

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 15 August 2012

**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 document**

**Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)"**

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

**The Office of the Prosecutor**

Fatou Bensouda

**Counsel for the Defence**

Emmanuel Altit

Agathe Bahi Baroan

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

Jean-Pierre Mignard

Jean-Paul Benoit

**Amicus Curiae**

## **REGISTRY**

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**Registrar & Deputy Registrar**

Silvana Arbia, Registrar

Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Pre-Trial Chamber I** (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the “Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)” (the “Challenge to Jurisdiction”).<sup>1</sup>

## **I. Procedural history**

1. On 1 October 2003, the Republic of Côte d’Ivoire (“Côte d’Ivoire”) lodged a declaration under article 12(3) of the Rome Statute (the “Statute”) dated 18 April 2003, accepting the jurisdiction of the Court over crimes committed on its territory since the events of 19 September 2002 (the “Declaration of 18 April 2003”). It indicated that the Declaration was made for an unspecified period of time (“*pour une durée indéterminée.*”) <sup>2</sup>

2. On 14 December 2010, the President, the Prosecutor and the Registrar of the Court received a letter from Alassane Ouattara (“Mr Ouattara”), confirming the continuing validity of the Declaration of 18 April 2003 and committing the country to full cooperation with the Court, without delay, in particular with respect to crimes and abuses committed since March 2004.<sup>3</sup>

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<sup>1</sup> ICC-02/11-01/11-129-Corr-tENG.

<sup>2</sup> Republic of Côte d’Ivoire, Declaration dated 18 April 2003, ICC-02/11-01/11-129-Anx16 : «Conformément à l’article 12 paragraphe 3 du statut de la Cour Pénale Internationale, le Gouvernement ivoirien reconnaît la compétence de la Cour aux fins d’identifier, de poursuivre, de juger les auteurs et complices des actes commis sur le territoire ivoirien depuis les événements du 19 septembre 2002. En conséquence, la Côte d’Ivoire s’engage à coopérer avec la Cour sans retard et sans exception conformément au chapitre IX du statut. Cette déclaration, faite pour une durée indéterminée, entrera en vigueur dès sa signature. Fait à Abidjan, le 18 Avr. 2003. Pour le Gouvernement de la République de Côte d’Ivoire Le Ministre d’Etat, Ministre des Affaires Etrangères, Bamba Mamadou. »

<sup>3</sup> Republic of Côte d’Ivoire, Letter confirming acceptance of jurisdiction of 14 December 2010: «Monsieur le Président, Le 18 Avril 2003, le Gouvernement de la République de Côte d’Ivoire reconnaissait solennellement, par son Ministre des Affaires Etrangères, la compétence de la Cour Pénale Internationale. Depuis le 02 décembre 2010, suite à l’élection présidentielle de sortie de crise qu’elle a organisée les 31 octobre et 28 novembre 2010, la Côte d’Ivoire a un nouveau Président de la

3. In a subsequent letter addressed to the Prosecutor on 3 May 2011, Mr Ouattara referred to the serious crisis that had followed the presidential elections of 31 October 2010 and 28 November 2010 “during which it is unfortunately reasonable to believe that crimes falling under the jurisdiction of the International Criminal Court have been committed”. In light of the gravity of the crimes, he requested the assistance of the Court to ensure that the perpetrators would not go unpunished.<sup>4</sup>

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*République dont la victoire a été proclamée par la Commission Electorale Indépendante. Le Représentant spécial du Secrétaire Général de l'ONU a certifié les résultats de cette élection, conformément aux accords politiques de sortie de crise. L'ensemble de la Communauté internationale, notamment le Conseil de Sécurité de l'ONU, les Etats-Unis d'Amérique, la France, l'Union Africaine, la Communauté Economique des Etats d'Afrique de l'Ouest et l'Union Européenne, a reconnu les résultats de cette élection et m'a apporté son soutien. Aussi, en ma qualité de nouveau Président de la République de Côte d'Ivoire et conformément à l'article 12 paragraphe 3 du statut de Rome qui dispose que : 'Si l'acceptation de la compétence de la Cour par un Etat qui n'est pas Partie au présent Statut est nécessaire aux fins du paragraphe 2, cet Etat peut, par déclaration déposée auprès du Greffier, consentir à ce que la Cour exerce sa compétence à l'égard du crime dont il s'agit. L'Etat ayant accepté la compétence de la Cour coopère avec celle-ci sans retard et sans exception conformément au chapitre IX', j'ai l'honneur de confirmer la déclaration du 18 avril 2003. A ce titre, j'engage mon pays, la Côte d'Ivoire, à coopérer pleinement et sans délai avec la Cour Pénale Internationale, notamment en ce qui concerne tous les crimes et exactions commis depuis mars 2004. Je vous prie de croire, Monsieur le Président, à l'expression de ma considération distinguée. Alassane Ouattara.»*

<sup>4</sup> Letter confirming acceptance of jurisdiction of 3 May 2011: « Monsieur le Procureur, Le 18 avril, conformément à l'article 12 paragraphe 3 du Statut de Rome, le Gouvernement de la République de Côte d'Ivoire reconnaissant solennellement, par son Ministre des Affaires Etrangères, la compétence de la Cour pénale internationale aux fins d'identifier, de poursuivre, de juger les auteurs et complices des actes commis sur le territoire ivoirien depuis les événements du 19 septembre 2002. Cette déclaration fut faite pour une durée indéterminée. A l'issue de mon élection à la Présidence de la République de Côte d'Ivoire le 02 décembre 2010, l'une de mes premières décisions fut de confirmer, par lettre en date du 14 décembre 2010, l'acceptation par la Côte d'Ivoire de la compétence de la Cour pénale internationale. Pour les raison que vous connaissez, le transfert de pouvoir à l'issue de l'élection présidentielle des 31 octobre et 28 novembre 2010 n'a pu s'opérer de la façon pacifique que j'appelais de mes voeux. Il s'en est suivi une période de grave crise au cours de laquelle il est malheureusement raisonnable de croire que des crimes relevant de la compétence de la Cour pénale internationale ont été commis. Ces crimes sont d'une telle gravité que j'en appelle à votre concours pour faire en sorte que les principaux auteurs ne restent pas impunis et ainsi contribuer à restaurer l'Etat de droit en Côte d'Ivoire. En ma qualité de Président de la République, je vais m'employer sans relâche à restaurer dans la plénitude de son indépendance et de ses prérogatives le système judiciaire ivoirien. Le Ministre de la Justice, Garde des Sceaux a déjà pris des mesures pour faire la lumière sur un certain nombre d'infractions commises au cours des derniers mois et des années précédentes. Je ne ménagerai par ailleurs aucun effort pour réconcilier les Ivoiriens entre eux et clore enfin une décennie de violences et de déchirures. Dans ce contexte, et après consultation avec le parquet général et les autorités judiciaires, il apparaît néanmoins que la justice ivoirienne n'est, à ce jour, pas la mieux placée pour connaître des crimes les plus graves commis au cours des derniers mois et toute tentative d'en traduire en justice les

4. On 22 June 2011, Pre-Trial Chamber III was constituted and the situation in Côte d'Ivoire reassigned to it.<sup>5</sup>

5. On 3 October 2011, Pre-Trial Chamber III, pursuant to a request of the Prosecutor,<sup>6</sup> authorised the commencement of an investigation in Côte d'Ivoire (the "First Decision Authorising an Investigation")<sup>7</sup> where it concluded that the Court had "jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002, on the basis of the Declaration of acceptance of 18 April and the letters of December 2010 and May 2011".<sup>8</sup> It further indicated that since Côte d'Ivoire had confirmed its acceptance of jurisdiction in 2010 and 2011, the Chamber did not need to assess whether the Declaration of 18 April 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011. The majority of the Chamber<sup>9</sup> considered that the relevant timeframe for the authorised investigation was "with respect to crimes within the jurisdiction of the Court committed since 28 November 2010 and with respect to continuing crimes that may be committed in the future [...] insofar as they are part of the context of the ongoing situation in Côte d'Ivoire".<sup>10</sup>

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*plus hauts responsables risquerait de se heurter à des difficultés de tous ordres. Par la présente, j'entends confirmer mon souhait que votre Bureau mène en Côte d'Ivoire des enquêtes indépendantes et impartiales sur les crimes les plus graves commis depuis le 28 novembre 2010 sur l'ensemble du territoire ivoirien, et fasse en sorte que les personnes portant la responsabilité pénale la plus lourde pour ces crimes soient identifiées, poursuivies et traduites devant la Cour pénale internationale. Je réitère l'engagement de mon pays à coopérer pleinement avec votre Bureau tout au long de ces enquêtes et poursuites, et confirme mon intention de faire en sorte que la Côte d'Ivoire devienne Etat Partie au Statut de Rome dans les meilleurs délais possibles. Je vous prie de croire, Monsieur le Procureur, en l'assurance de ma considération distinguée. Alassane Ouattara. Président de la République de Côte d'Ivoire. »*

<sup>5</sup> ICC-02/11-02.

<sup>6</sup> ICC-02/11-3.

<sup>7</sup> ICC-02/11-14.

<sup>8</sup> *Ibid.*, para. 15.

<sup>9</sup> ICC-02/11-15-Corr; Judge Fernández de Gurmendi filed a separate and partially dissenting opinion setting out her disagreement with the temporal parameters set by the majority in relation to the authorised investigation.

<sup>10</sup> ICC-02/11-14, para. 212.

6. On 23 November 2011, Pre-Trial Chamber III issued a warrant for the arrest of Mr Laurent Gbagbo (“Mr Gbagbo”) for crimes against humanity under article 7 of the Statute allegedly committed on the territory of Côte d’Ivoire during the period between 16 December 2010 and 12 April 2011.<sup>11</sup>

7. On the basis of additional information provided by the Prosecutor as to potentially relevant crimes committed between 2002 and 2010, on 22 February 2012 the Chamber expanded its authorisation for an investigation in Côte d’Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010 (the “Second Decision Authorising an Investigation”).<sup>12</sup>

8. On 15 March 2012, the situation in Côte d’Ivoire was reassigned to Pre-Trial Chamber I.<sup>13</sup>

9. On 29 May 2012, the Defence of Mr Gbagbo filed the Challenge to Jurisdiction. In its submissions, the Defence requests the Chamber to find that the Declaration of 18 April 2003 “is not relevant to the period covered by the allegations against [...] Mr Gbagbo, viz., between 16 December 2010 and 12 April 2011”;<sup>14</sup> and that the two letters sent by Mr Ouattara on 14 December 2010 and on 3 May 2011 have no legal value and, as such, may not broaden the ambit of the Court’s jurisdiction beyond that accepted in the Declaration of 18 April 2003.<sup>15</sup> Accordingly, the Defence requests the Chamber to find that the Court “lacks jurisdiction for the period and events referred to in the

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<sup>11</sup> ICC-02/11-01/11-1.

<sup>12</sup> ICC-02/11-36, para. 37.

<sup>13</sup> ICC-02/11-37.

<sup>14</sup> Challenge to Jurisdiction, p. 73.

<sup>15</sup> *Ibid.*, p. 73.

warrant of arrest issued for [...] Mr Gbagbo on 23 November 2011 and in the Document Containing the Charges filed by the Prosecutor on 16 May 2012”.<sup>16</sup>

10. In the alternative, the Defence seeks a finding from the Chamber that Mr Gbagbo’s rights under articles 55 and 59 of the Statute were infringed during his eight-month detention in Côte d’Ivoire and in the course of his transfer to the Court on 29 November 2011, and that these violations render a fair trial impossible.<sup>17</sup> Accordingly, the Defence requests the Chamber “to entertain the challenge to jurisdiction” and to rule that “the Court cannot exercise its jurisdiction in such circumstances”.<sup>18</sup>

11. On 15 June 2012, the Chamber issued the “Decision on the conduct of the proceedings following the defence challenge to the jurisdiction of the Court pursuant to article 19 of the Statute”, setting deadlines for the Prosecutor and the Office of Public Counsel for victims (the “OPCV”) to respond to the Defence Challenge to Jurisdiction.<sup>19</sup>

12. On 18 June 2012, Côte d’Ivoire requested leave to submit observations on the Defence Challenge to Jurisdiction, under regulation 24(3) of the Regulations of the Court (the “Regulations”) (“Côte d’Ivoire’s Request to Respond”).<sup>20</sup>

13. On the same date, Côte d’Ivoire also submitted its observations on the Defence Challenge to Jurisdiction, in which it requests the Chamber to rule that the Declaration of 18 April 2003, as confirmed by the two letters dated 14 December 2010 and 3 May 2011, confer jurisdiction on the Court to adjudicate crimes committed in the context of the situation that has existed in

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<sup>16</sup> *Ibid.*, p. 74.

<sup>17</sup> *Ibid.*, p. 74.

<sup>18</sup> *Ibid.*, p. 74.

<sup>19</sup> ICC-02/11-01/11-153.

<sup>20</sup> ICC-02/11-01/11-154.

Côte d'Ivoire since 19 September 2002.<sup>21</sup> In addition, Côte d'Ivoire requests the Chamber to find that the violations of Mr Gbagbo's rights that allegedly occurred during his detention and subsequent transfer to the Court are not issues of jurisdiction.<sup>22</sup> Finally, Côte d'Ivoire requests a finding to the effect that the violations alleged by the Defence are factually unfounded.<sup>23</sup>

14. On 25 June 2012, the Defence objected to Côte d'Ivoire's Request to Respond, and requested that the observations filed by Côte d'Ivoire be disregarded.<sup>24</sup>

15. On 27 June 2012, the OPCV filed its observations on the Defence Challenge to Jurisdiction, requesting the Chamber to reject the requests advanced therein.<sup>25</sup>

16. On 28 June 2012, the Prosecutor submitted her observations on the Defence Challenge to Jurisdiction, requesting the Chamber to reject it in its entirety.<sup>26</sup>

17. On 6 July 2012, the Defence filed the "*Demande d'autorisation aux fins de répliquer aux observations du Procureur et du Représentant légal commun des victimes relatives à la requête de la Défense contestant la compétence de la Cour Pénale Internationale*"<sup>27</sup> (the "Defence Request to Reply"), in which it seeks, in accordance with regulation 24(5) of the Regulations, leave to reply to the observations submitted by the Prosecutor and the OPCV.

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<sup>21</sup> ICC-02/11-01/11-156, p. 26.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> ICC-02/11-01/11-163, paras 33-51, p. 17.

<sup>25</sup> ICC-02/11-01/11-165, p. 30.

<sup>26</sup> ICC-02/11-01/11-167-Corr, p. 24.

<sup>27</sup> ICC-02/11-01/11-174.

18. On 10 July 2012, the Prosecutor filed her response objecting to the Defence Request to Reply.<sup>28</sup>

## II. Applicable law

19. For the purposes of the present decision, the Chamber has considered articles 12, 13, 14, 15, 19, 21, 55 and 59 of the Statute, rules 44, 58, 59 and 103 of the Rules of Procedure and Evidence (the “Rules”) and regulation 24 of the Regulations.

## III. Preliminary matters

### *Côte d’Ivoire’s Request to Respond*

20. As already noted, Côte d’Ivoire has requested leave to respond to the Challenge to Jurisdiction, arguing that it qualifies as a State participating in the present proceedings within the meaning of regulation 24(3) of the Regulations.

21. The Defence opposes such request, submitting that a joint reading of article 19(3) of the Statute and rules 58 and 59 of the Rules makes it clear that the participation of Côte d’Ivoire in the instant proceedings is not envisaged by the Court’s statutory documents,<sup>29</sup> as they are confined to the Prosecutor, the victims and “those who have referred the situation under article 13”, as clarified by article 19(3) of the Statute.<sup>30</sup> In addition, the Defence points out that the Chamber did not rely on its discretion pursuant to rule 58(2) of the Rules as to the organisation of the proceedings in relation to the Challenge to

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<sup>28</sup> ICC-02/11-01/11-175, para. 17.

<sup>29</sup> ICC-02/11-01/11-163, paras 34-35.

<sup>30</sup> *Ibid.*, paras 40-41.

Jurisdiction to allow Côte d'Ivoire to submit observations on the challenge presented by the Defence.<sup>31</sup>

22. The Chamber notes that, under rule 58(2) of the Rules, in the event of a challenge to the jurisdiction of the Court, the Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. The Chamber considers that, in the present circumstances and in light of the nature of the arguments raised in the Challenge to Jurisdiction, the submissions of Côte d'Ivoire are of manifest relevance for the determination of the issue *sub judice*.

23. Accordingly, Côte d'Ivoire's Request to Respond must be granted and the Chamber, for the purpose of the present decision on the Challenge to Jurisdiction, will take into consideration the observations filed by Côte d'Ivoire on 18 June 2012.

#### ***Defence Request to Reply***

24. The Defence, in accordance with regulation 24 (5) of the Regulations, seeks leave to reply to the responses submitted by the Prosecutor and the OPCV in light of the new issues allegedly raised therein.<sup>32</sup>

25. The Chamber is of the view that the Defence Request to Reply does not identify any new issues of fact or law raised by the Prosecutor, or the OPCV but simply sets out issues discussed by the Prosecutor or the OPCV on the basis of the Defence Challenge to Jurisdiction, which the Defence wishes to further develop.

26. In light of the foregoing, the Chamber considers that the submissions of the parties and participants, which the Chamber has already received, are

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<sup>31</sup> *Ibid.*, para. 49.

<sup>32</sup> ICC-02/11-01/11-174.

sufficient to enable it to reach a decision on the issues pending before it in the present proceedings. Accordingly, the Chamber does not consider it appropriate to grant the Defence Request to Reply.

#### **IV. Challenge to the jurisdiction of the Court on the basis of the limited scope of the Declaration of 18 April 2003 under article 12(3) of the Statute**

##### *Submissions of the parties*

##### *Defence Submissions*

27. As already indicated, the Defence requests the Chamber to find that the scope of the Declaration of 18 April 2003 was limited to crimes committed in the context of the *coup d'état* of 19 September 2002<sup>33</sup> and, as such, is not relevant to the period covered by the allegations against Mr Gbagbo, *i.e.* for the period between 16 December 2010 and 12 April 2011.

28. The Defence submits that a declaration under article 12(3) of the Statute is materially different from a State referral under article 14 of the Statute.<sup>34</sup> In particular, the Defence argues that the declaration itself takes precedence over any determination of the situation by the Court and determines the context in which the Court may exercise its jurisdiction.<sup>35</sup>

29. The Defence indicates that it does not contest that one and the same situation may have existed in Côte d'Ivoire between 2002 and 2010.<sup>36</sup> Its submission is rather that the interpretation of a declaration under article 12(3) of the Statute must be exclusively based on the intention of the State lodging

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<sup>33</sup> Challenge to Jurisdiction, para. 52.

<sup>34</sup> *Ibid.*, para. 63.

<sup>35</sup> *Ibid.*, para. 64.

<sup>36</sup> *Ibid.*, para. 65.

the declaration and that the Declaration of 18 April 2003 was intended to cover a limited time period.<sup>37</sup>

30. The Defence argues that a strict interpretation of a declaration under article 12(3) of the Statute is necessary based on the following:

- (i) such a declaration has the effect, not only of recognising the jurisdiction of the Court over a situation but also of creating unilateral cooperation obligations for that State, obligations which do not pre-exist as in the case of a referral by a State Party;<sup>38</sup>
- (ii) the legal effect of a unilateral declaration is dependent on the consent of the State to be bound and, therefore, the intention of the State is paramount;<sup>39</sup>
- (iii) the special importance of the intent of the State in this context necessitates rules of interpretation slightly different from those contained in the Vienna Convention on the Law of Treaties;<sup>40</sup> and
- (iv) the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006 should be applied instead, from which it is apparent that (a) the intention of a State must be interpreted in light of the context and circumstances in which the declaration was formulated, and (b) in case of doubt, a restrictive interpretation must be given.<sup>41</sup>

31. The Defence submits that the words "*faite pour une durée indéterminée*" in the Declaration of 18 April 2003 relate solely to the ability of the Court to exercise its jurisdiction and not to the events over which the Court may exercise its jurisdiction, which, in principle, are limited to the time period

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<sup>37</sup> *Ibid.*, paras 66 and 74.

<sup>38</sup> *Ibid.*, para. 66-67.

<sup>39</sup> *Ibid.*, paras 68.

<sup>40</sup> *Ibid.*, para. 69.

<sup>41</sup> *Ibid.*, paras 70-71.

preceding the declaration.<sup>42</sup> In the view of the Defence, any other interpretation would be inconsistent with the principles of international law relating to unilateral declarations and the spirit of the Statute.<sup>43</sup>

32. In support of this argument, the Defence points to the fact that article 12(2)(a) of the Statute refers to conduct which occurred or crimes committed.<sup>44</sup> The Defence submits that an article 12(3) declaration has to be made in relation to crimes which have been committed and cannot extend forward in time to cover crimes having a tenuous link with the situation.<sup>45</sup> In this regard, the Defence submits that the jurisprudence of the Court in relation to the definition of a situation in the case of a State referral is not applicable, given the differences between a declaration under article 12(3) of the Statute and a referral.<sup>46</sup>

33. Alternatively, the Defence argues that the temporal scope of the jurisdiction granted to the Court must be interpreted in light of the context at the time that the declaration was made.<sup>47</sup> The Defence claims that the Declaration of 18 April 2003 under article 12(3) of the Statute was part of a larger process, involving the grant of an amnesty for specific events and the creation of an international commission to conduct investigations and establish facts surrounding the 2002 *coup d'état*.<sup>48</sup> Accordingly, the Defence submits that the declaration of 18 April 2003 does not extend beyond 24 January 2003, being the date of the signing of the Linas-Marcoussis

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<sup>42</sup> *Ibid.*, paras 74-75.

<sup>43</sup> *Ibid.*, paras 76-77.

<sup>44</sup> *Ibid.*, para. 79.

<sup>45</sup> *Ibid.*, para. 79.

<sup>46</sup> *Ibid.*, paras 80-81.

<sup>47</sup> *Ibid.*, para. 83.

<sup>48</sup> *Ibid.*, paras 84-87.

Agreement, concluded to bring an end to the political crisis surrounding the 2002 *coup d'état*.<sup>49</sup>

34. The Defence also asserts that the letter from Mr Ouattara dated 14 December 2010 is merely a confirmation of the Declaration of 18 April 2003 and cannot broaden the ambit of the jurisdiction of the Court. With respect to the letter from Mr Ouattara dated 3 May 2011, the Defence asserts that it is a simple reminder of the letter of 2010<sup>50</sup> and, in any case, was not sent to the Registrar as required under article 12(3) of the Statute.<sup>51</sup>

35. The Defence further argues that Mr Ouattara was neither *de facto* or *de jure* President of Côte d'Ivoire at the time that the letters of 2010 and 2011 were drafted and therefore did not have capacity to bind the State.<sup>52</sup> The Defence submits that international recognition is not determinative of the legitimacy of a new president, that the recognition of a new head of State is dependant on the State's constitution and, under the Ivorian Constitution, the *Conseil Constitutionnel* is responsible for the proclamation of the new president.<sup>53</sup> The Defence also points out that, on 22 December 2011, the *Conseil Constitutionnel* issued an advisory opinion declaring all acts of Mr Ouattara as purported president null and void.<sup>54</sup>

36. The Defence also questions the motivation of Mr Ouattara in writing the 2011 letter which requests the Prosecutor to investigate those crimes committed on the territory of Côte d'Ivoire since 28 November 2010.<sup>55</sup> The

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<sup>49</sup> *Ibid.*, paras 84 and 88.

<sup>50</sup> *Ibid.*, paras 91 and 103.

<sup>51</sup> *Ibid.*, para. 103.

<sup>52</sup> *Ibid.*, paras 94, 98 and 101.

<sup>53</sup> *Ibid.*, paras 94-97.

<sup>54</sup> *Ibid.*, para. 99.

<sup>55</sup> *Ibid.*, paras 105-108.

Defence submits that it betrays the desire of the Ivorian authorities to use the Court for their own political ends.<sup>56</sup>

*Prosecutor's Submissions*

37. The Prosecutor submits that the Declaration of 18 April 2003 was not confined to events at the time that it was made and that, in any event, the 2010 letter and 2011 letter make it clear that the jurisdiction granted covers events in 2010 and 2011.<sup>57</sup>

38. The Prosecutor refers to the findings of Pre-Trial Chamber III that the Declaration of 18 April 2003 “explicitly indicates its unspecified duration”, which is confirmed by the letters of 14 December 2010 and 3 May 2011 and authorising an investigation of events in Côte d’Ivoire from 28 November 2010 to include ongoing crimes which may be committed in the future.<sup>58</sup>

39. The Prosecutor further argues that the intent of Côte d’Ivoire can be discerned from subsequent statements of the Government, through which the Government of Côte d’Ivoire continues to demonstrate its ongoing intent to recognise the Court’s jurisdiction.<sup>59</sup>

40. The Prosecutor finally submits that Mr Ouattara is generally recognised nationally and internationally as the duly elected head of State in Côte d’Ivoire.<sup>60</sup>

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<sup>56</sup> *Ibid.*, paras 105-108.

<sup>57</sup> ICC-02/11-01/11-167-Conf, para.14.

<sup>58</sup> *Ibid.*, paras 16-17.

<sup>59</sup> *Ibid.*, para. 21.

<sup>60</sup> *Ibid.*, paras 14 and 19-20.

### *OPCV Submissions*

41. The OPCV submits that the Declaration of 18 April 2003 explicitly states that it is valid for an undetermined period of time demonstrating the clear intention of Côte d'Ivoire to accept the jurisdiction of the Court.<sup>61</sup>

42. The OPCV notes that article 12(3) of the Statute and rule 44 of the Rules do not require the provision of specific information in terms of time, territory or subject-matter or supporting documentation and that nothing prevents a State from lodging a declaration accepting the Court's jurisdiction with a broad or general scope of applicability within the context of the situation in question.<sup>62</sup>

43. The OPCV submits that a declaration under article 12(3) of the Statute is only a precondition to the exercise of jurisdiction by the Court and that responsibility lies with the Prosecutor to define the scope of her investigations with respect to specific crimes or individuals within the context of the situation.<sup>63</sup> In interpreting the parameters of the "situation", the OPCV refers to the jurisprudence of the Court and, particularly, the jurisdictional test set out in the case of *The Prosecutor v Callixte Mbarushimana*<sup>64</sup> as to whether the crimes "are sufficiently linked to the situation of crisis that was ongoing at the time of the referral".<sup>65</sup> The OPCV argues that this jurisprudence in relation to a State referral could be applied by analogy to the instant case and that a consistent interpretation of the scope of the investigative responsibility of the Prosecutor in relation to referrals under article 14 of the Statute and declarations under article 12(3) of the Statute would enhance legal certainty.<sup>66</sup>

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<sup>61</sup> ICC-02/11-01/11-165, paras 16-17.

<sup>62</sup> *Ibid.*, para. 18.

<sup>63</sup> *Ibid.*, para. 19.

<sup>64</sup> ICC-01/04-01/10-451, para. 16.

<sup>65</sup> ICC-02/11-01/11-165, para. 20-22.

<sup>66</sup> *Ibid.*, paras 22-23.

44. The OPCV contends that unilateral acts carried out by States in the context of international justice are explicitly excluded from the scope of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006<sup>67</sup> and that declarations under article 12(3) should thus be interpreted in accordance with the Vienna Convention and in particular in accordance with their ordinary meaning.<sup>68</sup> The OPCV makes reference to international human rights jurisprudence to demonstrate that there is no basis for adopting a restrictive interpretation of declarations under article 12(3) of the Statute.<sup>69</sup>

45. The OPCV submits that the ordinary meaning of the language of the Declaration of 18 April 2003 makes it clear that Côte d'Ivoire accepted the jurisdiction of the Court without temporal, geographical or subject matter restriction.<sup>70</sup>

46. In relation to the capacity of Mr Ouattara to submit the 2010 letter and 2011 letter to the Court, the OPCV points out that the Conseil Constitutionnel of Côte d'Ivoire declared Mr Ouattara president of Côte d'Ivoire on 4 May 2011, approved and validated all decisions previously taken by Mr Ouattara and declared null and void all other decisions that are inconsistent with its decision of 4 May 2011, thereby recognising the validity of the 2010 letter and 2011 letter and the invalidity of its own previous decision to declare Mr Gbagbo president.<sup>71</sup>

47. The OPCV submits that even if the 2010 letter and 2011 letter do not fulfil the formal requirements of a declaration under article 12(3) of the

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<sup>67</sup> International Law Commission, Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto, Official Records of the General Assembly, 61st session, Supplement No.10 (A/61/10).

<sup>68</sup> *Ibid.*, paras 32-33.

<sup>69</sup> *Ibid.*, paras 27-31.

<sup>70</sup> *Ibid.*, para. 35.

<sup>71</sup> *Ibid.*, para. 37.

Statute, they make it clear and unambiguous that the intention of Côte d'Ivoire has always been to accept the jurisdiction of the Court without restriction.

*Submissions of Côte d'Ivoire*

48. Côte d'Ivoire submits that there is no question as to whether the Declaration of 18 April 2003 is a validly executed declaration under article 12(3) of the Statute; the only issue which arises is the extent of the jurisdiction thereby granted to the Court. In this regard, Côte d'Ivoire submits that the scope of the Declaration of 18 April 2003 must be determined by reference to article 12(3) of the Statute, which provides the possibility of a State not party to the Statute to consent to the jurisdiction of the Court.<sup>72</sup>

49. In this respect, Côte d'Ivoire agrees with the Defence submissions that a restrictive approach must be applied to the interpretation of a State's will in the case of unilateral acts.<sup>73</sup> Côte d'Ivoire submits that, according to the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations of 2006, interpretation of the scope of the obligations resulting from such a declaration must give weight first and foremost to the text of the declaration.<sup>74</sup> However, Côte d'Ivoire submits that the Statute and the Rules do not make the determination of the situation over which the Court may exercise its jurisdiction dependent on the wishes of a State.<sup>75</sup>

50. Côte d'Ivoire states that its sovereign will was clearly expressed in the Declaration of 18 April 2003 and that, although it could have set a temporal limit to the acceptance of the Court's jurisdiction, it did not do so. The Court's jurisdiction was accepted for an indeterminate duration and an analysis of the

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<sup>72</sup> ICC-02/11-01/11-156, paras 27-28.

<sup>73</sup> *Ibid.*, para. 30.

<sup>74</sup> *Ibid.*, para. 31.

<sup>75</sup> *Ibid.*, para. 34.

context and circumstances of the making of the declaration does not contradict the plain meaning of the wording of the declaration.<sup>76</sup>

51. Côte d'Ivoire submits that the letter of 14 December 2010 was not intended to be a declaration of acceptance of the Court's jurisdiction under article 12(3) of the Statute; it was merely a confirmation of the 2003 declaration.<sup>77</sup> Although not necessary from a legal point of view, this confirmation of acceptance of the Court's jurisdiction by the newly elected Ivorian authorities was welcome in the politically complex aftermath of the presidential elections of 2010.<sup>78</sup> The 2010 letter also confirms that the scope of the Declaration of 18 April 2003 encompasses crimes committed from 19 September 2002 and throughout the situation which allowed the perpetration of those crimes.<sup>79</sup>

52. Similarly, Côte d'Ivoire states that the letter of 3 May 2011 simply reiterates the acceptance of jurisdiction already made in 2003, expresses the continued willingness of the Ivorian authorities to cooperate with the Court and indicates again the willingness of Côte d'Ivoire to extend the temporal scope of the Declaration of 18 April 2003 to include crimes committed between 19 September 2002 and spring 2011.

53. As to the capacity of Mr Ouattara to issue the 2010 and 2011 letters on behalf of the Ivorian State, Côte d'Ivoire suggests that the Defence is attempting to lure the Court into judging the constitutionality of a national election which is *ultra vires* its competence.<sup>80</sup>

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<sup>76</sup> *Ibid.*, paras 32, 35-36.

<sup>77</sup> *Ibid.*, paras 40-41.

<sup>78</sup> *Ibid.*, paras 41-43.

<sup>79</sup> *Ibid.*, para. 44.

<sup>80</sup> *Ibid.*, para. 45.

54. Côte d'Ivoire relies on the following facts as establishing that Mr Ouattara's electoral victory in the 2010 elections cannot be contested: (i) on 2 December 2010, the Independent Electoral Commission announced that Mr Ouattara had won the presidential election; (ii) independent observers found the elections to be free and fair; (iii) on 3 December 2010, the Conseil Constitutionnel proclaimed Mr Gbagbo to be the winner of the presidential elections, citing irregularities in the conduct of the elections; (iv) on the same day, the Special Representative of the Secretary General of the United Nations, in accordance with the procedure set out in UN Security Council Resolution 1765, confirmed the results announced by the Independent Electoral Commission and certified that the pronouncement of the Conseil Constitutionnel was not based on the facts; (v) also on 3 December 2010, the Secretary General of the United Nations, the United Nations Security Council, the African Union, the Economic Community of West African States, the European Union and numerous States recognised Mr Ouattara as the President of Côte d'Ivoire; and (vi) on 4 May 2011, the Conseil Constitutionnel finally endorsed the victory of Mr Ouattara and proclaimed him President of Côte d'Ivoire.<sup>81</sup>

### *Analysis of the Chamber*

55. As set out above, Côte d'Ivoire lodged with the Registrar a declaration under article 12(3) of the Statute accepting the jurisdiction of the Court for crimes committed on its territory after the events of 19 September 2002 and indicated that the declaration was made for an unspecified period of time. The declaration, dated 18 April 2003, was signed by the then Ivorian Minister for Foreign Affairs of President Gbagbo, Bamba Mamadou, and lodged with

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<sup>81</sup> *Ibid.*, paras 46-48.

the Registrar in accordance with article 12(3) of the Statute and rule 44 of the Rules.

56. Pre-Trial Chamber III has already confirmed that this Declaration of 18 April 2003 was signed by an official who “had the authority to sign a valid declaration on behalf of Côte d’Ivoire”<sup>82</sup> and no question has been raised by the Defence as to the validity of the declaration. As already indicated, the objection of the Defence in relation to the Declaration of 18 April 2003 relates to the extent of jurisdiction thereby granted to the Court.

57. The Chamber shares the view of the Defence that a declaration made under article 12(3) of the Statute cannot be equated with a “referral”. The Statute draws a distinction between the preconditions to the exercise of jurisdiction, which are set forth in article 12 and the mechanisms that may trigger the exercise of jurisdiction of the Court in accordance with articles 13 to 15 of the Statute.

58. Unless a situation is referred by the Security Council, acceptance of the exercise of jurisdiction by the Court is required from the territorial State or the State of nationality of the suspect. This acceptance, which is a precondition to the exercise of jurisdiction, can be signalled by a State either by becoming a party to the Statute in accordance with article 12(1) of the Statute or by lodging a declaration of acceptance of jurisdiction in accordance with article 12(3) of the Statute.

59. The Chamber notes that while States may choose to consent or not to the jurisdiction of the Court through declarations provided for in article 12(3) of the Statute, the scope of such declarations is predetermined by the ICC legal framework. Most notably rule 44 of the Rules explicitly limits the

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<sup>82</sup> ICC-02/11-14, para. 14.

discretion of States in framing the situation that may be investigated by the Court. This rule mandates the Registrar to remind accepting States 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” (emphasis added). Rule 44 of the Rules was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court “opportunistically”.<sup>83</sup> Indeed, there were concerns that the wording of article 12(3) of the Statute, and specifically the reference to the acceptance of jurisdiction “with respect to the crime in question”, would allow the Court to be used as a political tool by States not party to the Statute who could selectively accept the exercise of jurisdiction in respect of certain crimes or certain parties to a conflict.<sup>84</sup>

60. In light of the above, it is clear, in the view of the Chamber, that while States may indeed seek to define the scope of its acceptance, such definition cannot establish arbitrary parameters to a given situation as it must encompass all crimes that are relevant to it. Contrary to the Defence submission, the Chamber is of the view that it will be ultimately for the Court to determine whether the scope of acceptance, as set out in the declaration, is consistent with the objective parameters of the situation at hand.

61. In any event, the Chamber notes that Côte d’Ivoire did not seek to define the scope of the situation in relation to which it accepted jurisdiction by means of its Declaration of 18 April 2003, other than referring to the initial events of 19 September 2002. Furthermore, nothing in the Declaration of 18 April 2003 indicates any attempt by Côte d’Ivoire to restrict the scope by

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<sup>83</sup> R. Wedgwood, Speech Three: Improve the International Criminal Court, in: Council for Foreign Relations, *Toward an International Criminal Court?* (1999), p.69.

<sup>84</sup> S.A. Williams, Article 12, Preconditions to the Exercise of Jurisdiction, in: O. Triffterer (ed.), *Commentary on the Rome Statute: Observers’ Notes, Article by Article*, (2008), pp 559-560.

temporal or other limitations to the crimes to be investigated in Côte d'Ivoire after those events. The words of the Declaration of 18 April 2003, whereby Côte d'Ivoire recognised the jurisdiction of the Court for "*une durée indéterminée*", when given their ordinary meaning, make it clear that Côte d'Ivoire accepted the jurisdiction of the Court over events from 19 September 2002 onwards.

62. Upon its reception, the Registrar informed Côte d'Ivoire of the consequences that were attached to the Declaration of 18 April 2003 under rule 44 of the Rules.<sup>85</sup>

63. In its First Decision Authorising an Investigation, Pre-Trial Chamber III established, within the broad terms of the Declaration of 18 April 2003, the objective temporal framework of the situation that may be investigated, having conducted an in-depth analysis of the available material related to the political and military crisis in Côte d'Ivoire since the attempted *coup* of 2002.<sup>86</sup> In its Second Decision Authorising an Investigation, Pre-Trial Chamber III reiterated that "in accordance with the Decision of 3 October 2011 [...] the violent events in Côte d'Ivoire in the period between 19 September 2002 and 28 November 2010, although reaching varying levels of intensity at different locations and at different times, are to be treated as a single situation, in which an ongoing crisis involving a prolonged political dispute and power-struggle culminated in the events in relation to which the Chamber earlier authorised an investigation".<sup>87</sup>

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<sup>85</sup> Registrar of the International Criminal Court, letter dated October 2003.

<sup>86</sup> ICC-02/11-14, paras 180-183.

<sup>87</sup> ICC-02/11-36, para. 36.

64. The Chamber notes that the Defence does not contest the conclusion of Pre-Trial Chamber III that one and the same situation may have existed in Côte d'Ivoire between 2002 and 2010.<sup>88</sup>

65. For the foregoing reasons, the Chamber finds that the Court has jurisdiction over all alleged crimes committed since 19 September 2002, including those allegedly committed since 28 November 2010, on the basis of the Declaration of 18 April 2003.

66. In light of the above, the Chamber deems it unnecessary to address the validity of the letters of 14 December 2010 and 3 May 2011 or the question of the capacity of Mr Ouattara to bind Côte d'Ivoire on those particular dates. However, it considers it worthwhile to note that, while not necessary from a legal point of view, these letters, together with the subsequent statements and continuous cooperation of Côte d'Ivoire with the Court, are further evidence that Côte d'Ivoire has accepted the exercise of jurisdiction of the Court in relation to the situation as set out above.

67. The Defence challenge to the jurisdiction of the Court based on the limited scope of Côte d'Ivoire's acceptance of jurisdiction under article 12(3) of the Statute must thus be rejected.

## **V. Challenge to the jurisdiction of the Court on the basis of the alleged breach of Mr Gbagbo's rights during his arrest and surrender to the Court**

### ***Submissions of the parties***

#### ***Defence submissions***

68. In its submissions, the Defence contends that, between 11 April 2011 and 29 November 2011, Mr Gbagbo endured the violation of a number of

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<sup>88</sup> *Ibid.*, para. 65.

rights to which he is entitled under Ivorian law, international law and articles 55(1)(b) and (d) and 59(2) of the Statute.<sup>89</sup> In particular, the Defence contends that Mr Gbagbo was subjected to arbitrary arrest and detention by the Ivorian authorities and that, during the abovementioned period of time, he was subjected to conditions of detention amounting to inhuman and degrading treatment as well as torture, in violation of article 55(1)(b) and (d) of the Statute.<sup>90</sup>

69. The Defence asserts that, given that the Prosecutor had already publicly expressed his interest in investigating Mr Gbagbo's conduct, had established contact with the Ivorian authorities and had been informed by Mr Gbagbo's counsel of the alleged breach of Mr Gbagbo's rights, the Prosecutor violated his statutory obligations "by refusing to perform his duty and to request that Ivorian authorities put an end to the very grave breaches of [Mr] Gbagbo's rights".<sup>91</sup>

70. In addition, the Defence avers that the surrender proceedings, which took place on 29 November 2011 before an Ivorian judicial authority, was characterised by procedural irregularities, in violation of article 59(2) of the Statute.<sup>92</sup>

71. According to the Defence, the unlawfulness of Mr Gbagbo's arrest and detention is demonstrated by the fact that Mr Gbagbo: (i) was arrested pursuant to an unlawful procedure, which disregarded his official status under Ivorian Constitutional law and was not implemented by the competent enforcement officers;<sup>93</sup> (ii) was not notified of any arrest warrant or house-arrest order, nor was he brought before a judge to challenge the legality of his

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<sup>89</sup> Challenge to Jurisdiction, paras 109-304.

<sup>90</sup> *Ibid.*, paras 112-234.

<sup>91</sup> Challenge to Jurisdiction, para. 266.

<sup>92</sup> *Ibid.*, paras 268-280.

<sup>93</sup> *Ibid.*, paras 142-159.

detention, either before or after formal charges of economic crimes were entered against him on 18 August 2011;<sup>94</sup> and (iii) was denied access to counsel for the first six weeks of his detention, and was subsequently able to meet his counsel only 4 times throughout the period of his detention.<sup>95</sup>

72. Furthermore, the Defence avers that the conditions of Mr Gbagbo's detention in Côte d'Ivoire constituted inhuman and degrading treatment.<sup>96</sup> Moreover, the Defence submits that, taken cumulatively, the treatment of Mr Gbagbo amounted to torture, in violation of article 55(1)(b) of the Statute.<sup>97</sup>

73. As for the violations of the rights of the suspect in the course of the surrender process, the Defence alleges that "a number of flagrantly illegal acts [were] committed by the Ivorian authorities",<sup>98</sup> which relate to the conduct of the surrender process on 29 November 2011. The Defence submits that "the analysis of the infringement of article 55(1) applies *mutatis mutandis* to the arrest procedure within the context of the procedure of transfer to the Court [envisaged in article 59(2)]".<sup>99</sup> Accordingly, the arrest to be taken into account pursuant to article 59(2) of the Statute is, in the view of the Defence, the one which took place on 11 April 2011.<sup>100</sup>

74. In particular, the Defence objects to the sudden scheduling of the surrender hearing and the lack of time to prepare for it;<sup>101</sup> the lack of any possibility for Mr Gbagbo's lawyers to make submissions on the legality of the surrender;<sup>102</sup> the lack of proper reasoning and the incorrect legal basis

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<sup>94</sup> *Ibid.*, paras 160-180, 193.

<sup>95</sup> *Ibid.*, paras 129-139.

<sup>96</sup> *Ibid.*, paras 198; 200-202; 204; 220-227.

<sup>97</sup> *Ibid.*, paras 228-234.

<sup>98</sup> *Ibid.*, para. 275.

<sup>99</sup> *Ibid.*, para. 272.

<sup>100</sup> *Ibid.*, para. 274.

<sup>101</sup> *Ibid.*, para. 276.

<sup>102</sup> *Ibid.*, para. 276.

used by the Ivorian court in its decision;<sup>103</sup> the lack of impartiality by the Ivorian Judges during the hearing and in the course of their deliberations. In addition, the Defence observes that the immediate transfer of Mr Gbagbo to The Hague after the closing of the hearing was inconsistent with the suspensive effect of an appeal against a surrender decision under Ivorian law.<sup>104</sup>

75. The Defence is of the view that prior to the arrest of Mr Gbagbo, the Prosecutor had already established contact and had developed a form of cooperation with Ivorian authorities, aimed at depriving Mr Gbagbo of his liberty with a view “to hold[ing] [...] [Mr] Gbagbo at the disposal of the Court at the appropriate moment”.<sup>105</sup> According to the Defence, the foregoing would show that the Prosecutor had already taken investigative steps in the process of bringing Mr Gbagbo before the Court, thus triggering the protection afforded to the suspect by article 55 of the Statute and putting the Prosecutor under the obligation to “fully respect the rights of persons arising under [...] [the] Statute”, pursuant to article 54(1)(c) of the Statute.<sup>106</sup> Furthermore, it is contended that the Registry “contributed to the impunity with which the Ivorian authorities conducted the [surrender] proceedings”, thereby triggering the Chamber’s duty to remedy the infringements committed in the context of those proceedings.<sup>107</sup> This allegation is based on the fact that the Registry, having been informed by the requested State of the conduct of the surrender proceedings on 29 November 2011, “could not have been unaware of the alacrity with which the proceedings have been initiated”.<sup>108</sup>

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<sup>103</sup> *Ibid.*, paras 287-279.

<sup>104</sup> *Ibid.*, para. 280.

<sup>105</sup> *Ibid.*, para. 254.

<sup>106</sup> *Ibid.*, paras 255-256, 262.

<sup>107</sup> *Ibid.*, para. 288.

<sup>108</sup> *Ibid.*, para. 288.

76. Finally, the Defence contends that the cumulative effect of the abovementioned violations renders the proceedings against Mr Gbagbo before the Court unfair and would, more generally, undermines the integrity and the legitimacy of international justice.<sup>109</sup> Thus, the Defence requests the Chamber to decline to exercise its jurisdiction and order a permanent stay of the proceedings against Mr Gbagbo.<sup>110</sup>

#### *Prosecutor's Submissions*

77. The Prosecutor contends that “the detention in Côte d’Ivoire of [Mr] Gbagbo or any other alleged event connected to it cannot have any bearing on the Court’s jurisdiction”.<sup>111</sup> The Prosecutor claims that neither her office nor any organ of the Court was involved in the initial arrest, on 11 April 2011, and detention of Mr Gbagbo “before the transmission by the Registry of the Court’s arrest warrant or request for his surrender to the Court on 25 November 2011”.<sup>112</sup> By the same token, the Prosecutor alleges that she did not have “any control over the Ivorian [...] authorities or their conduct of national proceedings, including the detention of the [s]uspect”.<sup>113</sup> In the view of the Prosecutor, mere knowledge of national investigations and related proceedings as well as contact between the Prosecution and Ivorian authorities in connection with the former’s activities does not suggest any concerted action or involvement in Mr Gbagbo’s investigations or detention by national authorities.<sup>114</sup>

78. The Prosecutor considers that article 55 of the Statute is applicable “in respect of an investigation under this Statute”, thus suggesting that it does not

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<sup>109</sup> *Ibid.*, para. 304.

<sup>110</sup> *Ibid.*, para. 304, p. 79.

<sup>111</sup> ICC-02/11-01/11-167-Red-Corr, para. 30.

<sup>112</sup> *Ibid.*, para. 27.

<sup>113</sup> *Ibid.*, para. 27.

<sup>114</sup> *Ibid.*, para. 28.

apply to investigations or prosecutions by another entity, unrelated to the Court, which may investigate offences that do not form the basis of the proceedings against Mr Gbagbo before the Court.<sup>115</sup>

79. In her submissions, the Prosecutor also challenges the Defence's contention that irregularities took place during the surrender proceedings before the Ivorian judicial authorities and Mr Gbagbo's subsequent transfer to The Hague, in violation of article 59(2) of the Statute. In this respect, the Prosecutor underlines that the wording "in accordance with the law of that State" in article 59(2) of the Statute means that it rests upon national authorities to interpret and apply national law.<sup>116</sup> Accordingly, the role of the Chamber when conducting a review under said provision is confined to ensuring that "the process envisaged by [national] law was duly followed and that the rights of the arrestee were properly respected".<sup>117</sup> In the Prosecutor's view, the Chamber does not sit "as a court of appeal vis-à-vis the process conducted by the national authorities and any ensuing decision".<sup>118</sup>

80. Concerning the procedures adopted in the course of and subsequent to the transfer of Mr Gbagbo to The Hague, the Prosecutor underlines that the communications between the Registry and the Ivorian authorities related to the practical steps necessary "to effect the arrest and surrender of the [s]uspect to the Court for crimes as charged by the Court", as required by rule 184 of the Rules.<sup>119</sup>

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<sup>115</sup> *Ibid.*, para. 34.

<sup>116</sup> *Ibid.*, para. 47.

<sup>117</sup> *Ibid.*, para. 46.

<sup>118</sup> *Ibid.*, para. 57.

<sup>119</sup> *Ibid.*, para. 29.

81. On the basis of the facts as alleged by the Defence, the Prosecutor avers that no material breach of article 59(2) of the Statute occurred during the surrender proceedings.<sup>120</sup>

82. The Prosecutor concludes that in relation to the period before the issuance of the Chamber's decision pursuant to article 58 of the Statute "neither the Prosecutor nor the Court was in any way connected or involved in the [s]uspect's detention".<sup>121</sup> With regard to the period after the issuance of said decision, the Defence has not provided evidence of any torture or serious mistreatment of the suspect that is any way related to the process of bringing him to justice for the crimes that form the subject-matter of the proceedings before the Court.<sup>122</sup> In light of all these considerations, the Prosecutor requests the Chamber to reject the Defence Challenge to Jurisdiction.<sup>123</sup>

#### *OPCV Submissions*

83. In the view of the OPCV, the Prosecutor or the Court as a whole may not be held 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 [...] [Court]".<sup>124</sup>

84. The OPCV observes that while the Chamber authorised the opening of an investigation on 3 October 2011, most of the violations alleged by the Defence occurred before that date.<sup>125</sup> Such violations are, however, in connection with Mr Gbagbo's arrest and detention by the Ivorian authorities in relation to economic crimes, which have no link with the crimes falling

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<sup>120</sup> *Ibid.*, para. 58.

<sup>121</sup> *Ibid.*, para. 39.

<sup>122</sup> *Ibid.*, para. 39.

<sup>123</sup> *Ibid.*, p. 24.

<sup>124</sup> ICC-02/11-01/11-165, para. 42.

<sup>125</sup> *Ibid.*, para. 41.

under the jurisdiction of the Court.<sup>126</sup> Accordingly, any contact between the Prosecutor and the Ivorian authorities during the period preceding the opening of the investigation, as authorised by the Chamber, “cannot prove any concerted action nor can it impose on the Prosecution any responsibility under article 55 of the Statute”.<sup>127</sup>

85. With regard to the period after the authorisation of investigations, the OPCV observes that the Defence has not provided evidence of concerted action between the Prosecutor and Ivorian authorities in relation to the infringement of Mr Gbagbo’s rights under the Statute.<sup>128</sup> Moreover, taking into account the exceptional character of the remedy of a permanent stay of proceedings in cases of abuse of process, the OPCV is of the view that the violations alleged, whether committed before or after the opening of the investigation, would not reach a sufficient threshold, on the basis of the jurisprudence of the Court and of other international tribunals, to require the Chamber to order “an ‘exceptional’, ‘drastic’ and ‘last resort’ remedy, *i.e.* a stay of proceedings”.<sup>129</sup>

#### *Submissions of Côte d’Ivoire*

86. With regard to the allegations of abuse of process made by the Defence, Côte d’Ivoire submits that the Defence has manifestly erred in the characterisation of its challenge, in that the purported violations of Mr Gbagbo’s rights under articles 55 and 59 of the Statute are irrelevant to the determination as to whether the Court has jurisdiction over the crimes with which the suspect is charged.<sup>130</sup> Côte d’Ivoire contends that the issue of whether the Court has jurisdiction pursuant to article 19 of the Statute, on the

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<sup>126</sup> *Ibid.*, para. 41.

<sup>127</sup> *Ibid.*, para. 41.

<sup>128</sup> *Ibid.*, para. 50.

<sup>129</sup> *Ibid.*, para. 58.

<sup>130</sup> ICC-02/11-01/11-156, paras 15, 18.

one hand, and the issue of abuse of process, on the other, must remain separate.<sup>131</sup> In addition, Côte d'Ivoire avers that during the period between his arrest and surrender to the Court, Mr Gbagbo was not subjected to any form of inhuman and degrading treatment or torture and that, taking into account the impact of the conflict in the country on the Ivorian judicial system, Mr Gbagbo's rights have been respected.<sup>132</sup>

87. In light of these considerations, Côte d'Ivoire requests the Chamber to find that the allegations concerning the violations of Mr Gbagbo's fundamental rights are unrelated to the Challenge to Jurisdiction and that these allegations are factually unfounded.<sup>133</sup>

### *Analysis of the Chamber*

88. The Chamber is of the view that this second limb of the Defence request, related to the alleged violation of the rights of Mr Gbagbo between his arrest on 11 April 2011 and his transfer to the Court on 29 November 2011, cannot be considered a challenge to the jurisdiction of the Court. Indeed, the Chamber notes that the Appeals Chamber, called upon to rule on an appeal by the Defence of Thomas Lubanga Dyilo, stated:

[T]he application is founded on the premise that the Court has jurisdiction to address the case but should desist from assuming jurisdiction in the matter for the reason that so to do would be an abuse of the proceedings before the Court owing to the grave violations of the rights of the appellant entrenched in the Statute. [...] The jurisdiction of the Court is defined by the Statute. [...] The Statute itself erects certain barriers to the exercise of the jurisdiction of the Court [...]. Abuse of process or gross violations of fundamental rights of the suspect are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction. Article 19 of the Statute regulates the context within which challenges to jurisdiction and admissibility may be raised by a party having an interest in the matter [...] Jurisdiction under article 19 of the Statute

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<sup>131</sup> *Ibid.*, para. 21.

<sup>132</sup> *Ibid.*, para. 22.

<sup>133</sup> *Ibid.*, p. 26.

denotes competence to deal with a criminal cause or matter under the Statute. Notwithstanding the label attached to it, the application of Mr Lubanga Dyilo does not challenge the jurisdiction of the Court. [...] What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. [...] The application could only survive, if the Court was vested with jurisdiction under the Statute or endowed with inherent power to stop judicial proceedings where it is just to do so.<sup>134</sup>

89. However, the Chamber notes, as also recognised by the Appeals Chamber, that a court of law is vested with the authority to stop judicial proceedings “by declining jurisdiction in a judicial cause, where to do otherwise would be odious to the administration of justice”.<sup>135</sup> Indeed, in light of article 21(3) of the Statute, “[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial”.<sup>136</sup>

90. Bearing in mind the seriousness of the allegations made by the Defence, the Chamber considers it necessary to entertain the Defence request in light of the power of the Chamber to stay proceedings in case of abuse of process.

91. As underlined by the Appeals Chamber, a permanent stay of proceedings is a remedy of an exceptional nature and not every infraction of the law or breach of the rights of the suspect will give rise to a finding of abuse of process: “the illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial”.<sup>137</sup> With regard to the circumstances in which the Chamber may consider a permanent stay of proceedings as a result of abuse of process, the Appeals Chamber has held that this power can be exercised when “either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal

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<sup>134</sup> Appeals Chamber, “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”, ICC-01/04-01/06-772, 14 December 2006, paras 20-24.

<sup>135</sup> ICC-01/04-01/06-772, para. 27.

<sup>136</sup> ICC-01/04-01/06-772, para. 37.

<sup>137</sup> ICC-01/04-01/06-772, para. 30.

action or gross violation of the rights of the individual making it unacceptable for justice to embark on its course".<sup>138</sup>

92. Accordingly, a permanent stay of proceedings may be ordered only when the breach of the suspect's rights would make the fairness of the proceedings against him impossible.<sup>139</sup> This logically entails that the breach of his or her rights must be related to the process of bringing the person to justice for the crimes that form the subject-matter of the proceedings before the Court.<sup>140</sup> Indeed, it is the view of the Chamber that violations of fundamental rights, however serious, can have the requisite impact on proceedings to constitute an abuse of process only insofar as they can be attributed to the Court. Attribution in this sense means that the act of violation of fundamental rights is: (i) either directly perpetrated by persons associated with the Court; or (ii) perpetrated by third persons in collusion with the Court.<sup>141</sup> Conversely, when a violation of the suspect's fundamental rights, however grave, is established, but demonstrates no such link with the Court, the exceptional remedy of staying the proceedings is not available.

93. Turning to the merits of the request, the Chamber is of the view that not every violation of articles 55 and 59 of the Statute would lead, *per se*, to the Court being required to decline to exercise jurisdiction, but only such violations that would amount, by themselves or in combination with other circumstances, to an abuse of process. In the same vein, other factual circumstances giving rise to violations of fundamental rights may amount to an abuse of process warranting a stay of proceedings. Indeed, it is the Defence submission that the alleged infringement of Mr Gbagbo's rights does not merely constitute a breach of the provisions of articles 55 and 59 of the Statute,

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<sup>138</sup> ICC-01/04-01/06-772, para. 31.

<sup>139</sup> ICC-01/04-01/06-772, para. 37.

<sup>140</sup> ICC-01/04-01/06-772, para. 44.

<sup>141</sup> ICC-01/04-01/06-512, p. 9; ICC-01/04-01/06-772, para. 42.

but is also so significant as to warrant, in itself, a permanent stay of proceedings.<sup>142</sup>

94. In light of the Defence submissions, the Chamber will first analyse whether there has been any violation of article 55 or article 59 of the Statute. Thereupon, the Chamber will evaluate whether there has been any other breach of Mr Gbagbo's fundamental rights as alleged by the Defence that constitutes in itself an abuse of process warranting a stay of the current proceedings, irrespective of whether such breach may also be regarded as an infringement of a particular provision of the Statute.

#### Alleged violation of article 55 of the Statute

95. Article 55 of the Statute is entitled "Rights of persons during an investigation". The Defence makes specific reference to the first paragraph of this provision in order to request a stay of the proceedings against Mr Gbagbo.

96. The Chamber notes that article 55(1) is applicable "[i]n respect of an investigation under this Statute". Such expression must be understood to encompass any investigative steps that are taken either by the Prosecutor or by national authorities at his or her behest. Conversely, an investigation conducted by an entity other than the Prosecutor, and which is not related to proceedings before the Court, does not trigger the rights under article 55 of the Statute.

97. With respect to the allegations of the Defence, the Chamber considers it decisive that the alleged violations of article 55(1) of the Statute were not perpetrated by the Prosecutor or by the Ivorian authorities on behalf of the Prosecutor or any organ of the Court. The Chamber in fact notes that Mr Gbagbo was arrested in the course of an operation carried out, as the Defence

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<sup>142</sup> Challenge to Jurisdiction, paras 292 to 303.

points out, by Mr Ouattara's forces.<sup>143</sup> He was subsequently transferred to the north of Côte d'Ivoire and kept in detention there.<sup>144</sup> Thus, the information provided shows that Mr Gbagbo was arrested and detained by the Ivorian authorities and subsequently charged with economic crimes in circumstances seemingly unconnected to the proceedings before the Court.<sup>145</sup> Article 55(1) of the Statute is thus not applicable.

98. The Defence contends that a series of public statements made by the Ivorian authorities, statements of the Prosecutor and documents in his possession as well as other factors, including the timing of Mr Gbagbo's transfer to the Court, demonstrate a negotiated "burden sharing" between the Ivorian authorities and the Prosecutor with a view to "hold[ing] [...] Mr Gbagbo at the disposal of the Court at the appropriate time".<sup>146</sup> The Chamber is, however, of the view that, in the absence of relevant evidence indicating that measures taken by the Ivorian authorities were adopted on behalf of the Prosecutor of the Court, the Defence allegations are purely speculative in nature.

#### Alleged violation of article 59 of the Statute

99. Article 59 of the Statute regulates arrest proceedings in the custodial State, *i.e.* proceedings following the receipt by that State of a request for arrest and surrender issued by the Court.

100. Article 59 of the Statute obliges the custodial State to act expeditiously in the surrender of persons subject to an arrest warrant issued by the Court.<sup>147</sup> In addition, by exhaustively listing the issues which the custodial State shall

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<sup>143</sup> Challenge to Jurisdiction, para. 114.

<sup>144</sup> *Ibid.*, para. 114.

<sup>145</sup> *Ibid.*, Annex 38.

<sup>146</sup> Challenge to Jurisdiction, para. 254.

<sup>147</sup> Cf. the use of "immediately" in para. 1; "promptly" in para. 2 and "as soon as possible" in para. 7.

examine, article 59 of the Statute safeguards the competence and decisions of the Court, most notably by preventing national authorities from examining the validity of the warrant of arrest, as clarified by paragraph (4) of that provision.

101. The object and purpose of the proceedings under article 59 of the Statute is thus limited to ensuring that the ICC warrant applies to the person arrested, that he or she has been arrested in accordance with the proper process, and that his or her rights have been respected.<sup>148</sup> Accordingly, the stipulations of article 59 of the Statute cannot be applied to the period of time before the receipt of the custodial State of the request for arrest and surrender, even in cases where the person may already have been in the custody of that State, and regardless of the grounds for any such prior detention. Consequently, the argument of the Defence that compliance with article 59 of the Statute should be examined with respect to the period from 11 April 2011, when Mr Gbagbo was first taken into custody by Côte d'Ivoire,<sup>149</sup> cannot be sustained.

102. The Chamber notes that the Registrar transmitted to Côte d'Ivoire the request for arrest and surrender of Mr Gbagbo on 25 November 2011,<sup>150</sup> triggering the obligations of Côte d'Ivoire under article 59 of the Statute. In execution of the request for arrest and surrender, the competent Ivorian authorities notified Mr Gbagbo of the warrant of arrest against him and the request for arrest and surrender on 29 November 2011.<sup>151</sup> As of that moment, the Chamber considers Mr Gbagbo to have been arrested pursuant to the warrant of arrest issued by this Court.

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<sup>148</sup> Article 59(2) of the Statute.

<sup>149</sup> Challenge to Jurisdiction, para. 274.

<sup>150</sup> ICC-02/11-01/11-2; ICC-02/11-01/11-12-Conf-Exp, p. 3 and ICC-02/11-01/11-12-Conf-Exp-Anx1.

<sup>151</sup> ICC-02/11-01/11-12-Conf-Exp, p. 4 and ICC-02/11-01/11-12-Conf-Exp-Anx3.

103. The Defence alleges that the arrest proceedings did not take place in accordance with Ivorian national law, and that this in turn constitutes a violation of article 59(2) of the Statute. With respect to the Chamber's competence in adjudicating this claim, the Appeals Chamber has held:

The enforcement of a warrant of arrest is designed to ensure, as article 59(2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have been respected. The Court does not sit in the process [...] on judgment as a court of appeal on the identificatory decision of the [national] judicial authorities. Its task is to see that the process envisaged by [national] law was duly followed and that the rights of the arrestee were properly respected.<sup>152</sup>

104. In light of the above, the Chamber is of the view that its role with respect to proceedings under article 59 of the Statute is limited to verifying that the basic safeguards envisaged by national law have been made available to the arrested person.

105. In this regard, the Chamber observes that Mr Gbagbo, after being notified of the warrant of arrest issued against him by the Court, was promptly brought before the national judicial authority. From the information available to the Chamber, it further appears that the national court satisfied itself of the identity of Mr Gbagbo and of the applicability to him of the Court's warrant of arrest.<sup>153</sup> Subsequently, the national court made specific reference to the arguments raised by the counsel for Mr Gbagbo, including with respect to the alleged irregularities in the arrest procedure in light of the official capacity of Mr Gbagbo and the inapplicability of the Statute in judicial proceedings before Ivorian courts.<sup>154</sup> The Chamber notes that the national

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<sup>152</sup> ICC-01/04-01/06-772, para. 41.

<sup>153</sup> ICC-02/11-01/11-12-Conf-Exp-Anx4.

<sup>154</sup> ICC-02/11-01/11-12-Conf-Exp-Anx4, p. 7.

court ruled on the issues raised by Mr Gbagbo's counsel and finally authorised the surrender of the suspect to the Court.<sup>155</sup>

106. To the extent that the challenges raised by the Defence were entertained by the national court and Mr Gbagbo was afforded the basic guarantees of an arrested person during the arrest and surrender proceedings, the Chamber does not consider there are reasons that would warrant the stay of proceedings as requested by the Defence.

#### Alleged breaches of other fundamental rights

107. In light of the Defence submissions, the Chamber must also determine whether, in the period between Mr Gbagbo's arrest by the Ivorian authorities on 11 April 2011 and his surrender to the Court on 29 November 2011, there was any other breach of his fundamental rights that can be attributed to the Court and that is so odious and repugnant to the rule of law as to make a fair trial impossible.

108. As found above, nothing in the material brought before the Chamber shows any involvement on the part of the Court in the detention of Mr Gbagbo in Côte d'Ivoire following his arrest on 11 April 2011. With respect to the period of detention prior to the notification of the request for arrest and surrender of Mr Gbagbo, the Chamber notes that Mr Gbagbo was not detained at the behest of Court nor did the Court have any involvement with the domestic proceedings of the Ivorian authorities.

109. In particular, the Chamber emphasises that, as stated by the Appeals Chamber, "[m]ere knowledge on the part of the Prosecutor of the investigations carried out by the [national] authorities is no proof of involvement on his part in the way they were conducted or the means used

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<sup>155</sup> ICC-02/11-01/11-12-Conf-Exp-Anx4, p. 8.

for the purpose".<sup>156</sup> In the same vein, the mere fact that the Prosecutor was in contact with the Ivorian authorities does not suggest that there was any involvement of the Prosecutor in the detention of Mr Gbagbo.

110. The same holds true for the period between the notification of the request for arrest and surrender of Mr Gbagbo and his transfer to the Court. During this period, he was still detained by the Ivorian authorities and the conditions of his detention were within their competence. In particular, while organs of the Court were involved in the process of surrender of Mr Gbagbo to the Court, there is no evidence indicating any violation of Mr Gbagbo's fundamental rights that can in any way be attributed to the Court.

111. The Chamber also notes that the Defence asserts a link between the alleged violations of Mr Gbagbo's fundamental rights and the Court by alleging that the Prosecutor was under a duty of care as concerns Mr Gbagbo during his detention in Côte d'Ivoire.<sup>157</sup> The Chamber is not persuaded by such argument. In fact, the powers of the Prosecutor may only be exercised in the context of, or in relation to, proceedings before the Court.

112. Accordingly, in the absence of any involvement on the part of the Court in the detention of Mr Gbagbo in Côte d'Ivoire, the Chamber cannot proceed to a determination of any particular violation of Mr Gbagbo's fundamental rights during his detention. It is, therefore, unnecessary to address the remaining requirements for abuse of process as identified above.

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<sup>156</sup> ICC-01/04-01/06-772, para. 42.

<sup>157</sup> Challenge to Jurisdiction, para. 262.

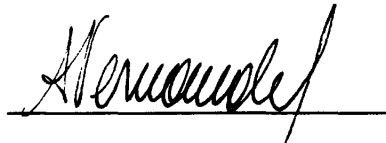
**FOR THESE REASONS, THE CHAMBER**

**GRANTS** Côte d'Ivoire's Request to Respond;

**REJECTS** the Defence Request to Reply; and

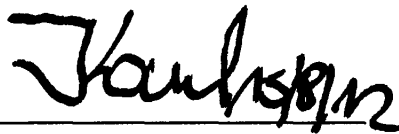
**REJECTS** the Defence Challenge to Jurisdiction.

Done in both English and French, the English version being authoritative.



**Judge Silvia Fernández de Gurmendi**

**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Christine Van den Wyngaert**

Dated this 15 August 2012

At The Hague, The Netherlands