the previous decisions declaring Mr. Laurent Gbagbo as President. The validity of the decision of the *Conseil Constitutionnel* No. CI-2011-EP-036/04-05/CC/SG dated 4 May 2011 has never been

⁶⁰ See the Defence Challenge, *supra* note 4, par. 75.

⁶¹ *Idem.*, paras. 94 to 104.

⁶² *Ibid.*, par. 99.

⁶³ See Annex 3 to the Defence Challenge, *supra* note 4, p. 4.

challenged either under the Ivorian law or the international law and has moreover never been questioned by the international community.

38. Consequently, the Defence assertions with regard to an alleged illegality of the decision of the *Conseil Constitutionnel* No. CI-2011-EP-036/04-05/CC/SG dated 4 May 2011⁶⁴ together with its contention as to the illegitimacy of Mr. Alassane Ouattara to act on behalf of the Côte d'Ivoire are of a purely speculative nature and are without merit.

39. Finally, the Principal Counsel submits that even assuming that the letters of 14 December 2010 and 3 May 2011 cannot be considered a declaration within the meaning of article 12(3) of the Rome Statute due to their alleged non-compliance with the formal requirements,⁶⁵ they make clear and unambiguous that the intention of the Côte d'Ivoire has always been to accept the jurisdiction of the Court with no restriction therein in term of time, territory and subject-matter.

3) *On the impact of alleged violations of the suspect's rights on the exercise by the Court of its jurisdiction*

40. The Principal Counsel observes first that it is more appropriate for the Office of the Prosecutor to fully address the question of the scope of the responsibility of the Prosecution with regards to arrested/detained persons before their transfer to the Court, as well as the question on whether in the present instance the Prosecution complied with its prosecutorial duties with due diligence.

41. Nevertheless, she contends that article 55 of the Rome Statute provides a person with rights during an "investigation". Pre-Trial Chamber III authorised the Prosecution to conduct an investigation with regard to the Côte d'Ivoire on 3 October

⁶⁴ See the Defence Challenge, *supra* note 4, par. 100.

⁶⁵ *Idem.*, par. 103.

2011.⁶⁶ But most violations of the suspect's rights alleged by the Defence concern the period preceding the opening of the "investigation", within the meaning of article 55 of the Rome Statute. Moreover, before a warrant of arrest was issued by Pre-Trial Chamber III and Mr. Gbagbo was surrendered to the Court, this latter was arrested and detained by the Ivorian authorities on the basis of charges related to economical crimes, which have no link with the crimes falling under the jurisdiction of the Court. The fact that the Office of the Prosecutor was allegedly in contact with the Ivorian authorities during the period preceding the opening of the investigation,⁶⁷ cannot prove any concerted action nor can it impose on the Prosecution any responsibility under article 55 of the Rome Statute.

42. In this regard, the international jurisprudence, in particular the jurisprudence developed by the International Criminal Tribunal for the Rwanda (the "ICTR"), clearly establishes that the Prosecutor or the Tribunal as a whole cannot be considered responsible for any alleged illegal arrest or detention of the suspect in the custodial State, if the arrest and detention was not carried out at the behest of the Tribunal.⁶⁸

43. Consequently, the Principal Counsel submits that the contentions of the Defence according to which the Prosecution did not comply with its prosecutorial duties with due diligence during the period preceding the opening of an investigation in the Côte d'Ivoire are of a purely speculative nature and are without merit.

⁶⁶ See the "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" (Pre-Trial Chamber III), No. ICC-02/11-14, 3 October 2011.

⁶⁷ See the Defence Challenge, *supra* note 4, paras. 241 to 254.

⁶⁸ See ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision, 31 May 2000, par. 101; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-T, Decision on the Defence motion concerning the illegal arrest and illegal detention of the accused, 12 December 2000, par. 30.

44. The Principal Counsel further contends that even assuming that the alleged violations of the suspect's rights during the period preceding the opening of an investigation in the Côte d'Ivoire may have an impact on the exercise by the Court of its jurisdiction, those violations are not of a nature to require that the Chamber declines to exercise its jurisdiction in the present case.

45. In this regard, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in its decision dated 3 October 2006,⁶⁹ Pre-Trial Chamber I considered the circumstances under which alleged violations of a suspect's rights can have impact on the ability of the Court to exercise its jurisdiction. In particular, the relevant findings of the Chamber can be summarised as follows:

*"'in accordance with the law of the State' [under article 59(2) of the Rome Statute] means that it is for national authorities to have primary jurisdiction for interpreting and applying national law; however, [...] this does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which, like those here, are referred directly back to that national law by the Statute;"*⁷⁰

[...]

*"article 59(2) of the Statute does not impose any obligation on the competent DRC authorities to review the lawfulness of the arrest and detention of Thomas Lubanga Dyilo prior to 14 March 2006 insofar as that detention was related solely to national proceedings in the DRC;"*⁷¹

*"any violations of Thomas Lubanga Dyilo's rights in relation to his arrest and detention prior to 14 March 2006 will be examined by the Court only once it has been established that there has been concerted action between the Court and the DRC authorities;"*⁷²

[...]

"whenever there is no concerted action between the Court and the authorities of the custodial State, the abuse of process doctrine constitutes

⁶⁹ See the "Decision on the Defence challenge to the jurisdiction of the Court pursuant to article 19(2)(a) of the Statute", *supra* note 26.

⁷⁰ *Idem.*, p. 6 (We underline).

⁷¹ *Ibid.* (We underline).

⁷² *Ibid.*, p. 9 (We underline). The Chamber refers to diverse international jurisprudence, in particular: ECHR, *Stocké v Germany*, Application No. 11755/85, 19 March 1991, paras. 51 to 54; ECHR, *Klaus Altmann v. France*, Application No. 10689/83, 4 July 1984, Decisions and Reports (D.R.) 27, p. 234; ICTR, *The Prosecutor v. Laurent Semanza*, No. ICTR-97-20-A, 31 May 2000, par. 79 and ICTR, *The Prosecutor v. André Rwamakuba*, No. ICTR-98-44-T, 12 December 2000, par. 30.

an additional guarantee of the rights of the accused; [...] to date, the application of this doctrine, which would require that the Court decline to exercise its jurisdiction in a particular case, has been confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international criminal tribunal".⁷³

46. In its decision dated 14 December 2006⁷⁴, the Appeals Chamber confirmed said findings and clarified certain issues regarding the scope of the application of the abuse of process doctrine, as follows:

"Not every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial. The power to stay proceedings should be sparingly exercised [...]. Room for its exercise is provided where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course";⁷⁵
[...]

"Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed."⁷⁶

47. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, in its decision dated 8 March 2011⁷⁷, after having reiterated the principles regarding the application of the doctrine of abuse of process within the legal framework of the Court, as established by the Appeals Chamber,⁷⁸ Trial Chamber I, stressed out the exceptional character of a stay of proceedings and the high threshold that is required to reach such a decision, as follows:

⁷³ *Ibid.*, p. 10 (We underline).

⁷⁴ See the "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006" (Appeals Chamber), No. ICC-01/04-01/06-772 OA4, 14 December 2006.

⁷⁵ *Idem.*, paras 30 and 31 (We underline).

⁷⁶ *Ibid.*, par. 39.

⁷⁷ See the "Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings" (Trial Chamber I), No. ICC-01/04-01/06-2690-Red2, 8 March 2011.

⁷⁸ *Idem.*, paras. 160 to 165 and 189.

*“the undoubtedly drastic remedy is to be reserved strictly for those cases that necessitate, on careful analysis, taking the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy)”;*⁷⁹

[...]

*“[n]ot every example of suggested prosecutorial misconduct will lead to a permanent stay of the proceedings; instead, this is a matter of fact and degree, given that the Chamber has to decide whether it would be ‘repugnant’ or ‘odious’ to the administration of justice to allow the case to continue” [...] “[c]lear examples of situations where a stay may be necessary include the material mistreatment of the accused in order to obtain evidence (e.g. by use of torture) or the non-disclosure of significant exculpatory evidence”. [But] “the Chamber must weigh the nature of the alleged abuse of process against the fact that only the most serious crimes of concern for the international community as a whole fall under the jurisdiction of the Court”.*⁸⁰

48. A definite stay of proceedings has never been granted throughout the international jurisprudence, although the International Criminal Tribunal for the former Yugoslavia (the “ICTY”) and the ICTR dealt with the issue on several occasions. The main principles of the said jurisprudence can be summarised as follows:

*“the abuse of process doctrine [...] is a process by which Judges may decline to exercise the court’s jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the Court’s integrity”;*⁸¹

*“Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made in abstracto, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. [...] Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will [...] usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”*⁸²

⁷⁹ *Ibid.*, par. 168 (We underline).

⁸⁰ *Ibid.*, par. 195 (We underline).

⁸¹ See ICTR, *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, par. 74.

⁸² See ICTY, *The Prosecutor v. Dragan Nikolić*, Case no. IT-94-2-AR73, Decision, 5 June 2003, par. 30.

49. In particular, in the *Nicolić* case, the ICTY did not find a basis to order a stay of proceedings due to kidnapping of the accused by third parties in the process of his arrest, while stating that this “*was not of such an egregious nature as to impede the exercise of jurisdiction*”, [and] “*even assuming that the conduct of Accused’s captors should have been attributed to the SFOR [and by extension to the Prosecutor] [...], the Appeals Chamber finds no basis upon which jurisdiction should not be exercised.*”⁸³ Moreover, no violation justifying a definite stay of proceedings was found in the *Barayagwiza* case before the ICTR, although the Applicant was informed of the charges approximately 11 months after he was initially detained.⁸⁴ In the *Kajelijeli* case, having found that the accused’s procedural rights were infringed during his arrest and detention and that the Prosecution failed to comply with its prosecutorial duties with due diligence, the Appeals Chamber refused to dismiss the case for lack of jurisdiction as the remedy requested by the Defence was deemed to be disproportionate.⁸⁵

50. The Principal Counsel submits that in the present case there is no evidence to establish that, on the one hand, there has been a concerted action between the Office of the Prosecutor and the Ivorian authorities and, on the other hand, that the violations of the suspect’s rights are, based on the jurisprudence analysed *supra*, “egregious”, “odious” and threatening “the integrity of the Court” to the point to require the Chamber to order an “exceptional”, “drastic” and “last resort” remedy, *i.e.* a stay of the proceedings.

51. Furthermore, internationally recognised human rights as developed by the international human rights jurisprudence are not absolute and are subject to numerous restrictions. Indeed, regarding inhuman or degrading treatment and

⁸³ *Ibid.*, par. 31 and 33

⁸⁴ See ICTR, *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, par. 78.

⁸⁵ See ICTR, *The Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005, paras. 251, 252 and 255.

torture the European Court of Human Rights (the “ECHR”) established the following principles:

*“ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3 [of the European Convention]. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”;*⁸⁶

*“In order for a punishment or treatment associated with it to be ‘inhuman’ or ‘degrading’, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account [...], but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3;*⁸⁷

*“In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof ‘beyond reasonable doubt’”;*⁸⁸

*“In assessing whether [a measure] may fall within the ambit of Article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned”.*⁸⁹

52. Regarding the conditions of detention, in the case *Ramirez Sanchez v. France*,⁹⁰ the ECHR found that the detention in solitary confinement of Mr. Ramirez Sanchez for more than eight years, in a cell of less than 7 square meters, did not reach the

⁸⁶ See ECHR, *A. and others v. UK*, Application No. 3455/05, 19 February 2009, par. 127 (We underline). See also ECHR, *Kafkaris v. Cyprus*, Application No. 21906/04, 12 February 2008, par. 95; *Jalloh v. Germany*, Application No. 54810/00, 11 July 2006, par. 67; *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, par. 117; *Ireland v. United Kingdom*, Application No. 5310/71, 18 January 1978, par. 167.

⁸⁷ See ECHR, *V. v. The United Kingdom*, Application No. 24888/94, 16 December 1999, par. 71 (We underline). See also, ECHR, *A. and others v. UK*, Application No. 3455/05, 19 February 2009, par. 127; *Ilascu and others v. Moldova and Russia*, Application No. 48787/99, 8 July 2004, par. 428; *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, par. 119; *Lorsé and others v. The Netherlands*, Application No. 52750/99, 4 February 2003, par. 60; *Indelicato v. Italy*, Application No. 31143/96, 18 October 2001, par. 32.

⁸⁸ See ECHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, par. 117 (We underline).

⁸⁹ See ECHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, par. 120; *Van der Ven v. The Netherlands*, Application No. 50901/99, 4 February 2003, par. 51. See also ECommHR, *Dhoest v. Belgium*, Application no. 10448/83, Report of 14 May 1987, Decisions and Reports (D.R.) 55, pp. 20 and 21, par. 117; *McFeeley and others v. UK*, Application No. 8317/78, Decision of 15 May 1980, Decisions and Reports (D.R.) 20, p. 44.

⁹⁰ See ECHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006.

level of severity necessary to constitute an inhuman treatment in violation of article 3 of the European Convention.⁹¹ In the case *Papon v. France*⁹², the ECHR concluded that:

*“si le requérant, âgé de plus de 90 ans, a des problèmes de santé qui restreignent sa liberté de mouvement (notamment sur le plan cardiaque, puisqu’il a subi un triple pontage et la pose d’un stimulateur cardiaque), [...] il bénéficie régulièrement d’une surveillance et de soins médicaux, soit par le personnel médical et paramédical de l’établissement pénitentiaire, soit dans le cadre de consultations ou d’hospitalisations dans un environnement hospitalier. [...] En conclusion, [...] la situation du requérant n’atteint pas, en l’état, un niveau suffisant de gravité pour rentrer dans le champ d’application de l’article 3 de la Convention.”*⁹³

53. Regarding the procedural safeguards referred to by the Defence,⁹⁴ the right to legal representation does not confer unlimited access to counsel.⁹⁵ Moreover, while article 6 of the European Convention is to be interpreted as obliging courts to give reasons for their decisions, a detailed answer to every argument is not required.⁹⁶ Furthermore, the ECHR makes a distinction between subjective (personal) impartiality and objective impartiality. Personal impartiality of a judge is to be presumed, until there is proof to the contrary.⁹⁷ Regarding objective impartiality, appearances are of a certain importance having regard to the confidence the courts must inspire to the public in a democratic society and to the accused. The standpoint of the accused is important but not decisive. What is determinant is whether the fear could be considered as “objectively justified”.⁹⁸ Moreover, there is a strong

⁹¹ *Idem.*, paras. 11 and 12, 87 and 127 to 135.

⁹² See ECHR, *Papon v. France*, Application No. 64666/01, Decision on Admissibility, 7 June 2001.

⁹³ *Idem.*, pp. 9 and 10.

⁹⁴ See the Defence Challenge, *supra* note 4, paras. 187 to 197.

⁹⁵ In this sense, see REID (K.), *A practitioner’s guide to the European Convention on human rights*, 3rd edition, 2008, Sweet and Maxwell Ltd., London, p. 151, IIA-125.

⁹⁶ See ECHR, *Garcia Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, par. 26; *Van de Hurk v. The Netherlands*, Application No. 16034/90, 19 April 1994, par. 61.

⁹⁷ See ECHR, *Micallef v. Malta*, Application No. 17056/06, 15 October 2009, par. 94; *Kyprianou v. Cyprus*, Application No. 73797/01, 15 December 2005, par. 119; *Le Compte, Van Leuven and De Meyere v. Belgium*, Application No. 6878/75, 7238/75, 23 June 1981, par. 58.

⁹⁸ See ECHR, *Micallef v. Malta*, Application No. 17056/06, 15 October 2009, par. 96; *Wettstein v. Switzerland*, Application No. 33958/96, 21 December 2000, par. 44; *Morel v. France*, Application No. 34130/96, 6 June 2000, par. 44; *Nortier v. The Netherlands*, Application No. 13924/88, 24 August 1993, par. 33.

presumption that professional judges by their training are not influenced by adverse media coverage or hostile public opinion against an accused.⁹⁹

54. Without speculating on whether the suspect's rights were actually infringed under the Ivorian law, the Principal Counsel submits that the Defence did not provide any evidence that the treatment alleged as inhuman treatment and torture constituted, based on the jurisprudence of the Court regarding the *Lubanga* case analysed *supra*, "*material mistreatment of the accused in order to obtain evidence*".¹⁰⁰ Moreover, she contends that Mr. Gbagbo does not seem to have suffered of "*complete sensory isolation or total social isolation*" within the meaning of ECHR jurisprudence. Indeed, it appears that he had at least regular contact with his doctor, who was also detained in the same place, which indicates that he was not isolated from other detainees and guards.¹⁰¹ It also appears that he received regular visits from his lawyers,¹⁰² although not unlimited, interactions which also constitute contacts "*with the outside world*".¹⁰³ Apart from contacts "*with the outside world*", another element also makes a difference in comparison with the jurisprudence referred to by the Defence in relation to *incommunicado* detention: the detention of Mr. Gbagbo was not kept secret, his arrest was reported in numerous medias and his conditions of detention was the subject of concerns by both the United Nations and certain NGO's,¹⁰⁴ his family and relatives could not thus ignore that he was detained in the North of the country.¹⁰⁵ Moreover, it appears that he had his own private cell of nine square meters,¹⁰⁶ such a size would be considered as more than appropriate in light of the

⁹⁹ See ECHR, *Craxi v. Italie*, Application No. 34896/97, 5 December 2002, par. 99; *Sunday Times v. UK*, Application No. 6538/74, 26 April 1979, par. 65.

¹⁰⁰ See *supra* par. 47.

¹⁰¹ See the Defence Challenge, *supra* note 4, paras. 201 to 203 and 209.

¹⁰² *Idem.*, paras. 129, 130 and 200.

¹⁰³ See HRC, *Medjnoune v. Algeria*, Communication No. 1297/2004, 14 July 2006, par. 8.4.

¹⁰⁴ See the Defence Challenge, *supra* note 4, paras. 12, 27, 136, 237, 238, 245, 249, 251, 263 and 264.

¹⁰⁵ *Idem.*, par. 215.

¹⁰⁶ *Ibid.*, par. 21.

decision of the ECHR in the *Ramirez Sanchez* case, since a smaller cell was found to be “large enough to accommodate a prisoner”.¹⁰⁷

55. In addition, the allegations of the Defence regarding inhuman treatment and torture with respect to the suspect are only supported by the reports of a general practitioner dated 31 March 2011 and 9 January 2012 according to which the treatment received by Mr. Gbagbo should be considered as inhuman treatment and torture.¹⁰⁸ Since the Defence refused to give to the Principal Counsel access to confidential material attached to the Defence Challenge, including the said reports attached as Annexes 7 and 8,¹⁰⁹ the Principal Counsel cannot duly address the question on the relevance of the findings contained in the said reports.

56. Nevertheless, she contends that while a general practitioner is supposed to provide an expertise regarding the health conditions of a person, he or she has neither standing nor qualification to make findings on matters of law, *i.e.* whether detention conditions can be qualified as inhuman or degrading treatments or torture. These findings are simply not relevant to support the Defence allegations. Moreover, in the decision of 12 June 2012,¹¹⁰ the Single Judge of the Chamber refused to take into consideration the report dated 31 March 2011 attached as Annex 8 to the Defence Challenge for the reasons that the expert was chosen by the Defence but not appointed by the Chamber and that “the content of the report appears to have been either contradicted by other practitioners or superseded by ulterior events”.¹¹¹

¹⁰⁷ See ECHR, *Ramirez Sanchez v. France*, Application No. 59450/00, 4 July 2006, paras. 11 to 12, 87, 127 to 135.

¹⁰⁸ See the Defence Challenge, *supra* note 4, paras. 24 to 26, 109, 201 to 208 and 234.

¹⁰⁹ See *supra* paras. 6 and 10.

¹¹⁰ See the “Decision on the “Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012””, *supra* note 11.

¹¹¹ *Idem.*, paras. 28 and 29.

57. The Principal Counsel submits that in the absence of relevant evidence regarding the nature of ill-treatment allegedly received by the suspect, the assumptions of the Defence in this regard are purely of speculative nature.

58. In conclusion, the Principal Counsel contends that even assuming that the suspect's rights were infringed during the period preceding the opening of an investigation, these violations do not reach a sufficient threshold to be considered as, based on the jurisprudence analysed *supra*, "egregious", "odious" and threatening "the integrity of the Court" to the point to require the Chamber to order an "exceptional", "drastic" and "last resort" remedy, *i.e.* a stay of the proceedings. The same conclusion should apply to any eventual irregularities which allegedly took place¹¹² during the arrest proceedings of the suspect in the custodial State under article 59(2) of the Rome Statute.

III. SPECIFIC VIEWS AND CONCERNS OF VICTIMS

59. The Office has prepared a written explanation in French (the "Information Sheet") on the admissibility proceedings in order to gather the views and concerns of victims for the purposes of Article 19 proceedings in the most efficient and fast way. Said information sheet was largely distributed in the country, to victims directly, as well as to contact persons or organisations who helped victims in filling in their application forms in order for them to be able to gather informed views and concerns of the victims having communicated with the Court.

60. Since some of the applications for participation in the proceedings transmitted to the Office by the Registry in compliance with Pre-Trial Chamber I's Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of

¹¹² See the Defence Challenge, *supra* note 4, paras. 272 to 280.

the Court pursuant to article 19 of the Rome Statute¹¹³ relate to individuals already represented by counsels, the Principal Counsel also deemed it appropriate to contact said persons through their legal representatives in order to avoid security concerns and to facilitate the flow of information preserving the trust relationship between the victims and their lawyer. Accordingly, the said legal representatives were also provided with the information sheet.

61. Despite the limited time available to contact victims and receiving their observations, the Office was able to receive to date three written contributions containing respectively the views of victims a/20030/12, a/20046/12 as well as another;¹¹⁴ of victims a/20133/12, a/20146/12, a/20147/12 and a/20148/12¹¹⁵ and of victims a/20140/12, a/20141/12, a/20150/12, a/20151/12, a/20152/12, a/20154/12, a/20155/12, a/20156/12, a/20165/12, a/20166/12, a/20167/12, a/20168/12, a/20169/12, a/20170/12, a/20171/12 and a/20172/12 and of several hundreds of applicants and victims having communicated with the Court.¹¹⁶

62. The victims all contend that the Court has jurisdiction over Mr. Gbagbo by virtue of the declaration he, himself, lodged with the Registrar of the Court on 18 April 2003, which was lodged for an unlimited period of time.

63. Moreover, regarding the alleged ill-treatments suffered by Mr. Gbagbo on the Ivorian territory, some victims recall that during the visit of Mr. Desmond Tutu, Mr. Kofi Annan and Ms. Robinson on 2 May 2011, Mr. Gbagbo himself declared “[j]e mange bien, je dors bien, je suis bien traité”.¹¹⁷ Hence their difficulty to understand the contentions of the Defence.

¹¹³ See the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Rome Statute”, *supra* note 12.

¹¹⁴ See Annex 1.

¹¹⁵ See Annex 2.

¹¹⁶ See Annex 3.

¹¹⁷ See Annex 1, point III.

64. Last but not least, the victims trust that the case should proceed before the ICC in order for Justice to be done and as importantly to be seen to be done.

65. The Office also received phone communications from contact persons of victims (namely the ones who have filed a group application) essentially voicing the same concerned as expressed *supra*.

FOR THESE REASONS, the Principal Counsel respectfully requests the Pre-Trial Chamber to dismiss the Defence Challenge.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath.

Paolina Massidda
Principal Counsel

Dated this 27th day of June 2012

At The Hague, The Netherlands