



Original: **French**

No.: **ICC-02/11-01/11**

Date: **18 June 2012**

PRE-TRIAL CHAMBER I

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

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

Public Document

**Observations of the Republic of Côte d'Ivoire on the challenge to the jurisdiction
of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55
and 59 of the Rome Statute filed by the Defence for President Gbagbo**

Source: Republic of Côte d'Ivoire

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INTRODUCTION

1. On 24 May 2012, the Defence team for Mr Laurent Gbagbo submitted to Pre-Trial Chamber I a “challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo”¹ (“Challenge to Jurisdiction”).
2. The Defence founds its application on the allegation, *inter alia*, that the declaration of 18 April 2003, by which the Republic of Côte d’Ivoire accepted the jurisdiction of the Court pursuant to article 12(3) of the Statute, does not grant the Court jurisdiction “for the period and events referred to in the warrant of arrest issued for Laurent Gbagbo on 23 November 2011 and in the Document Containing the Charges filed [...] on 16 May 2012”.² The Defence further submits that the letter by which President Alassane Ouattara confirmed the continuing validity of the declaration of 18 April 2003 is “of no judicial import”,³ since “Alassane Ouattara was not empowered to make commitments to the ICC on behalf of Côte d’Ivoire on 14 December 2010”.⁴
3. The Defence for Laurent Gbagbo moves Pre-Trial Chamber I to find in the alternative that “the breach of his rights, torture and other inhuman and degrading treatment”⁵ which he allegedly suffered during detention prior to his transfer to The Hague, as well as the conditions of his transfer, “render a fair trial impossible”⁶ and, accordingly, preclude the Court from exercising its jurisdiction.
4. It is assuredly not the wish of the Republic of Côte d’Ivoire to deny Mr Gbagbo his right under article 19(2)(a) of the Rome Statute to challenge the jurisdiction of the Court. However, it notes that the Challenge to Jurisdiction of 24 May 2012 contains grave and unfounded allegations against Côte d’Ivoire, as follows:
 - failure to honour the international undertaking made by the State of Côte d’Ivoire on 18 April 2003;
 - the purported lack of legitimacy and representativeness of President Ouattara, who was elected by the people of Côte d’Ivoire on 28 November 2010;

¹ ICC-02/11-01/11-129-Corr-tENG, 25 May 2012.

² *Ibid.*, p. 74.

³ *Ibid.*, p. 73.

⁴ *Idem.*

⁵ *Ibid.*, p. 74.

- Mr Laurent Gbagbo’s alleged treatment in breach of the most basic respect for humanity in the period of his detention prior to his transfer to The Hague.
5. The Republic of Côte d’Ivoire cannot remain silent in the face of such serious and wholly unfounded accusations. Hence it has decided to submit this response to the Defence’s 24 May 2012 Challenge to Jurisdiction.

(a) Procedural background

6. On 23 June 2011, the Prosecutor sought Pre-Trial Chamber III’s authorisation to open an investigation pursuant to article 15 of the Rome Statute into the situation prevailing in Côte d’Ivoire since the second round of the presidential election on 28 November 2010. On 3 October 2011, the Chamber authorised the opening of an investigation into the period from 28 November 2010 to 23 June 2011 and crimes committed after that date, “insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011”.⁷ However, the Chamber held at that time that it did not possess “[s]ufficient information on specific crimes committed between 2002 and 2010 [...] to be able to assess whether there is a reasonable basis to proceed”.⁸
7. The decision of 3 October 2011 contains two factors which are particularly significant for the purposes of considering the Challenge to Jurisdiction filed by the Defence for Laurent Gbagbo.
8. The first factor concerns the temporal analysis of the crisis in Côte d’Ivoire. While it considered that it did not possess sufficient information to extend the temporal scope of the investigation, the Chamber observed that “[t]he information contained in the supporting material submitted by the Prosecutor and some of the victims’ representations provide indications of very serious human rights violations and abuses that have been committed *since the September 2002 coup attempt* that could amount to crimes within the jurisdiction of the Court”.⁹ It also noted that, “[w]hile the context of violence reached a critical point in late 2010, it appears that this was a *continuation of*

⁶ *Ibidem*.

⁷ ICC-02/11-14-Corr, *Corrigendum to “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”*, para. 179.

⁸ *Ibid.*, para. 185.

the ongoing political crisis and the culmination of a long power struggle in Côte d'Ivoire".¹⁰ In other words, Pre-Trial Chamber III considered *in limine* that the events which occurred in Côte d'Ivoire between the failed coup d'état on 19 September 2002 and 23 June 2011 all fell under one and the same situation, which could be referred to the Court, since crimes envisioned in its Statute had allegedly been committed. This is clearly the finding underpinning the Chamber's request that the Prosecutor revert to it with "any additional information [...] on potentially relevant crimes committed between 2002 and 2010".¹¹ In light of this information, Pre-Trial Chamber III decided on 22 February 2012 to expand "its authorisation for the investigation in Côte d'Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010".¹²

9. The second significant factor of the decision of 3 October 2011 concerns Pre-Trial Chamber III's analysis of Côte d'Ivoire's acceptance of the Court's jurisdiction on the basis of the declaration of 18 April 2003 and the confirmatory letters of 14 December 2010 and 3 May 2011. The Chamber's finding is worth reproducing *in extenso*:

14. The initial Declaration, which explicitly indicates its unspecified duration, was signed by the Minister of Foreign Affairs of the former President, Laurent Gbagbo, and he had the authority to sign a valid declaration on behalf of Côte d'Ivoire. 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. Although these letters refer to crimes committed in 2004 and 2010, they 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.

15. The Chamber concludes 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. [...]¹³

In the Chamber's estimation, the declaration of 18 April 2003 forms the basis for the Court's *ratione temporis* jurisdiction with regard to the situation existing in Côte d'Ivoire since 19 September 2002; the letters of 14 December 2010 and 3 May 2011

⁹ *Ibid.*, para. 182 [italics added].

¹⁰ *Ibid.*, para. 181 [italics added].

¹¹ *Ibid.*, para. 213.

¹² ICC-02/11-36, *Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010"*, para. 37.

¹³ ICC-02/11-14-Corr, paras. 14-15. The Chamber later added: "[i]n accordance with the Declaration lodged under Article 12(3) of the Statute in 2003, the Court has jurisdiction over crimes committed in Côte d'Ivoire since 19 September 2002" (*ibid.*, para. 173).

place no temporal restrictions – on the contrary, they confirm the Republic of Côte d’Ivoire’s acceptance of the Court’s jurisdiction and the concomitant obligation to cooperate with it in good faith. This obvious conclusion, which the Prosecutor also expressed,¹⁴ is the first matter contested by the Defence in its challenge to the Court’s jurisdiction.

10. After Pre-Trial Chamber III’s issuance of the warrant of arrest for Laurent Gbagbo on 23 November 2011¹⁵ and his transfer to The Hague on 30 November 2011, the Chamber organised his first appearance on 5 December 2011, during which it set 18 June 2012 as the commencement date of the confirmation hearing.¹⁶
11. On 4 May 2012, Pre-Trial Chamber I requested the Parties to submit their observations on the schedule for the confirmation hearing and, in particular, to state whether they intended to raise any issues or challenges concerning jurisdiction or admissibility in accordance with rule 122(2) of the Rules of Procedure and Evidence, or whether they intended to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing, in accordance with rule 122(3) of the Rules.¹⁷
12. On 23 May 2012 – one day before it filed its Challenge to Jurisdiction – the Defence responded that it intended to raise at the confirmation hearing “[TRANSLATION] the issue of admissibility”¹⁸ as well as “[TRANSLATION] a number of issues”¹⁹ concerning the unlawfulness of the proceedings. It also requested one hour for the oral

¹⁴ In the document containing the charges, the Prosecutor emphasises: “[TRANSLATION] The Republic of Côte d’Ivoire is not a State Party to the Rome Statute. However, on 1 October 2003, by a declaration dated 18 April of that year, the Government of Côte d’Ivoire accepted the jurisdiction of the Court to try the crimes committed on the territory of Côte d’Ivoire as from 19 September 2002. Accordingly, this declaration authorises the Court to exercise its jurisdiction in accordance with article 12(3) of the Rome Statute. [...] On 14 December 2010, the Prosecutor, the President and the Registrar of the Court received a letter from Mr Ouattara in his capacity as President of Côte d’Ivoire confirming the extended validity of the Declaration of 18 April 2003. A second letter to this effect was received on 4 May 2011” (ICC-02/11-01/11-124-Anx1-Red, paras. 16-17).

¹⁵ ICC-02/11-01/11-1.

¹⁶ By its *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 postponed the commencement of the hearing until 13 August 2012 (ICC-02/11-01/11-152-Red, 12 June 2012).

¹⁷ ICC-02/11-01/11-107, *Decision requesting observations from the parties on the schedule of the confirmation of charges hearing*, para. 14.

¹⁸ ICC-02/11-01/11-128, “*Observations de la Défense concernant le calendrier de l’audience de confirmation des charges*”, para. 14.

¹⁹ *Ibid.*, para. 15.

presentation of each issue.²⁰

13. As a result of the evasiveness of the Defence's responses to Pre-Trial Chamber I's requests, Côte d'Ivoire is currently unable to ascertain whether the Challenge to Jurisdiction of 24 May 2012 covers all of the issues mentioned the previous day, or whether the Defence intends to present other arguments at the confirmation hearing as to, *inter alia*, the admissibility of the case. Accordingly, it hereby reserves the right to seek the Chamber's leave to make oral submissions in response to the arguments which the Defence intends to present on the issues of jurisdiction, admissibility and lawfulness of the proceedings at the confirmation hearing.

(b) Outline of the Republic of Côte d'Ivoire's submissions

14. In its Challenge to Jurisdiction, the Defence for Laurent Gbagbo advances substantive arguments in an attempt to demonstrate that the Court lacks jurisdiction "founded on the breach of Laurent Gbagbo's rights during his arrest and surrender to the International Criminal Court".²¹ The greater part of the application is devoted to this issue,²² even to the extent of relegating to second place its analysis of the compliance with the Rome Statute of the declarations by which the Republic of Côte d'Ivoire accepted and subsequently confirmed the jurisdiction of the Court. In that part of its application, the Defence alleges, firstly, that during his arrest and detention in Côte d'Ivoire, Laurent Gbagbo was subjected to conditions "characteristic of inhuman or degrading treatment or even torture"²³ in breach of article 55 of the Statute and, secondly, that he was transferred to the Court in a procedure violative of article 59 of the Statute. The Defence relies on these two grounds to request Pre-Trial Chamber I to "find that these violations render a fair trial impossible" and to "rule that the Court cannot exercise its jurisdiction in such circumstances".²⁴
15. Côte d'Ivoire does not intend to advance specific arguments in respect of these aspects of the Defence application in the present observations. It will confine itself to noting that this part of the Defence's argumentation relies on a manifest error in the legal characterisation and that its Challenge to Jurisdiction therefore has no basis in law.

²⁰ *Ibid.*, para. 19.

²¹ ICC-02/11-01/11-129-Corr-tENG, p. 27.

16. The somewhat contrived efforts employed by the Defence *in fine* in order to link the alleged breaches of articles 55 and 59 of the Statute to a “challenge to the jurisdiction of the Court”²⁵ are unpersuasive of the merits of this part of the application. Even if they contained an element of descriptive truth – which Côte d’Ivoire strongly contests – the arguments presented by the Defence do not relate to the *establishment* of the Court’s jurisdiction, which is the sole subject of the 24 May 2012 application, as even its title shows, but instead to a potential suspension of the proceedings and hence the possibility of a temporary stay in the *exercise* of the Court’s jurisdiction.
17. The Defence’s contortions compel Côte d’Ivoire to provide a brief recapitulation of some common concepts. It is accepted that the jurisdiction of the International Criminal Court must be assessed on the basis of material, personal, spatial and temporal criteria. *Ratione materiae*, the Court has jurisdiction only with respect to the crimes set forth at article 5 of the Statute. *Ratione personae*, it has a very broad jurisdiction, the principle of which is set forth at article 25 of the Statute. *Ratione loci*, except for the specific case set forth at article 13(b), the Court’s jurisdiction is established by the combined application of article 12(2) and article 13(a) and (c). Lastly, article 11 and, of particular relevance to the case at bar, article 12(3) define the limits of the Court’s *ratione temporis* jurisdiction.
18. Accordingly, the determination of the rights of persons during an investigation (article 55 of the Statute) and the arrest proceedings in the custodial State and transfer to the Court (article 59 of the Statute) are wholly immaterial to the establishment of the Court’s jurisdiction. As a rule, the relevant articles of the Statute contain no provision subordinating the Court’s jurisdiction to respect for the rights and procedures at issue.
19. The Rules of Procedure and Evidence provide further confirmation – if any were needed – of the logic of this dichotomy. Rule 122(2) provides that if a question or challenge “concerning jurisdiction or admissibility” arises, rule 58 applies. And the express purpose of rule 58 is to lay down the applicable procedure under article 19 of the Statute, that is, for challenges to the jurisdiction of the Court or the admissibility of

²² *Ibid.*, pp. 27-73, paras. 109-304.

²³ *Ibid.*, para. 109.

²⁴ *Ibid.*, p. 74.

²⁵ *Ibid.*, paras. 292-304.

a case. However, no equivalent provision is made in the Rules of Procedure and Evidence in the event that a Party raises challenges “concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing”. Rule 122(3) merely provides that, within the context of the confirmation hearing, the Presiding Judge shall inquire as to the parties’ intentions on this point “before hearing the matter on the merits”. This precaution is no doubt intended to allow for a temporary stay of the hearing if the prerequisites for a fair trial are not met; however, it does not by any means subordinate the determination of a challenge to the provisions of rule 58 and article 19.

20. In order to circumvent this insurmountable obstacle, the Defence refers to the Appeals Chamber’s 14 December 2006 judgment in *Lubanga*.²⁶ Far from corroborating its broad construction of challenges to the jurisdiction of the Court, the judgment in question instead emphasises the need to dissociate issues relating to the establishment of the Court’s jurisdiction from those relating to the right to a fair trial. As the Appeals Chamber indeed notes:

Jurisdiction apart, admissibility is the only ground envisaged by the Statute for which the Court may validly refrain from assuming or exercising jurisdiction in any given cause. Abuse of process is not listed as a ground for relinquishing jurisdiction in article 17 of the Statute.²⁷

While the Appeals Chamber found that “the Statute does not provide for stay of proceedings for abuse of process as such”,²⁸ it nevertheless held that, “[w]here 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”.²⁹

21. As the Appeals Chamber itself emphasised, the uniqueness of such a challenge means that it can only be admitted “sparingly”,³⁰ where “[t]he illegal conduct [is] such as to make it otiose, repugnant to the rule of law to put the accused on trial”.³¹ It is therefore accepted that a distinction must be drawn between challenges to the jurisdiction of the

²⁶ See Challenge to Jurisdiction, paras. 293-294.

²⁷ ICC-01/04-01/06-772, *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*, para. 34.

²⁸ *Ibid.*, para. 35.

²⁹ *Ibid.*, para. 39.

³⁰ *Ibid.*, para. 31.

³¹ *Ibid.*, para. 30.

Court and those concerning procedural irregularity or abuse of process.³² In compelling circumstances they could no doubt lead to a similar *de facto* outcome, since a permanent stay of the proceedings has an effect similar to a finding that the Court lacks jurisdiction. However, it is important that they remain discrete *de jure*. Because a challenge based on a violation of the rights of the accused rests on highly specific and rigorous considerations and standards, it must fall within a specific procedural framework, distinct from that provided for under article 19 of the Statute and rule 58 of the Rules. It cannot purely and simply be subsumed into the conventional framework of challenges to jurisdiction expressly provided for by the Statute of the Court.

22. Accordingly, Côte d'Ivoire contends that the Defence has attempted to argue the Court's lack of jurisdiction on the basis of violations of Laurent Gbagbo's rights solely by means of a wholesale abuse of process. Hence this argument should be rejected in law because it is unrelated to the establishment of the Court's jurisdiction. Furthermore, in the period from his arrest until his transfer to the Court, Laurent Gbagbo did not suffer any inhuman or degrading treatment, still less torture, and, bearing in mind the particular circumstances into which the Ivorian judicial system was thrust as a result of the conflict, his rights were respected.
23. For the aforementioned reasons, Côte d'Ivoire will focus its submissions *infra* only on those issues in the Defence's Challenge to Jurisdiction which genuinely concern the establishment of the Court's jurisdiction to try the crimes of which Laurent Gbagbo stands accused. Accordingly, it will show, firstly, that the Republic of Côte d'Ivoire's acceptance of the jurisdiction of the Court is wholly established by the declaration of 18 April 2003 (I) and, secondly, that the letters from President Ouattara to the Court dated 14 December 2010 and 3 May 2011 clearly confirmed this assent (II).

³² Accordingly, Trial Chamber III found in *Bemba* that "[t]here has been no material irregularity or impropriety in the proceedings, and the abuse of process challenge is without foundation" (ICC-01/05-01/08-802, *Decision on the Admissibility and Abuse of Process Challenges*, para. 262), and did not link its consideration of this challenge to the previous finding on admissibility (the concept of "jurisdiction" mentioned previously (para. 252) referring to the opportunity for the Chamber to examine the abuse of process challenge).

I. THE REPUBLIC OF CÔTE D'IVOIRE'S ACCEPTANCE OF THE JURISDICTION OF THE COURT IS ESTABLISHED BY THE DECLARATION OF 18 APRIL 2003

24. The declaration of 18 April 2003, signed by Mr Mamadou Bamba, then Minister of Foreign Affairs of the Government of Côte d'Ivoire, reads as follows:

Declaration Accepting the Jurisdiction of the International Criminal Court

Pursuant to article 12(3) of the Statute of the International Criminal Court, the Government of Côte d'Ivoire accepts the jurisdiction of the Court for the purposes of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002.

Accordingly, Côte d'Ivoire undertakes to cooperate with the Court without delay or exception in accordance with Part 9 of the Statute.

This declaration shall be valid for an unspecified period of time and shall enter into effect on being signed.

Done at Abidjan, 18 April 2003

For the Government of the Republic of Côte d'Ivoire

Bamba Mamadou, Minister of State, Minister of Foreign Affairs,.

Côte d'Ivoire will hereinafter demonstrate that the declaration of 18 April 2003 constitutes a unilateral undertaking by which Côte d'Ivoire accepts the jurisdiction of the Court in accordance with article 12(3) of the Rome Statute (1). It will also demonstrate that this declaration confers jurisdiction on the Court over crimes falling under the Statute which were committed in the context of the situation in Côte d'Ivoire since 19 September 2002 (2).

1. The declaration of 18 April 2003 expresses Côte d'Ivoire's acceptance of the exercise of the Court's jurisdiction in accordance with article 12(3) of the Statute

25. In its Challenge to Jurisdiction, the Defence does not contest the fact that the declaration of 18 April 2003 constitutes an acceptance on the part of the Republic of Côte d'Ivoire of the jurisdiction of the International Criminal Court, notified in accordance with article 12(3) of the Statute. Côte d'Ivoire will briefly recall, merely for the sake of completeness and clarity, that this declaration does indeed satisfy the conditions of a unilateral undertaking by the State of Côte d'Ivoire, as contemplated by article 12(3).
26. It is worth recalling that in international law, it is common for a State to enter into a unilateral undertaking by means of a clear expression of its intention to accept the obligations envisioned in its declaration. As the International Court of Justice

emphasised:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.³³

Certainly, there may sometimes be difficulties in determining, *inter alia*, the precise scope of the obligation thus assumed by the State or the capacity of the signatory of the declaration to bind the State in question internationally.

27. However, there are clearly no such problems in the case of the declaration of 18 April 2003. Firstly, the declaration is signed by the Minister of Foreign Affairs of the government then headed by Laurent Gbagbo. As the International Law Commission clearly stated in its *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*:

A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. [...]³⁴

Secondly, and more importantly, the legal scope of the declaration of 28 April 2003 must be assessed simply and directly in light of article 12(3) of the Statute of the Court, to which the Minister of Foreign Affairs refers explicitly for the purposes of accepting the jurisdiction of the Court.

28. Except where a situation is referred to the Prosecutor by the Security Council pursuant to article 13(b), the only means by which a State not party to the Statute can accept the jurisdiction of the Court is to apply article 12(3), which provides:

³³ International Court of Justice, *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, *Rec. 1974*, p. 267, para. 43 (see also *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, *Rec. 1974*, p. 472, para. 46).

³⁴ International Law Commission, General Assembly, Official Records, 61st session, *Supplement No. 10 (A/61/10)*, p. 386 (principle 4). One of the best-known examples of a unilateral undertaking made by a Minister of Foreign Affairs on behalf of a State is the “Ihlen Declaration”, by which Norway was bound to Denmark on the issue of Greenland (see Permanent Court of International Justice, *Legal Status of Eastern Greenland*, judgment of 5 April 1933, series A/B No. 53, pp. 69-71).

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

The declaration of 18 April 2003 is precisely the expression of the Republic of Côte d'Ivoire's intention to avail itself of the mechanism provided for in article 12(3). Moreover, this is how it was understood by the Registry, which, in accordance with rule 44(2) of the Rule of Procedure and Evidence, informed Côte d'Ivoire that "the declaration under 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 and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply". Accordingly, by its declaration of 18 April 2003, Côte d'Ivoire legitimately accepted the jurisdiction of the International Criminal Court and was thenceforth compelled to conduct itself in accordance with its undertaking.

2. The declaration of 18 April 2003 confers jurisdiction on the Court over crimes committed in the context of the situation in Côte d'Ivoire since 19 September 2002

29. While it concedes that Côte d'Ivoire accepted the jurisdiction of the Court in accordance with article 12(3), the Defence nevertheless submits that the declaration of the Minister of Foreign Affairs does not allow for the "extension of the ambit of the jurisdiction [...] beyond 18 April 2003" and even that "an analysis of the political context would imply an end date of 24 January 2003"³⁵ (date of the Linas-Marcoussis Agreement). In order to reach this conclusion, the Defence submits that the declaration of Côte d'Ivoire relates "only to a particular crime, in this instance, the coup d'état of 19 September 2002 and its aftermath";³⁶ it also claims that the temporal framework specified in the declaration relates to "the duration of the validity of the declaration and not its content".³⁷
30. Such an argument defies the very letter of the declaration of 18 April 2003 and, accordingly, the sovereign will clearly expressed therein by Côte d'Ivoire. It is perfectly correct that in cases of unilateral acts, "[TRANSLATION] the interpretation of a

³⁵ ICC-02/11-01/11-129-Corr-tENG, para. 88.

³⁶ *Ibid.*, para. 52.

³⁷ *Ibid.*, para. 75.

State's will must be cautious"³⁸ and favour a "restrictive" approach.³⁹ Nevertheless, the requisite circumspection should not result in a radical misrepresentation of the freely expressed undertaking of Côte d'Ivoire.

31. In an attempt to minimise the temporal scope of the declaration of 18 April 2003, the Defence emphasises that "the intention must be interpreted with full regard to the circumstances existing at the time the declaration was made".⁴⁰ Even setting aside the Defence's singularly subjective and questionable presentation of the circumstances prevailing at the time of the declaration of 18 April 2003,⁴¹ its proposed interpretation methods manifestly obscure the fact that the main focus of attention must be on the wording itself of the State undertaking. Indeed, the seventh principle of the International Law Commission's *Guiding Principles*, which the Defence itself cites, clearly states: "[i]n interpreting the content of such obligations, weight shall be given *first and foremost* to the text of the declaration".⁴²
32. Thus, in order to determine the exact temporal scope of the obligation towards the Court assumed by Côte d'Ivoire, "[its] precise nature and limits must be understood in accordance with the actual terms in which they have been publicly expressed".⁴³ However the "actual content"⁴⁴ of the declaration of 18 April 2003 leaves no doubt: the "accept[ance of] the jurisdiction of the International Criminal Court" as stated in the heading itself is valid "for an unspecified period of time". Accordingly, a study of the circumstances of the declaration cannot contradict the terms in which the undertaking is formulated. If Côte d'Ivoire had wished to place temporal restrictions on its acceptance of the jurisdiction of the Court, it could have specified a date on which its acceptance would expire. By making its declaration valid for "an unspecified period of time", it freely chose to do the opposite: to accept the jurisdiction of the Court permanently.

³⁸ Daillier, P., Forteau, M. and Pellet, A., *Droit international public*, L.G.D.J., Paris, 8th ed., 2009, p. 401.

³⁹ International Court of Justice, *Nuclear Tests Case*, aforementioned judgment, p. 267, para. 44; see also Challenge to Jurisdiction, ICC-02/11-01/11-129-Corr-tENG, para. 71.

⁴⁰ *Ibidem*.

⁴¹ See *ibid.*, paras. 83-88.

⁴² International Law Commission, General Assembly, Official Records, 61st session, Supplement No. 10 (N61/10), p. 386 [italics added].

⁴³ International Court of Justice, *Nuclear Tests Case*, aforementioned judgment, p. 270, para. 51.

⁴⁴ International Court of Justice, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006 (new application), *Rec.* 2006, p. 28, para. 49.

33. In an attempt to circumvent this conclusion, which the wording of the declaration itself makes inescapable, the Defence seeks to restrict the material scope of the document. To this end, it recalls that, pursuant to article 12(3) of the Statute, a State which is not a Party to the Statute may accept the jurisdiction of the Court “with respect to the crime in question”. It then infers that jurisdiction established in this manner is exercised in regard to “all crimes in article 5 of the Statute of relevance to the situation”, as stated in rule 44(2) of the Rules of Procedure and evidence, but adds that the situation under consideration is the situation “covered by the declaration”.⁴⁵
34. Needless to say, the proposed construction would considerably restrict the material scope of the jurisdiction of the Court, whereas the provisions of the Statute and the Rules of Procedure and Evidence in no way make the determination of the situation under consideration contingent on the wishes of the State concerned. If accepted, the perverse result could be that by strictly delimiting the situation concerned, a State would enjoy the privilege provided for in article 12(3) without allowing the Court actually to exercise its jurisdiction.
35. In any event, the terms of the 18 April 2003 declaration do not provide any reasonable grounds, as the Defence seeks to argue, for limiting the scope of the Court’s jurisdiction to crimes committed in Côte d’Ivoire between 19 September 2002 and 24 January 2003.⁴⁶ Again, the wording of the document is impeccably clear:
- [T]he Government of Côte d’Ivoire accepts the jurisdiction of the Court for the purposes of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory *since the events of 19 September 2002*.⁴⁷
- Hence, Côte d’Ivoire does not set any time limit on the Court’s examination of crimes committed in the context of the situation under consideration. As noted above,⁴⁸ Pre-Trial Chamber III has already emphasised that the crimes which the Court may adjudge in this context fall within a continuous crisis beginning on 19 September 2002.
36. By its declaration of 18 April 2003, Côte d’Ivoire thereby consented to the Court’s exercising its jurisdiction over crimes perpetrated on its territory from 19 September 2002 until 23 June 2011 or even beyond, insofar as the contextual elements of the

⁴⁵ *Ibid.*, para. 78.

⁴⁶ See ICC-02/11-01/11-129-Corr-tENG, para. 87.

⁴⁷ Italics added.

⁴⁸ See *supra*, para. 8.

crimes are identical to those perpetrated before the latter date.

II. THE DECLARATIONS OF 14 DECEMBER 2010 AND 3 MAY 2011 CONFIRM THE REPUBLIC OF CÔTE D’IVOIRE’S ACCEPTANCE OF THE JURISDICTION OF THE COURT

37. In its Challenge to Jurisdiction, the Defence submits that President Ouattara’s letter to the Court dated 14 December 2010 “is not a valid declaration within the meaning of article 12(3)”, because, “[w]hen [he] wrote the letter, he was not in fact the President of Côte d’Ivoire and hence not a representative of the State authorised to make commitments on its behalf”.⁴⁹ For similar reasons, and also for reasons of form and because it “rather corresponds to a referral, which is reserved to States Parties”,⁵⁰ the Defence also considers that President Ouattara’s letter of 3 May 2011 does not constitute a valid declaration within the meaning of article 12(3) of the Statute.
38. Such arguments patently have absolutely no basis in fact and are wholly unfounded in law. Côte d’Ivoire will therefore respond briefly, by addressing first the confirmatory letter dated 14 December 2010 (2.1) and then the letter of 3 May 2011 (2.2).

2.1 Confirmatory letter of 14 December 2010

39. The letter of 14 December 2010 reads as follows:

Subject: Confirmation of the Declaration of Acceptance

Mr President,

On 18 April 2003, the Government of the Republic of Côte d’Ivoire, represented by its Minister of Foreign Affairs, formally accepted the jurisdiction of the International Criminal Court.

Since 2 December 2010, following the post-crisis presidential elections held on 31 October and 28 November 2010, Côte d’Ivoire has had a new President of the Republic, whose victory was proclaimed by the Independent Electoral Commission.

The Special Representative of the UN Secretary-General has certified the election results, in accordance with the political agreements intended to resolve the crisis. The entire international community, in particular the UN Security Council, the United States of America, France, the African Union, the Economic Community of West African States and the European Union, has recognised the results of this election and offered me its support.

Accordingly, in my capacity as the new President of the Republic of Côte d’Ivoire and pursuant to article 12(3) of the Rome Statute [...], I have the honour of confirming the declaration of 18 April 2003.

As such, I pledge that my country, Côte d’Ivoire, will cooperate fully and without delay with the International Criminal Court, particularly as regards all of the crimes and acts of violence committed since March 2004.

⁴⁹ ICC-02/11-01/11-129-Corr-tENG, para. 53.

⁵⁰ *Ibid.*, para. 54.

Yours faithfully,
Alassane Ouattara

40. It is worth noting from the outset that this letter is not presented as a declaration of acceptance of the Court pursuant to article 12(3) of the Statute. As stated in the title and the body of the text, its purpose is merely to “confirm the declaration of 18 April 2003”.
41. The confirmatory nature of the letter is perfectly founded in law. As noted above,⁵¹ the declaration of 18 April 2003 alone is sufficient to establish the Republic of Côte d’Ivoire’s acceptance of the Court’s exercise of jurisdiction over crimes committed on its territory since 19 September 2002. From an international law perspective, there can be no doubt that such a clear, precise, unconditional unilateral document binds Côte d’Ivoire beyond the person of those in government who are authorised to represent it for a given period. This is simply the immediate corollary of the fundamental principle of continuity of State, under which a new government remains bound by the obligations assumed by its predecessor.⁵² Accordingly, the letter of 14 December 2010 could not express *de novo* an acceptance of the jurisdiction of the Court which had already been in effect since 18 April 2003; it was in fact intended to provide formal confirmation of the acceptance of the Court’s jurisdiction by the new authorities of Côte d’Ivoire.
42. Therefore, while not strictly indispensable in law, the confirmation nevertheless appears to be most apposite in the particularly troubled circumstances in Côte d’Ivoire following the second round of the presidential election on 28 November 2010. The Defence errs in having little regard for its significance, stating that the letter of 14 December 2010 “cannot be considered to have any legal effect whatsoever [for the Court]”.⁵³ In fact, in addition to the principle itself of confirming the declaration of acceptance, the letter comprises information which materially supports the argument for the Court genuinely to exercise its jurisdiction over crimes committed in Côte d’Ivoire.

⁵¹ See *supra*, paras. 25-36.

⁵² The principle of continuity of the State has been expressed particularly robustly in several arbitral awards since the late 19th century. Thus, in the Bolívar Railway Company arbitral award (1903), the Mixed Claims Great Britain-Venezuela Commission stated: “[n]ations do not die when there is a change of their rulers or in their forms of government. These are but expressions of a change of national will. ‘The king is dead; long live the king!’ has typified this thought for ages” (Reports of International Arbitral Awards, vol. IX, pp. 452-453).

⁵³ ICC-02/11-01/11-129-Corr-tENG, para. 91.

43. The same notably applies to President Ouattara's undertaking in the days following his election and as a founding declaration of his mandate to lead "Côte d'Ivoire [to] cooperate fully and without delay with the International Criminal Court". Beyond the formal acceptance of jurisdiction contained in the 18 April 2003 declaration, there can be no doubt that this clearly shows the Ivorian State's willingness to allow the Court actually to exercise the powers entrusted to it by the international community on its territory.
44. Likewise, the 14 December 2010 letter provides an important confirmation of the temporal scope of the acceptance of the Court's jurisdiction. By reaffirming Côte d'Ivoire's undertaking to cooperate with the Court "particularly as regards all of the crimes and acts of violence committed since March 2004", President Ouattara's letter emphasises the extent to which the unduly restrictive interpretation of the 18 April 2003 declaration proposed by the Defence⁵⁴ is inadmissible. As Pre-Trial Chamber III noted, this letter, and the subsequent letter of 3 May 2011:

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.⁵⁵

In this respect, the 14 December 2010 letter clearly supports the conclusion that the Court has jurisdiction over crimes committed in Côte d'Ivoire since 19 September 2002 and for the duration of the situation in which they were allowed to be perpetrated.

45. Furthermore, it is no doubt because it is perfectly aware of the confirmatory nature of the 14 December 2010 letter that the Defence seeks to minimise its importance by contesting the capacity of its signatory to represent the State. When it "simply moves the Chamber to find that at the time of writing the 14 December 2010 letter, Alassane Ouattara was not *de facto* and *de jure* President of the country within the meaning of the Ivorian constitution",⁵⁶ the Defence is in actual fact attempting to establish the Court as the judge of the constitutionality of a national presidential election. The Court, which clearly cannot assume such a role without acting *ultra vires*, cannot in any event accept such a line of defence, which has already been strongly refuted for being unfounded in fact or in law. A review of the main events surrounding the presidential election of October and November 2010 should suffice.

⁵⁴ See *supra*, para. 29.

46. After the first round on 31 October 2010, Laurent Gbagbo had secured 38.3 percent of the vote, Alassane Ouattara 32.08 percent and Henri Konan Bédié 25.24 percent. Since none of the candidates had won a majority, a run-off between Laurent Gbagbo and Alassane Ouattara was held on 28 November 2010. On 2 December 2010, the Independent Electoral Commission (IEC) announced that Alassane Ouattara had won the second round with 54.1 percent of the vote. Monitoring groups, including the European Union and the Carter Center, considered the election free and fair. Less than 24 hours after the IEC's announcement, Paul Yao N'Dré, president of the Constitutional Council and an ally of Laurent Gbagbo, overturned the Commission's results and proclaimed Laurent Gbagbo the winner with 51.45 percent of the vote. The Constitutional Council declared that the IEC had failed to respect the three-day deadline to announce the results. The Constitutional Council also annulled hundreds of thousands of ballots mainly from northern regions, where Ouattara drew significant support, based on alleged voting irregularities.
47. On 3 December 2010, in accordance with procedures outlined in UN Security Council resolution 1765, the Special Representative of the UN Secretary-General for Côte d'Ivoire, Choi Young-Jin, confirmed the IEC's results proclaiming Alassane Ouattara as the winner, and certified that the Constitutional Council's proclamation was not based on facts. The UN Secretary-General and Security Council⁵⁷ also endorsed Alassane Ouattara's victory, which was further recognised by the African Union,⁵⁸ ECOWAS, the European Union and a great many States. After several months of conflict, on 4 May 2011 the Constitutional Council of Côte d'Ivoire finally confirmed Alassane Ouattara's victory and he was proclaimed President of the Republic of Côte d'Ivoire.
48. As this brief recapitulation shows, Alassane Ouattara's victory at the polls of 28 November 2010 is in actual fact uncontested, both in fact and in law. From this perspective, the international recognition which the new Head of State immediately

⁵⁵ ICC-02/11-14-Corr, para. 14.

⁵⁶ ICC-02/11-01/11-129-Corr-tENG, para. 104.

⁵⁷ On 20 December 2010, the Security Council urged "all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union's recognition of Alassane Dramane Ouattara as President-elect of Côte d'Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission" (resolution 1962 (2010), para. 1).

⁵⁸ On 10 March 2011, the African Union once again confirmed Alassane Ouattara's victory and called on Laurent Gbagbo to step down.

received is not insignificant, contrary to what the Defence would have the Court believe.⁵⁹ And while such recognition does not in and of itself establish the existence of a new government, it is indeed essential for the new authorities as well as for the States and organisations recognising them. For example, the European Court of Human Rights noted in *Loizidou* that:

[T]he applicant Government have been recognised by the international community as the Government of the Republic of Cyprus [...]. Their locus standi as the Government of a High Contracting Party to the Convention *cannot therefore be in doubt*.⁶⁰

Recognition of a government therefore satisfies an “[TRANSLATION] auxiliary evidentiary role”,⁶¹ which has been further supported by the increasing institutionalisation of international relations.

49. This role is particularly significant when, as in the situation *sub judice*, the beneficiary of that recognition is the representative of the will of the people of the State in question. Contrary to the bizarre allegation that the Court should confine itself *in fine* to confirming the false declaration of the election results by the Ivorian Constitutional Council on 3 December 2010,⁶² the Court in fact has an obligation under international law to consider fully the right of the people of Côte d’Ivoire to self-determination, otherwise it would be in breach of the fundamental obligation “not to recognize the illegal situation” resulting from the failure to respect the people’s right to self-determination, as well as the concomitant obligation “not to render aid or assistance”⁶³ in maintaining the situation.

50. Accordingly, Pre-Trial Chamber I should not accept the Defence’s argument that the 14 December 2010 letter “is not a valid declaration within the meaning of article 12(3) of the Rome Statute”. Mr Alassane Ouattara, acting in his capacity as President of the Republic of Côte d’Ivoire, representing the freely expressed will of the Ivorian people,

⁵⁹ See ICC-02/11-01/11-129-Corr-tENG, para. 97.

⁶⁰ *Loizidou v. Turkey (preliminary objections)*, judgment of 23 March 1995, Series A, No. 310, para. 40 [italics added].

⁶¹ De Visscher, C., “*Les effectivités du droit international public*”, Pedone, Paris, 1967, p. 24. For other authors, “[TRANSLATION] recognition of a government is important owing to its political and even legal impact. In particular, it enables the true international representative of the State to be determined” (Daillier, P., Forteau, M., and Pellet, A., *op. cit.*, p. 461). In *Tinoco*, the single arbitrator Taft also noted: “[u]ndoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations” (*Aguilar-Amory and Royal Bank of Canada (Tinoco)*, arbitral award of 18 October 1923 (Great Britain v. Costa Rica), *Reports of International Arbitral Awards*, vol. 1, p. 380).

⁶² See ICC-02/11-01/11-129-Corr-tENG, para. 99.

⁶³ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, Rep. 2004, p. 202, para. 59.

had full authority to represent Côte d'Ivoire before the Court and, accordingly, to confirm the acceptance of jurisdiction notified on 18 April 2003.

2.2 Confirmatory letter of 3 May 2011

51. The relevant excerpts of the letter of 3 May 2011 read as follows:

Mr Prosecutor,

On 18 April 2003, acting pursuant to article 12(3) of the Rome Statute, the Government of the Republic of Côte d'Ivoire, represented by its Minister of Foreign Affairs, formally accepted the jurisdiction of the International Criminal Court for the purposes of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002. This declaration was made for an unspecified period of time.

Following my election to the Presidency of the Republic of Côte d'Ivoire on 2 December 2010, one of my first decisions was to confirm, by letter of 14 December 2010, Côte d'Ivoire's acceptance of the jurisdiction of the International Criminal Court.

For reasons of which you are aware, the transfer of power following the presidential election of 31 October and 28 November 2010 could not take place in the peaceful manner for which I had hoped.

There followed a period of serious crisis, during which it is unfortunately reasonable to believe that crimes falling within the jurisdiction of the International Criminal Court were committed. So grave were those crimes that I call on your support to ensure that the main perpetrators do not go unpunished, thereby contributing to the restoration of the rule of law in Côte d'Ivoire. [...]

I hereby confirm that I wish your Office to undertake independent and impartial investigations in Côte d'Ivoire into the most serious crimes committed since 28 November 2010 throughout Ivorian territory and to ensure that those persons bearing the greatest criminal responsibility for these crimes are identified, prosecuted and brought before the International Criminal Court.

I reiterate my country's undertaking to cooperate fully with your Office throughout these investigations and prosecutions, and confirm my intent to ensure that Côte d'Ivoire becomes a State Party to the Rome Statute as soon as practicable.

Yours faithfully,

Alassane Ouattara, President of the Republic of Côte d'Ivoire.

52. According to the Defence, the Court should “purely and simply [...] disregard the 3 May 2011 letter inasmuch as that document is wholly void”.⁶⁴ To support this submission, the Defence argues not only that the letter suffers the same lack of official capacity of its signatory as the 14 December 2010 letter, but also that it is not a “declaration” in accordance with article 12(3), but instead a “referral by stealth”⁶⁵ of a situation to the Prosecutor of the Court.

53. As to the bizarre referral theory, Côte d'Ivoire will merely note that it has sufficiently

⁶⁴ ICC-02/11-01/11-129-Corr-tENG, para. 101.

⁶⁵ *Ibid.*, p. 26.

demonstrated via the content of its letters of 18 April 2003, 14 December 2010 and 3 May 2011 that it is fully cognisant of the distinctions made by the Statute between the respective rights of States depending on whether or not they are parties to the treaty. Rather than seeking in this manner to “refer” a situation to the Prosecutor as a State Party might under article 14, the 3 May 2011 letter merely demonstrates Côte d’Ivoire’s desire to assist and an undertaking to cooperate, characteristic of the manner in which a non-State party chooses to avail itself of the option afforded by article 12(3).

54. The remaining allegations made by the Defence do not seem to call for detailed argument, since the submissions made above in relation to the 14 December 2010 letter also apply *mutatis mutandis* to the 3 May 2011 letter. In addition to Mr Alassane Ouattara’s incontestable authority to sign it as Head of State, nothing in the letter supports the conclusion that it is a *de novo* declaration of acceptance of the jurisdiction of the Court in accordance with article 12(3) of the Statute. Like the preceding letter of December 2010, this letter instead provides further confirmation which is material to the consideration of the issues at stake.
55. Firstly, it restates the acceptance of jurisdiction which was already expressed in 2003 and confirmed in 2010; secondly, it conveys once again Côte d’Ivoire’s desire to extend the temporal scope of its acceptance so as to encompass crimes committed between 19 September 2002 and the spring of 2011. In this respect, Côte d’Ivoire regrets that the Defence relied on a truncated version of Pre-Trial Chamber III’s analysis of the letter of 3 May 2011. Contrary to what is stated in the Challenge to Jurisdiction, the Chamber did not “merely detail[] the content of the May 2011 letter without, however, educing the ineluctable conclusion”.⁶⁶ In actual fact, it was “on the basis of the Declaration of acceptance of 18 April 2003 *and the letters of December 2010 and May 2011*”⁶⁷ that the Chamber held that the Court “has jurisdiction over crimes allegedly committed in Côte d’Ivoire since 19 September 2002”.⁶⁸

⁶⁶ *Ibid.*, para. 104.

⁶⁷ ICC-02/11-14-Corr, para. 15 [italics added].

⁶⁸ *Ibidem* (see *supra*, para. 9).

For these reasons, the Republic of Côte d'Ivoire prays Pre-Trial Chamber I:

- In the main, to rule that the 18 April 2003 declaration, confirmed by the letters of 14 December 2010 and 3 May 2011, confers on the International Criminal Court jurisdiction over crimes committed in the context of the situation existing in Côte d'Ivoire since 19 September 2002;
- In the alternative, to dismiss the Defence argument based on the alleged violation of Laurent Gbagbo's rights during his arrest, detention and surrender to the Court, on the grounds that this argument is wholly unrelated to a challenge to the Court's jurisdiction;
- In the further alternative, to dismiss the Defence argument based on the alleged violation of Laurent Gbagbo's rights during his arrest, detention and transfer to the Court, on the grounds that it has no basis in fact.

<u> [signed] </u> Jean-Pierre Mignard	<u> [signed] </u> Jean-Paul Benoit
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Counsel for the Republic of Côte d'Ivoire

Dated this 18 June 2012
At Paris