

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/11-01/11 OA 2

Date: 12 December 2012

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT KOUDOU GBAGBO

Public document

Judgment

**on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial
Chamber I on jurisdiction and stay of the proceedings**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

The Office of the Public Counsel for Victims
Ms Paolina Massidda

States Representatives
Mr Jean-Pierre Mignard
Mr Jean-Paul Benoit

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I entitled “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)’” of 15 August 2012 (ICC-02/11-01/11-212),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The “Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’” is confirmed with respect to the decision contained therein to reject Mr Gbagbo’s challenge to the jurisdiction of the Court. In this respect, the appeal is dismissed.
2. In respect of the decision to reject Mr Gbagbo’s request for a stay of the proceedings in the “Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)’”, the appeal is dismissed *in limine*.
3. The request to reclassify as confidential the “Observations de l’Etat de Côte d’Ivoire relatives au ‘Document à l’appui de l’appel de la “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-02/11-01/11-253-Anx1) is rejected.



REASONS

I. KEY FINDINGS

1. Unless stipulated in the declaration under article 12 (3) of the Statute, acceptance of jurisdiction is not limited to specific events or a specific “situation” within the meaning of article 13 of the Statute. It may also cover crimes under article 5 of the Statute committed after the declaration has been lodged.
2. A decision rejecting a request for a stay of the proceedings based on allegations of violations of the suspect’s fundamental rights is not jurisdictional in nature and therefore cannot be appealed under article 82 (1) (a) of the Statute, even if the request for a stay of proceedings was combined with a challenge to the jurisdiction of the Court and the Chamber disposes of the stay request and the challenge to the jurisdiction in the same document.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 29 May 2012, Mr Laurent Koudou Gbagbo (hereinafter: “Mr Gbagbo”) filed 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)”¹ (hereinafter: “Jurisdictional Challenge”).
4. On 15 June 2012, the Pre-Trial Chamber rendered 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”² (hereinafter: “Decision on the Conduct of the Proceedings”), inviting the Prosecutor and the victims represented by the Office of Public Counsel for victims (hereinafter: “OPCV”) to submit written observations on the Jurisdictional Challenge.

¹ ICC-02/11-01/11-129-Corr-tENG.

² ICC-02/11-01/11-153 <<http://www.legal-tools.org/doc/829d3f/>>.

5. On the same day, the Republic of Côte d'Ivoire (hereinafter: "Côte d'Ivoire") filed a request for leave to submit observations on the Jurisdictional Challenge³ (hereinafter: "Request for Leave to Submit Observations") and, on 18 June 2012, filed its observations⁴ (hereinafter: "Côte d'Ivoire's Observations on the Jurisdictional Challenge"). On 25 June 2012 Mr Gbagbo objected to the Request for Leave to Submit Observations⁵ (hereinafter: "Objection to the Request for Leave to Submit Observations").

6. On 27 June 2012, the OPCV filed the "Observations on behalf of victims regarding the Defence Challenge to the Jurisdiction of the Court".⁶

7. On 28 June 2012, the Prosecutor filed the "Corrigendum to Prosecution Response to Defence motion for a declaration on lack of jurisdiction of the Court based on articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute".⁷

8. On 15 August 2012, the Pre-Trial Chamber rendered the "Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)'"⁸ (hereinafter: "Impugned Decision"), rejecting the Jurisdictional Challenge.⁹ Furthermore, in the Impugned Decision, the Pre-Trial Chamber granted the Request for Leave to Submit Observations and rejected the Objection to the Request for Leave to Submit Observations.¹⁰

³ "Request by the Republic of Côte d'Ivoire to submit observations 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", ICC-02/11-01/11-154-tENG.

⁴ "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", ICC-02/11-01/11-156-tENG.

⁵ "Defence motion to deny requests, namely to attend the confirmation hearing and to file observations on the jurisdictional challenge, from Counsel claiming to represent the Republic of Côte d'Ivoire", ICC-02/11-01/11-163-tENG <<http://www.legal-tools.org/doc/a30fc7/>>.

⁶ ICC-02/11-01/11-165 <<http://www.legal-tools.org/doc/23f03a/>>.

⁷ ICC-02/11-01/11-167-Red-Corr <<http://www.legal-tools.org/doc/991ada/>>.

⁸ ICC-02/11-01/11-212 <<http://www.legal-tools.org/doc/0d14c3/>>.

⁹ Impugned Decision, p. 41.

¹⁰ Impugned Decision, p. 41.

B. Proceedings before the Appeals Chamber

9. On 21 August 2012 Mr Gbagbo filed his appeal against the Impugned Decision.¹¹

10. On 31 August 2012, the Appeals Chamber invited victims and Côte d'Ivoire to submit observations on the appeal.¹²

11. On 6 September 2012, Mr Gbagbo filed the "Document in support of the appeal against the 'Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo" (ICC-02/11-01/11-212)'"¹³ (hereinafter: "Document in Support of the Appeal").

12. On 28 September 2012, the Prosecutor filed the "Response to the [sic] Lauren [sic] Gbagbo's Appeal against the 'Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo" (ICC-02/11-01/11-212)'"¹⁴ (hereinafter: "Response to the Document in Support of the Appeal").

13. On the same day, two documents were filed, purporting to be observations by Côte d'Ivoire on the Document in Support of the Appeal, one entitled "Observations de la République de Côte d'Ivoire sur le document à l'appui de l'appel de la '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'"¹⁵ (hereinafter: "First Observations by Côte d'Ivoire") and one called "Observations de l'Etat de Côte d'Ivoire relatives au 'Document à l'appui de l'appel de la "Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3),

¹¹ "Defence appeal against Pre-Trial Chamber I's *Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo'* (ICC-02/11-01/11-212)", ICC-02/11-01/11-225-tENG (OA 2) <<http://www.legal-tools.org/doc/f32a45/>>.

¹² "Directions on the submissions of observations", ICC-02/11-01/11-236 (OA 2) <<http://www.legal-tools.org/doc/43a732/>>.

¹³ ICC-02/11-01/11-240-tENG (OA 2).

¹⁴ ICC-02/11-01/11-251 (OA 2) <<http://www.legal-tools.org/doc/9cbb8c/>>.

¹⁵ ICC-02/11-01/11-250 (OA 2) <<http://www.legal-tools.org/doc/52f759/>>.

19(2), 21(3), 55 and 59 of the Rome Statute filed by the defence for President Gbagbo”¹⁶ (hereinafter: “Annex to the Registrar’s Transmission”).

14. On 1 October 2012, the Appeals Chamber decided to disregard both documents for exceeding the page limit and invited Côte d’Ivoire to re-submit its observations.¹⁷

15. On 8 October 2012, Côte d’Ivoire submitted its “Observations on the document in support of appeal of the ‘Decision on the “Corrigendum of the challenge to the jurisdiction of the international criminal court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the defence for President Gbagbo””¹⁸ (hereinafter: “Côte d’Ivoire’s Observations”) and requested to reclassify as confidential the First Observations of Côte d’Ivoire and the Annex to the Registrar’s Transmission.¹⁹

16. On the same day, the OPCV filed²⁰ its “Observations on behalf of victims on the Defence’s document in support of the appeal against Pre-Trial Chamber I’s Decision on the Defence Challenge to the Jurisdiction of the Court”²¹ (hereinafter: “OPCV’s Observations”).

17. On 16 October 2012, the Appeals Chamber rendered the “Decision on requests related to page limits and reclassification of documents”²² (hereinafter: “Decision on page limits and reclassification”), requesting, *inter alia*, that Côte d’Ivoire provide reasons for the reclassification sought.

18. On 22 October 2012, in the “Réponse de la République de Côte d’Ivoire à la décision de la Chambre d’appel sur les demandes relatives à la limitation du nombre

¹⁶ Annex 1 to “Transmission du Greffe d’un document reçu le 28 septembre 2012 à 15h35 de Mme Karine Wetzel, Conseillère Représentante de l’Etat de Côte d’Ivoire auprès de la Cour pénale internationale”, 28 September 2012, ICC-02/11-01/11-253 (OA 2).

¹⁷ “Decision on Observations submitted by the Republic of Côte d’Ivoire”, 1 October 2012, ICC-02/11-01/11-254 (OA 2).

¹⁸ ICC-02/11-01/11-258-tENG (OA 2).

¹⁹ Côte d’Ivoire’s Observations, para. IV.

²⁰ On 5 October 2012, the OPCV had filed the “Observations on behalf of victims on the Defence’s document in support of the appeal against Pre-Trial Chamber I’s Decision on the Defence Challenge to the Jurisdiction of the Court”, ICC-02/11-01/11-255 (OA 2). On the same day, the Appeals Chamber decided to disregard this document and invited the victims represented by the OPCV to submit their observations by 8 October 2012; *see* “Decision on Observations submitted by OPCV on behalf of victims”, 5 October 2012, ICC-02/11-01/11-256 (OA 2).

²¹ ICC-02/11-01/11-259 (OA 2).

²² ICC-02/11-01/11-266 (OA 2).

de pages et à la reclassification de documents (ICC-02/11-01/11-266 OA2, 16 octobre 2012)”²³ (hereinafter: “Response of Côte d’Ivoire on Reclassification”), Côte d’Ivoire limited its request for reclassification to the Annex to the Registrar’s Transmission.

19. On 19 October 2012, Mr Gbagbo filed the “Response of President Gbagbo’s Defence to the Observations of the Republic of Côte d’Ivoire (ICC-02/11-01/11-258 OA 2) and of the Office of Public Counsel for Victims (ICC-02/11-01/11-259 OA 2)”²⁴ (hereinafter: “Mr Gbagbo’s Response”).

20. On the same day, the Prosecutor filed the “Response to the Observations of the Republic of Côte d’Ivoire (ICC-02/11-01/11-258 OA2) and the Office of Public Counsel for Victims (ICC-02/11-01/11-259 OA2)”²⁵ (hereinafter: “Prosecutor’s Response”).

III. PRELIMINARY MATTERS

A. Reclassification of the Annex to the Registrar’s Transmission

21. Côte d’Ivoire requests the Appeals Chamber to reclassify as confidential the Annex to the Registrar’s Transmission on the basis that this document was not filed on behalf of Côte d’Ivoire, as the person who filed this document did not have the right to represent Côte d’Ivoire in judicial proceedings before the Court.²⁶

22. The Appeals Chamber recalls that, under rule 15 of the Rules of Procedure and Evidence, the “Registrar shall keep a database containing all the particulars of each case brought before the Court, subject to any order [...] providing for the non-disclosure of any document or information, and to the protection of sensitive personal data”. As a rule, this database shall be available to the public. Read together with regulation 23*bis* of the Regulations of the Court, it follows that documents may be classified as confidential if reasons are provided in support of such classification. This is consistent with the Appeals Chamber’s jurisprudence that documents can only

²³ ICC-02/11-01/11-274 (OA 2).

²⁴ ICC-02/11-01/11-271-tENG (OA 2); see “Decision further to the ‘Directions on the submissions of observations’ issued on 31 August 2012 and on the Clarification Request of Mr Gbagbo”, 18 October 2012, ICC-02/11-01/11-268-tENG (OA 2).

²⁵ ICC-02/11-01/11-269 (OA 2).

²⁶ Response of Côte d’Ivoire on Reclassification, para. 10.

remain classified as confidential if there are reasons for that classification.²⁷ The Appeals Chamber notes that the Annex to the Registrar's Transmission was disregarded because it exceeds the page limit.²⁸ The fact that the document was disregarded, however, is not grounds for departing from the procedure requiring reasons for the classification as "confidential". The Appeals Chamber recalls in this respect that it previously reclassified as public a request that had been dismissed *in limine*.²⁹

23. In the case at hand, the only reason given for reclassifying the Annex to the Registrar's Transmission is that it had been filed by a person who did not represent Côte d'Ivoire in the proceedings before the Court. The Appeals Chamber considers that this alone is not reason enough to reclassify the document as confidential. The Appeals Chamber also notes that it is already publicly known that the Annex to the Registrar's Transmission was filed.³⁰

24. Therefore, the Appeals Chamber rejects the request of Côte d'Ivoire to reclassify the Annex to the Registrar's Transmission.

B. Other preliminary matters

25. The Appeals Chamber decides to accept the classification of Annex 1 to the Document in Support of the Appeal, which was filed confidentially because, as

²⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", 25 September 2009, ICC-01/04-01/07-1497 (OA 8) <<http://www.legal-tools.org/doc/ba82b5/>>; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on 'Government of Libya's Appeal Against the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi of 10 April 2012'"", 25 April 2012, ICC-01/11-01/11-126 (OA 2).

²⁸ Decision on Observations submitted by the Republic of Côte d'Ivoire", 1 October 2012, ICC-02/11-01/11-254 (OA 2).

²⁹ *See Situation in the Republic of Kenya*, "Application of Dr. David Nyekorach-Matsanga for leave to reply, pursuant to Regulations of the Court, Regulation 24 (5), to the Prosecution's confidential comments, dated 12 June 2012", 12 June 2012, ICC-01/09-92-Red (OA 2) <<http://www.legal-tools.org/doc/bc9af3/>>; *see also* "Decision on the reclassification or filing of public redacted versions of certain documents", 6 September 2012, ICC-01/09-104-Conf-Exp, para. 3; *see also* "Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga", 11 July 2012, redacted version of 6 September 2012, ICC-01/09-96-Red (OA 2) <<http://www.legal-tools.org/doc/a77532/>>.

³⁰ *See, e.g.*, Decision on page limits and reclassification.

explained by Mr Gbagbo, it makes reference to communications *inter partes* between the Prosecutor and the Defence.³¹

26. The Appeals Chamber notes that the Document in Support of the Appeal, Côte d'Ivoire's Observations and Mr Gbagbo's Response do not have annexed copies of the authorities relied upon or, if appropriate, a list of internet links, as required under regulation 23 (3) of the Regulations of the Court. Only Mr Gbagbo provided internet links, where available, in the footnotes of his submissions. The Appeals Chamber finds it important to recall that, when filing documents, the participants must comply with the requirements of regulation 23 (3) of the Regulations of the Court.³²

IV. MERITS

A. First and second grounds of appeal (pertaining to Côte d'Ivoire's role in the proceedings before the Pre-Trial Chamber)

27. Under the first and second grounds of appeal, Mr Gbagbo alleges errors pertaining to the procedure of the Pre-Trial Chamber leading up to the rendering of the Impugned Decision. Under the first ground of appeal, Mr Gbagbo alleges that Côte d'Ivoire should not have been allowed to file submissions.³³ Under the second ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber should have rendered a separate decision on the Request for Leave to Submit Observations instead of deciding on this request in the Impugned Decision.³⁴

1. Procedural background and relevant part of the Impugned Decision

28. The Pre-Trial Chamber rendered the Decision on the Conduct of the Proceedings on the same day on which Côte d'Ivoire filed the Request for Leave to Submit Observations. Three days later, and in the absence of a decision of the Pre-Trial Chamber on the Request for Leave to Submit Observations, Côte d'Ivoire's

³¹ See Document in Support of the Appeal, para. 1.

³² See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Order Relating to the Authorities Relied Upon in the Document in Support of Germain Katanga's Appeal Against the 'Decision on the Modalities of Victim Participation at Trial'", 19 May 2010, ICC-01/04-01/07-2113 (OA 11) <<http://www.legal-tools.org/doc/dc1fcd/>>.

³³ Document in Support of the Appeal, paras 76-78; Mr Gbagbo's Response, paras 24-31.

³⁴ Document in Support of the Appeal, paras 79-84.

Observations on the Jurisdictional Challenge were filed. Mr Gbagbo filed the Objection to the Request for Leave to Submit Observations seven days later.

29. Approximately two months after the Request for Leave to Submit Observations was filed, the Pre-Trial Chamber rendered the Impugned Decision in which it granted, *inter alia*, the Request for Leave to Submit Observations, thereby accepting Côte d'Ivoire's Observations on the Jurisdictional Challenge.³⁵ Referring to rule 58 (2) of the Rules of Procedure and Evidence, the Pre-Trial Chamber considered that, in the "present circumstances and in light of the nature of the arguments raised [...] the submissions of Côte d'Ivoire are of manifest relevance for the determination of the issue *sub judice*".³⁶

2. Parties and participants' submissions

30. Under the first ground of appeal, Mr Gbagbo submits that Côte d'Ivoire is not "a State participating in the instant proceedings" within the meaning of regulation 24 (3) of the Regulations of the Court, which would allow a State to file a response subject to an order of the Pre-Trial Chamber.³⁷ Furthermore, he notes that article 19 (3) of the Statute and rule 59 of the Rules of Procedure and Evidence, which, in his submission, exhaustively regulate the participation of third parties in proceedings under article 19 (3) of the Statute, only refer to "those who have referred a situation pursuant to article 13" and do not include States in the position of Côte d'Ivoire, namely a State that is not a Party to the Statute, which lodged a declaration under article 12 (3) of the Statute with the Registrar.³⁸ In this context, he refers to Pre-Trial Chamber II's interpretation of this provision in the case of *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*³⁹ (hereinafter: "Kenya Confirmation Hearing Decision"). Having noted that the Pre-Trial Chamber acted under rule 58 (2) of the Rules of Procedure and Evidence, Mr Gbagbo argues that this provision cannot be used to violate rule 59 of the Rules of Procedure and

³⁵ Impugned Decision, para. 23.

³⁶ Impugned Decision, para. 22.

³⁷ Document in Support of the Appeal, para. 76; Mr Gbagbo's Response, para. 29.

³⁸ Mr Gbagbo's Response, paras 25-26, 29.

³⁹ Document in Support of the Appeal, para. 77, referring to "Decision on the 'Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings'", 20 September 2011, ICC-01/09-02/11-340 <<http://www.legal-tools.org/doc/79a169/>>, paras 9-11.

Evidence.⁴⁰ Moreover, in response to claims made by the Prosecutor, the OPCV and Côte d'Ivoire that the Pre-Trial Chamber has discretion to decide on the procedure to be followed pursuant to rule 58 (2) of the Rules of Procedure and Evidence, Mr Gbagbo submits that all parties have ignored the fundamental legal principle that judicial discretion is not absolute.⁴¹

31. Under the second ground of appeal, Mr Gbagbo submits that the Pre-Trial Chamber committed an error by granting the Request for Leave to Submit Observations in the Impugned Decision instead of rendering a separate decision thereon.⁴² In his view, the Pre-Trial Chamber prevented him from appealing the decision on the Request for Leave to Submit Observations under article 82 (1) (d) of the Statute and from filing a response to Côte d'Ivoire's Observations on the Jurisdictional Challenge.⁴³ Mr Gbagbo avers that the fact that the present appeal is pending before the Appeals Chamber does not constitute a remedy because the Pre-Trial Chamber took Côte d'Ivoire's arguments into account in the Impugned Decision; it is therefore impossible "to 'forget'" Côte d'Ivoire's Observations on the Jurisdictional Challenge.⁴⁴ Mr Gbagbo further submits that it is impossible to show how the fact that the Pre-Trial Chamber took Côte d'Ivoire's Observations on the Jurisdictional Challenge into account has materially affected the Impugned Decision.⁴⁵ According to Mr Gbagbo, at the heart of the appeal is the integrity of the judicial process, which must balance the interests of a number of participants of which the Defence and the Prosecution are the main actors.⁴⁶ Mr Gbagbo submits that the participation of other participants must be exceptional, necessary and limited, lest this balance be distorted.⁴⁷

32. The Prosecutor submits that the first two grounds of appeal are procedural errors which do not pertain to the jurisdiction of the Court and do not materially affect the Impugned Decision.⁴⁸ The Prosecutor further submits, with respect to the first

⁴⁰ Mr Gbagbo's Response, paras 25-26.

⁴¹ Mr Gbagbo's Response, paras 25-26.

⁴² Document in Support of the Appeal, paras 74-75, 79-83.

⁴³ Document in Support of the Appeal, para. 80.

⁴⁴ Document in Support of the Appeal, para. 81.

⁴⁵ Mr Gbagbo's Response, para. 36.

⁴⁶ Mr Gbagbo's Response, para. 38.

⁴⁷ Mr Gbagbo's Response, para. 38.

⁴⁸ Prosecutor's Response, para. 16.

ground of appeal, that the Pre-Trial Chamber did not treat Côte d'Ivoire as a party or participant to the proceedings because it did not allow it to make submissions pursuant to regulation 24 of the Regulations of the Court⁴⁹ or pursuant to rule 59 of the Rules of Procedure and Evidence.⁵⁰ According to the Prosecutor, Mr Gbagbo has confused the duty imposed on the Registrar to inform the referring State pursuant to rule 59 of the Rules of Procedure and Evidence and the discretion afforded, under rule 58 (2) of the Rules of Procedure and Evidence, to Chambers of the Court to decide on the best manner to determine a challenge to jurisdiction.⁵¹ She argues that the Pre-Trial Chamber acted validly under rule 58 (2) of the Rules of Procedure and Evidence⁵² and recalls that Pre-Trial Chamber III granted a similar request under rule 58 (2) of the Rules of Procedure and Evidence in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*.⁵³ Moreover, according to the Prosecutor, the Chamber rightly decided that the submissions of Côte d'Ivoire are of “manifest relevance for the determination of the issue *sub judice*” given the serious allegations of torture made by Mr Gbagbo and the claim that Côte d'Ivoire “violated national procedures” when surrendering him to the Court.⁵⁴

33. As to Mr Gbagbo's second ground of appeal, the Prosecutor submits that the Pre-Trial Chamber did not err.⁵⁵ The Prosecutor recalls that Mr Gbagbo had an opportunity to object to the Request for Leave to Submit Observations and indeed filed the Objection to the Request for Leave.⁵⁶ He was therefore heard by the Pre-Trial Chamber.⁵⁷ The Prosecutor avers that Mr Gbagbo was “not deprived of the ability to appeal” the admission of Côte d'Ivoire's submissions⁵⁸ and that he is, in

⁴⁹ Response to the Document in Support of the Appeal, para. 28; Prosecutor's Response, para. 17.

⁵⁰ Response to the Document in Support of the Appeal, paras 28, 29.

⁵¹ Response to the Document in Support of the Appeal, para. 29.

⁵² Response to the Document in Support of the Appeal, para. 28.

⁵³ Response to the Document in Support of the Appeal, para. 28, referring to Transcript of 8 March 2010, ICC-01/05-01/08-T-20-CONF-ENG CT2, p. 1, line 13 – p. 4, line 2, p. 7, line 23 – p. 8, line 13 and “Decision on the Admissibility and Abuse of Process Challenges”, 24 June 2010, ICC-01/05-01/08-802 <<http://www.legal-tools.org/doc/a5de24/>>, para. 24.

⁵⁴ Response to the Document in Support of the Appeal, para. 30.

⁵⁵ Response to the Document in Support of the Appeal, para. 32.

⁵⁶ Response to the Document in Support of the Appeal, para. 32, referring to Objection to the Request for Leave to Submit Observations, paras 33-51, p. 17.

⁵⁷ Response to the Document in Support of the Appeal, para. 32, referring to Impugned Decision, paras 20-23.

⁵⁸ Response to the Document in Support of the Appeal, para. 32, referring to Document in Support of the Appeal, paras 80-81.

fact, doing so as part of the current appeal.⁵⁹ The Prosecutor submits that the Pre-Trial Chamber's approach did not materially prejudice Mr Gbagbo.⁶⁰ In addition, the Prosecutor argues that the Pre-Trial Chamber was able to separately decide whether to consider, at its discretion, the submissions "irrespective of whether it was technically already in receipt of those observations when it made that determination".⁶¹ Finally, the Prosecutor submits, in respect of the alleged loss of the right to appeal, that Mr Gbagbo is, in fact, now in a better position as he is able to directly appeal this issue instead of having to seek leave to appeal under article 82 (1) (d) of the Statute.⁶²

34. The OPCV addresses the first two grounds of appeal together.⁶³ The OPCV submits that Mr Gbagbo ought to have pleaded that the errors underlying the first two grounds of appeal were "procedural error[s]" rather than an "error of law".⁶⁴ In this context, the OPCV refers to prior jurisprudence of the Appeals Chamber.⁶⁵ Furthermore, the OPCV avers that Côte d'Ivoire has an interest in participating in the proceedings and that its observations "were warranted by the very nature of the proceedings and were undoubtedly covered by the discretionary powers of the Pre-Trial Chamber when deciding on the proper conduct of said proceedings".⁶⁶ Finally, the OPCV submits that, should the Appeals Chamber find that the Pre-Trial Chamber erred, the error did not materially affect the Impugned Decision.⁶⁷

35. Côte d'Ivoire submits that the first two grounds of appeal are not jurisdictional matters.⁶⁸ It argues that it is clearly and *de jure* a State "participating in the proceedings" within the meaning of regulation 24 (3) of the Regulations of the Court.⁶⁹ It avers that making a declaration pursuant to article 12 (3) of the Statute confers discrete rights, such as those which allow it to participate in the present

⁵⁹ Response to the Document in Support of the Appeal, para. 32, referring to Document in Support of the Appeal, paras 79-84.

⁶⁰ Response to the Document in Support of the Appeal, para. 32.

⁶¹ Response to the Document in Support of the Appeal, para. 32.

⁶² Response to the Document in Support of the Appeal, para. 32.

⁶³ OPCV's Observations, paras 27-34.

⁶⁴ OPCV's Observations, para. 27.

⁶⁵ OPCV's Observations, para. 27, referring to *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3) <<http://www.legal-tools.org/doc/c40d73/>> (hereinafter: "*Kony OA 3 Judgment*"), paras 46-47.

⁶⁶ OPCV's Observations, para. 32.

⁶⁷ OPCV's Observations, paras 33-34.

⁶⁸ Côte d'Ivoire's Observations, para. 4.

⁶⁹ Côte d'Ivoire's Observations, paras 6-7.

proceedings before the Appeals Chamber and the Pre-Trial Chamber.⁷⁰ Further, it recalls that the alleged crimes occurred on its territory and that Mr Gbagbo is an Ivorian national, which should also form a basis for a role in the proceedings.⁷¹ Côte d'Ivoire argues that article 19 (3) of the Statute and rule 59 of the Rules of Procedure and Evidence do not exhaustively list who may make submissions in proceedings triggered by a jurisdictional challenge.⁷² Côte d'Ivoire also states that article 19 of the Statute and rule 58 (2) of the Rules of Procedure and Evidence give the Pre-Trial Chamber flexibility in dealing with such proceedings.⁷³ Finally, Côte d'Ivoire avers that there is no provision in the legal texts that would have required the Pre-Trial Chamber to rule separately on the Request for Leave to Submit Observations.⁷⁴

3. Determination by the Appeals Chamber

36. As argued by the Prosecutor and the OPCV,⁷⁵ the Appeals Chamber notes that the first and second alleged errors are procedural errors. As both errors pertain to the procedure based on a challenge to the jurisdiction of the Court pursuant to article 19 (2) of the Statute, they can be raised as errors in an appeal pursuant to articles 19 (6) and 82 (1) (a) of the Statute.⁷⁶

37. Under his first ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber should not have taken into account Côte d'Ivoire's Observations on the Jurisdictional Challenge and should not have heard Côte d'Ivoire. In this regard, the Appeals Chamber is not convinced by Côte d'Ivoire's argument that it had an automatic right to respond to the Jurisdictional Challenge pursuant to regulation 24 (3) of the Regulations of the Court. This provision regulates the right to respond of "States participating in the proceedings". It does not, however, confer participatory rights to States that are not yet participating in the proceedings.

⁷⁰ Côte d'Ivoire's Observations, paras 7, 10.

⁷¹ Côte d'Ivoire's Observations, para. 7.

⁷² Côte d'Ivoire's Observations, para. 8.

⁷³ Côte d'Ivoire's Observations, para. 12.

⁷⁴ Côte d'Ivoire's Observations, para. 12.

⁷⁵ Prosecutor's Response, para. 16; OPCV's Observations, para. 27.

⁷⁶ See *Kony OA 3 Judgment*, paras 46-47; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 19 October 2010, ICC-01/05-01/08-962-Corr (OA 3) <<http://www.legal-tools.org/doc/37e559/>> (hereinafter: "*Bemba OA 3 Judgment*"), paras 100-101.

38. Mr Gbagbo correctly points out that Côte d'Ivoire is not a State entitled to participate in the proceedings pursuant to article 19 (3) of the Statute and rule 59 of the Rules of Procedure and Evidence.⁷⁷ However, the Pre-Trial Chamber did not act on that legal basis. The Pre-Trial Chamber based its decision on rule 58 (2) of the Rules of Procedure and Evidence, which provides that the Pre-Trial Chamber “shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings”.

39. The Appeals Chamber notes that rule 58 (2) of the Rules of Procedure and Evidence gives the relevant Chamber broad discretion over the conduct of proceedings pursuant to articles 19 (1) and (2) of the Statute. The Appeals Chamber, however, finds that such discretion is not unlimited. It has to be exercised in conjunction with other relevant legal provisions. In this regard, the Appeals Chamber recalls that sub-rule 1 of rule 103 of the Rules of Procedure and Evidence, which is included in Chapter 4, “Provisions relating to various stages of the proceedings”, provides as follows: “At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”. In the context of proceedings in relation to jurisdiction or admissibility, this provision thus regulates how a Pre-Trial Chamber may hear submissions from individuals and entities other than those mentioned in article 19 (3) of the Statute and rules 58 and 59 of the Rules of Procedure and Evidence. The Appeals Chamber therefore finds that rule 58 (2) of the Rules of Procedure and Evidence has to be applied by the Pre-Trial Chamber in conjunction with rule 103 of the Rules of Procedure and Evidence, if it decides to hear States that may have an interest in jurisdiction proceedings, but do not have a right to participate in the proceedings pursuant to article 19 (3) of the Statute.

40. The Appeals Chamber notes Mr Gbagbo’s arguments in relation to the Kenya Confirmation Hearing Decision, which rejected a request by the Republic of Kenya to participate in the confirmation hearing. However, this decision did not relate to proceedings in respect of jurisdiction and is therefore of limited relevance to the determination of the first ground of appeal.

⁷⁷ Document in Support of the Appeal, para. 77.



41. The fact that the Pre-Trial Chamber did not refer to rule 103 of the Rules of Procedure and Evidence when granting the Request for Leave to Submit Observations, but only referred to rule 58 (2) of the Rules of Procedure and Evidence, does not take away from the conclusion that there was a legal basis for the Pre-Trial Chamber to hear submissions from Côte d'Ivoire. The Appeals Chamber is therefore not persuaded by Mr Gbagbo's arguments under the first ground of appeal.

42. At the same time, the fact that rule 103 of the Rules of Procedure and Evidence is the legal basis for the Pre-Trial Chamber's decision to allow submissions from Côte d'Ivoire is essential to the determination of the second ground of appeal, which raises the question of whether the Pre-Trial Chamber should have decided separately on the Request for Leave to Submit Observations.

43. As discussed above, rule 103 of the Rules of Procedure and Evidence regulates the procedure for hearing entities that would not otherwise participate in the proceedings. In the view of the Appeals Chamber, rule 103 of the Rules of Procedure and Evidence requires the Chamber to render a separate decision on requests for leave to submit observations. This is because, under sub-rule 2, "[t]he Prosecutor and the defence" are entitled to respond to the observations, if any, and the Chamber should set the applicable time limits for such responses. In the case at hand, the Pre-Trial Chamber should therefore have treated the Request for Leave to Submit Observations as a request pursuant to rule 103 (1) of the Rules of Procedure and Evidence. It should have decided on this request and allowed Mr Gbagbo and the Prosecutor the opportunity to respond to Côte d'Ivoire's Observations on the Jurisdictional Challenge. Since this procedure was not followed, the Appeals Chamber finds that the Pre-Trial Chamber erred. As argued by the Prosecutor, the issue of whether this omission affected Mr Gbagbo's right to request leave to appeal does not arise given that Mr Gbagbo could raise, and has raised, these matters in the current appeal proceedings.

44. The Appeals Chamber has consistently held that, "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have



materially affected the Impugned Decision”.⁷⁸ The appellant therefore has a duty to substantiate how an error materially affects the Impugned Decision. In relation to an error of law, the Appeals Chamber held that “[a] decision is materially affected by an error of law if the Pre-Trial or Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error”.⁷⁹ In the case at hand, the Appeals Chamber notes that Mr Gbagbo did not explain how the procedural error materially affected the Impugned Decision. He simply avers that the Pre-Trial Chamber could not ignore Côte d’Ivoire’s submissions and states that it would be impossible to show how this error precisely affected the Impugned Decision.⁸⁰ However, as set out above, it was not erroneous, as such, that the Pre-Trial Chamber took Côte d’Ivoire’s submissions into account. Rather, the Pre-Trial Chamber erred by omitting to issue a separate decision and to hear the responses of Mr Gbagbo and the Prosecutor. Mr Gbagbo did not explain how the Pre-Trial Chamber’s decision on the Jurisdictional Challenge would have been substantially different without this error, such as by referring to arguments that he would have made in response to Côte d’Ivoire’s submissions and that could have led to a different decision. In the absence of such submissions, the Appeals Chamber will not address the matter any further.

45. In conclusion, the Appeals Chamber finds that the Pre-Trial Chamber committed a procedural error when it failed to render a separate decision on the Request for Leave to Submit Observations, but it has not been demonstrated that this error materially affected the Impugned Decision.

46. Therefore, the Appeals Chamber rejects the first and second grounds of appeal.

⁷⁸ *Kony OA 3 Judgment*, para. 48; *see also Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’”, 19 November 2010, ICC-01/05-01/08-1019 (OA 4) <<http://www.legal-tools.org/doc/f5c41c/>>, para. 69; *Bemba OA 3 Judgment*, para. 102.

⁷⁹ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’”, 13 July 2006, ICC-01/04-169 <<http://www.legal-tools.org/doc/8c20eb/>>, para. 84.

⁸⁰ Document in Support of the Appeal, para. 81; Mr Gbagbo’s Response, para. 36.

B. Third, fourth and fifth grounds of appeal (pertaining to article 12 (3) of the Statute)

47. Mr Gbagbo alleges under the third, fourth and fifth grounds of appeal that the Pre-Trial Chamber erred in finding that it had jurisdiction over the crimes Mr Gbagbo is alleged to have committed. All three grounds of appeal are considered together because they relate to the interpretation of article 12 (3) of the Statute as well as the interpretation of the declaration and letters of Côte d'Ivoire relevant to that same article.

1. Background

48. On 24 January 2003, various Ivorian political actors concluded the “Linass-Marcoussis Agreement of 24 January 2003” (hereinafter: “Linass-Marcoussis Agreement”) to end the ongoing conflict in the country following an attempted *coup d'état* on 19 September 2002.⁸¹ The Linass-Marcoussis Agreement provided for a “national reconciliation government” to be led by a “consensus Prime Minister”.⁸² An annex to the Linass-Marcoussis Agreement set out the government programme, which provides in relevant part:

1. [...]
2. The national reconciliation government shall seek the establishment of an international commission to expedite investigations and establish the facts throughout the national territory in order to document grave violations of human rights and international humanitarian law since **19 September 2002**.
3. On the basis of the report of the International Commission of Inquiry, the national reconciliation government shall determine those matters to be brought to justice so as to end impunity. **The Round Table singles out for particular condemnation the acts of death squads and their commanders and the perpetrators of summary executions throughout the territory, and is of the view that the perpetrators of such acts and their accomplices shall be tried before international courts.**
4. The national reconciliation government shall endeavour to facilitate humanitarian operations in favour of all victims of the conflict throughout national territory. On the basis of the report of the National Human Rights Commission, it shall take measures to compensate and rehabilitate the victims.⁸³ [Emphasis added.]

⁸¹ See ICC-02/11-01/11-129-Anx17-tENG.

⁸² Linass-Marcoussis Agreement, p. 2.

⁸³ Linass-Marcoussis Agreement, p. 6.

49. On 18 April 2003, Mr Mamadou Bamba, the Minister of Foreign Affairs of Côte d'Ivoire at the time, submitted to the Registrar of the Court the following letter (hereinafter: "2003 Declaration"):

Republic of Côte d'Ivoire

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.⁸⁴

50. The Linas-Marcoussis Agreement also provided for "the necessary measures for the release and amnesty of all soldiers detained on grounds of undermining national security".⁸⁵ In this respect, the annex to the Agreement provided that:

The national reconciliation government shall take the necessary measures for the release and amnesty of all soldiers detained on grounds of undermining national security and shall afford the same measure to soldiers in exile. The amnesty law shall under no circumstances exonerate the perpetrators of grave economic crimes and grave violations of human rights and international humanitarian law.⁸⁶

51. On 18 August 2003, the Amnesty Law (hereinafter: "2003 Amnesty Law") was promulgated, providing in article 4 (d) that amnesty does not extend to crimes provided for in "articles 5 to 8 of the Rome Statute".⁸⁷

52. Presidential elections were held in 2010, with the final round taking place on 28 November 2010. In the proceedings before the Court, Mr Gbagbo is alleged to have

⁸⁴ ICC-02/11-01/11-129-Anx 16-tENG <<http://www.legal-tools.org/doc/e44492/>>.

⁸⁵ Linas-Marcoussis Agreement, para. 3(i).

⁸⁶ Linas-Marcoussis Agreement, part VII, para. 5.

⁸⁷ ICC-02/11-01/11-129-Anx 19-tENG.

committed crimes falling under article 5 of the Statute after that date, i.e. after 28 November 2010.⁸⁸

53. On 2 December 2010, the Independent Electoral Commission declared that Mr Ouattara had won the election.⁸⁹

54. On 3 December 2010, on the petition of Mr Gbagbo, the Constitutional Council of Côte d'Ivoire declared that he had won the elections⁹⁰ and Mr Gbagbo took the oath of office on 4 December 2010.⁹¹

55. On 14 December 2010, Mr Ouattara sent three letters with the same content to the President, the Prosecutor and the Registrar of the Court (hereinafter: "2010 Letter"), stating that he confirms Côte d'Ivoire's acceptance of the Court's jurisdiction.⁹²

56. On 3 May 2011, Mr Ouattara sent a letter to the Prosecutor of the Court (hereinafter: "2011 Letter"), in which he repeated Côte d'Ivoire's acceptance of the Court's jurisdiction.⁹³

57. On 4 May 2011, the Constitutional Council of Côte d'Ivoire proclaimed Mr Ouattara the president of Côte d'Ivoire and declared valid the decisions he had previously taken in his function as president.⁹⁴

2. *The Impugned Decision*

58. In the Impugned Decision, the Pre-Trial Chamber determined that the Court has jurisdiction over the crimes allegedly committed by Mr Gbagbo based on the 2003

⁸⁸ "Warrant of Arrest for Laurent Koudou Gbagbo", 23 November 2011, ICC-02/11-01/11-1 <<http://www.legal-tools.org/doc/80881e/>>, paras 8-9; "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo", 30 November 2011, ICC-02/11-01/11-9-Red <<http://www.legal-tools.org/doc/f8bdcb/>>, para. 11; Annex 1 to "Soumission de l'Accusation du Document de notification des charges, de l'Inventaire des éléments de preuve à charge et des Tableaux des éléments constitutifs des crimes", 16 May 2012, ICC-02/11-01/11-124-Conf-Anx1; public redacted version: ICC-02/11-01/11-124-Anx1-Red <<http://www.legal-tools.org/doc/2c1a6e/>>, paras 18-19.

⁸⁹ Côte d'Ivoire's Observations on the Jurisdictional Challenge, para. 46; Document in Support of the Appeal, para. 5.

⁹⁰ ICC-02/11-01/11-129-Anx1 <<http://www.legal-tools.org/doc/a1a4d9/>>.

⁹¹ ICC-02/11-01/11-129-Anx2 <<http://www.legal-tools.org/doc/b747d2/>>.

⁹² ICC-02/11-01/11-129-Anx14-tENG.

⁹³ ICC-02/11-01/11-129-Anx15-tENG.

⁹⁴ ICC-02/11-01/11-129-Anx3-tENG <<http://www.legal-tools.org/doc/f432f1/>>.

Declaration.⁹⁵ The Pre-Trial Chamber found that this was a valid declaration pursuant to article 12 (3) of the Statute and that it should not be mistaken for a “referral” of a situation.⁹⁶ The Pre-Trial Chamber stated that “the scope of such declarations is predetermined by the ICC legal framework”.⁹⁷ It noted rule 44 of the Rules of Procedure and Evidence and explained that this rule “explicitly limits the discretion of States in framing the situation that may be investigated by the Court”.⁹⁸ With reference to rule 44 (2) of the Rules of Procedure and Evidence (“crimes referred to in article 5 of relevance to the situation”), it recalled that “[r]ule 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’”,⁹⁹ i.e. that the Court could not be used as a political tool allowing a State to accept the jurisdiction of the Court selectively “in respect of certain crimes or certain parties to a conflict”.¹⁰⁰

59. Based on this assessment, the Pre-Trial Chamber found:

[T]hat 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.¹⁰¹

60. The Pre-Trial Chamber noted that the 2003 Declaration “did not seek to define the scope of the situation in relation to which it accepted jurisdiction” as it only referred to the events of 19 September 2002.¹⁰² In addition, the Pre-Trial Chamber found that the 2003 Declaration was not subject to further temporal or other limitations.¹⁰³ Instead, the Pre-Trial Chamber noted that the formulation used in the 2003 Declaration, namely “*une durée indéterminée*”, when given its ordinary

⁹⁵ Impugned Decision, paras 55-65.

⁹⁶ Impugned Decision, paras 56-58.

⁹⁷ Impugned Decision, para. 59.

⁹⁸ Impugned Decision, para. 59.

⁹⁹ Impugned Decision, para. 59.

¹⁰⁰ Impugned Decision, para. 59.

¹⁰¹ Impugned Decision, para. 60.

¹⁰² Impugned Decision, para. 61.

¹⁰³ Impugned Decision, para. 61.

meaning, made “it clear that Côte d’Ivoire accepted the jurisdiction of the Court over events from 19 September 2002 onwards”.¹⁰⁴

61. The Pre-Trial Chamber referred to Pre-Trial Chamber III’s finding¹⁰⁵ that the events between 19 September 2002 and 28 November 2010 are part of 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”.¹⁰⁶ It noted that Mr Gbagbo did not contest that there was a single situation in Côte d’Ivoire.¹⁰⁷ It concluded 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”.¹⁰⁸

62. Furthermore, the Pre-Trial Chamber noted that it was “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”.¹⁰⁹ Nevertheless, the Pre-Trial Chamber stated that:

[I]t 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.¹¹⁰

3. *Parties and participants’ submissions*

63. Under his third ground of appeal, the first set of Mr Gbagbo’s arguments is directed against the Pre-Trial Chamber’s finding that the Statute defines the objective parameters of a declaration pursuant to article 12 (3) of the Statute and that this definition depends, as indicated by rule 44 of the Rules of Procedure and Evidence, on whether a “situation” exists.¹¹¹ He submits that this cannot be correct because rule 44 (2) of the Rules of Procedure and Evidence addresses neither the temporal nor

¹⁰⁴ Impugned Decision, para. 61.

¹⁰⁵ Impugned Decision, para. 63.

¹⁰⁶ Impugned Decision, para. 63.

¹⁰⁷ Impugned Decision, para. 64.

¹⁰⁸ Impugned Decision, para. 65.

¹⁰⁹ Impugned Decision, para. 66.

¹¹⁰ Impugned Decision, para. 66.

¹¹¹ See Document in Support of the Appeal, paras 86-98.

geographical scope of a declaration.¹¹² In his submission, article 12 of the Statute, and therefore also rule 44 (2) of the Rules of Procedure, deal with the subject-matter and personal jurisdiction of the Court, not with its temporal jurisdiction.¹¹³ He notes that rule 44 (2) of the Rules of Procedure and Evidence only refers to “crimes referred to in article 5”.¹¹⁴ Therefore, in his submission, the only limitation stipulated by rule 44 (2) of the Rules of Procedure and Evidence is to crimes, which has no influence on the question of the temporal scope of the acceptance of jurisdiction.¹¹⁵ He argues that the Pre-Trial Chamber confuses questions of jurisdiction with the mechanisms of article 13 of the Statute relevant to the exercise of jurisdiction, which makes reference to a “situation”.¹¹⁶

64. Second, Mr Gbagbo appears to argue that the term “crime” in article 12 (3) of the Statute, read in context, only refers to crimes that occurred in the past.¹¹⁷

65. Under the fourth ground of appeal, Mr Gbagbo alleges that the Pre-Trial Chamber erred in interpreting the 2003 Declaration.¹¹⁸ In his view, the Pre-Trial Chamber should have interpreted the 2003 Declaration as a unilateral act according to the “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations”¹¹⁹ (hereinafter: “Guiding Principles”). According to Mr Gbagbo, this means that the 2003 Declaration should have been interpreted restrictively, taking into account the intent of Côte d’Ivoire and the circumstances that existed at the time of making the Declaration.¹²⁰ Mr Gbagbo notes that the Linas-Marcoussis Agreement also provided for the 2003 Amnesty Law, which only covered crimes committed between 19 September 2002 and the conclusion of the Linas-Marcoussis Agreement.¹²¹ In his submission, this demonstrates that the 2003 Declaration was intended only to cover crimes that were committed before the Linas-

¹¹² Document in Support of the Appeal, para. 90; Mr Gbagbo’s Response, para. 44.

¹¹³ Document in Support of the Appeal, para. 91; Mr Gbagbo’s Response, para. 45.

¹¹⁴ Document in Support of the Appeal, para. 90; Mr Gbagbo’s Response, para. 45.

¹¹⁵ Document in Support of the Appeal, para. 93; Mr Gbagbo’s Response, para. 45.

¹¹⁶ Document in Support of the Appeal, para. 93.

¹¹⁷ Mr Gbagbo’s Response, para. 42; *see also* Jurisdictional Challenge, para. 79.

¹¹⁸ Document in Support of the Appeal, paras 99-107.

¹¹⁹ United Nations, General Assembly, *Report of the International Law Commission Fifty-eighth session*, 11 May – 9 June and 3 July – 11 August 2006, A/61/10 (2006), pp. 367-381; *see also* Document in Support of the Appeal, paras 103-104.

¹²⁰ Document in Support of the Appeal, para. 104; Mr Gbagbo’s Response, para. 42.

¹²¹ Document in Support of the Appeal, para. 105; Mr Gbagbo’s Response, para. 42.



Marcoussis Agreement was concluded.¹²² He further argues that the Pre-Trial Chamber erred when it relied on the phrase “for an unspecified period of time” in support of its finding that the temporal scope of the 2003 Declaration is not limited.¹²³ He submits that this phrase relates to the fact that the Court may exercise its jurisdiction, without restriction, over the crimes committed within the specific time frame to which he refers.¹²⁴

66. Finally, under his fifth ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber should not have taken into account the 2010 Letter and the 2011 Letter.¹²⁵ He alleges that none of the letters are valid as Mr Ouattara was not the president of Côte d’Ivoire when he sent those letters to the Court.¹²⁶

67. The Prosecutor and the OPCV oppose the arguments of Mr Gbagbo.¹²⁷ The Prosecutor argues that acceptance of jurisdiction does not create a “situation” before the Court.¹²⁸ To the extent that Mr Gbagbo argues that a declaration under article 12 (3) of the Statute cannot confer jurisdiction over future crimes, the Prosecutor submits that this is “simply incorrect”.¹²⁹ The Prosecutor argues that the temporal scope of jurisdiction must be defined by the plain terms of the declaration, the intent of the declaring State and the objective parameters of the situation as defined in rule 44 of the Rules of Procedure and Evidence.¹³⁰ She further submits that an attempt “to divorce a ‘declaration’ from ‘situation’” is futile, as rule 44 of the Rules of Procedure and Evidence makes it clear that a situation is defined the same way, whether arising under article 12 (3) of the Statute or article 13 of the Statute.¹³¹ This, the Prosecutor submits, results from the inclusion of the words “the situation” in rule 44 (2) of the Rules of Procedure and Evidence.¹³² In her view, this clarifies that the legal texts do

¹²² Document in Support of the Appeal, para. 105; Mr Gbagbo’s Response, para. 42.

¹²³ Document in Support of the Appeal, para. 106.

¹²⁴ Document in Support of the Appeal, para. 106.

¹²⁵ Document in Support of the Appeal, paras 108-110; Mr Gbagbo’s Response, para. 53.

¹²⁶ Document in Support of the Appeal, para. 111; Mr Gbagbo’s Response, paras 53-54.

¹²⁷ Response to the Document in Support of the Appeal, para. 34; OPCV’s Observations, paras 35-40.

¹²⁸ Response to the Document in Support of the Appeal, paras 35-36.

¹²⁹ Response to the Document in Support of the Appeal, para. 37.

¹³⁰ Response to the Document in Support of the Appeal, para. 37.

¹³¹ Response to the Document in Support of the Appeal, para. 38.

¹³² Response to the Document in Support of the Appeal, para. 38.

not prevent a State, by way of a declaration, from accepting the Court's jurisdiction with respect to prospective crimes.¹³³

68. Turning to the fourth ground of appeal, the Prosecutor avers that the Pre-Trial Chamber did not err by not explicitly determining whether or not the 2003 Declaration amounted to a "unilateral act" of Côte d'Ivoire.¹³⁴ The Prosecutor submits that the Pre-Trial Chamber addressed the arguments raised by Mr Gbagbo.¹³⁵ Further, according to the Prosecutor, the law relating to unilateral declarations of States does not apply in this instance "as *prima facie* 'unilateral' acts carried out by States in the context of international justice are excluded from the scope of the [Guiding Principles]".¹³⁶ Second, the Prosecutor submits that "there is no applicable principle of interpretation whereby declarations made before this Court should be interpreted narrowly, nor is there any requirement in the Statute to that effect".¹³⁷ Finally, the Prosecutor submits that, should the Guiding Principles be applicable, Mr Gbagbo's submissions are not in line with the plain meaning and intent of the language of the 2003 Declaration and even contradict the Guiding Principles.¹³⁸

69. Regarding the fifth ground of appeal, the Prosecutor avers that the Chamber did not err in law. According to the Prosecutor, the Pre-Trial Chamber correctly decided that it was not required "to assess the legal validity of the 2010 Letter and 2011 Letter or Mr Ouattara's capacity to bind [Côte d'Ivoire] on those dates".¹³⁹ In support of this submission, the Prosecutor asserts that the Pre-Trial Chamber had already decided that the Court had jurisdiction – based on the 2003 Declaration – over all crimes committed since 19 September 2002, including those allegedly committed by Mr Gbagbo since 28 November 2010 and, secondly, that the Pre-Trial Chamber clarified that the 2010 Letter and the 2011 Letter were not the basis for the Court's jurisdiction, but were "further evidence" that Côte d'Ivoire accepted the Court's jurisdiction.¹⁴⁰

¹³³ Response to the Document in Support of the Appeal, para. 39.

¹³⁴ Response to the Document in Support of the Appeal, para. 49.

¹³⁵ Response to the Document in Support of the Appeal, para. 50.

¹³⁶ Response to the Document in Support of the Appeal, para. 51; *see also* Prosecutor's Response, para. 19.

¹³⁷ Response to the Document in Support of the Appeal, para. 52.

¹³⁸ Prosecutor's Response, para. 20.

¹³⁹ Response to the Document in Support of the Appeal, para. 54.

¹⁴⁰ Response to the Document in Support of the Appeal, para. 54.

70. The OPCV refers to its previous submissions as regards the 2003 Declaration.¹⁴¹ In addition, the OPCV submits that the Chamber clarified that the 2010 Letter and 2011 Letter “have no actual relevance on its determination of the [Jurisdictional Challenge]” and, accordingly, that this alleged error “does not affect the Impugned Decision”.¹⁴² According to the OPCV, the third, fourth and fifth grounds of appeal should therefore be dismissed.¹⁴³

71. Côte d’Ivoire refers the Appeals Chamber to its submissions made in Côte d’Ivoire’s Observations on the Jurisdictional Challenge.¹⁴⁴

4. Determination by the Appeals Chamber

72. At the outset, the Appeals Chamber recalls that Côte d’Ivoire is not a Party to the Rome Statute. By becoming a Party to the Rome Statute (subject to any declaration pursuant to article 124 of the Statute), a State accepts the jurisdiction of the Court within the parameters set, in particular, by articles 11 and 12 (1) and (2) of the Statute. A State Party is a member of the Assembly of States Parties with corresponding rights, such as deciding on the budget of the Court, providing management oversight to the organs of the Court or considering matters relating to non-cooperation by States.¹⁴⁵ It also enjoys certain other rights, such as the right to refer situations to the Court pursuant to articles 13 and 14 of the Statute and the right to nominate candidates for the elected offices of the Court. Furthermore, a State Party may propose amendments to the Statute and the Rules of Procedure and Evidence and has the right to vote on amendment proposals pursuant to articles 121 and 51 of the Statute.

73. In contrast, a State that is not a Party to the Statute may accept the jurisdiction of the Court pursuant to article 12 (3) of the Statute, which provides:

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.

¹⁴¹ OPCV’s Observations, para. 37.

¹⁴² OPCV’s Observations, para. 39.

¹⁴³ OPCV’s Observations, para. 40.

¹⁴⁴ Côte d’Ivoire’s Observations, para. 15.

¹⁴⁵ See article 112 of the Statute.

74. The effects of such a declaration are that the Court may exercise its jurisdiction and that the State in question is obliged to cooperate with the Court in accordance with Part 9 of the Statute. Nevertheless, a State making a declaration under article 12 (3) of the Statute does not, as a result, have all the rights or obligations of a State Party.

75. In 2003, Côte d'Ivoire lodged a declaration pursuant to article 12 (3) of the Statute.¹⁴⁶ The general validity of the 2003 Declaration is not disputed. The following three questions are, in essence, raised by the three grounds of appeal:

- a. Whether, under article 12 (3) of the Statute, the acceptance of jurisdiction is *per se* limited to past crimes or specific "situations";
- b. Whether the 2003 Declaration implicitly limits the jurisdiction to crimes committed before the conclusion of the Linas-Marcoussis Agreement; and
- c. What the effects are, if any, of the 2010 and 2011 Letters relevant to the applicability of the 2003 Declaration.

76. The three grounds of appeal are raised as errors of law, including errors in the interpretation of a declaration and letters of a State relevant to the jurisdiction of the Court. The Appeals Chamber's standard of review for errors of law is settled:

The Appeals Chamber has repeatedly held that its review is corrective in nature and not *de novo*. On questions of law, the Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision. [Footnote omitted.]¹⁴⁷

¹⁴⁶ See *supra* paragraph 49.

¹⁴⁷ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20; see also *Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514 (OA 4) <<http://www.legal-tools.org/doc/256bb2/>>, para. 15.

(a) Acceptance of jurisdiction is not *per se* limited to past crimes or specific situations

77. The Appeals Chamber must first consider whether, under article 12 (3) of the Statute, a State may accept the Court's jurisdiction only in respect of crimes committed in the past or in respect of a specific "situation" within the meaning of article 13 of the Statute.

78. In this regard, Mr Gbagbo submits that a State cannot, by way of a declaration pursuant to article 12 (3) of the Statute, accept jurisdiction for crimes committed after the declaration was made.¹⁴⁸ This argument appears to be primarily based on the text of article 12 (3) of the Statute, according to which jurisdiction is accepted in respect of the "crime in question".¹⁴⁹ This phrase is different from paragraph 1 of article 12 of the Statute, which stipulates that, by becoming a Party to the Statute, a State accepts the jurisdiction of the Court "with respect to the crimes referred to in article 5". The term "crime in question" in article 12 (3) of the Statute could therefore indeed be understood as referring to specific events in the course of which crimes were committed. Read in this way, the "crime in question" would relate only to past events and a declaration under article 12 (3) of the Statute could not therefore cover future crimes.

79. The Appeals Chamber notes, however, that this interpretation is not supported by rule 44 (2) of the Rules of Procedure and Evidence, which provides as follows:

When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned 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 [...] [Emphasis added.]

80. The use of the words "crimes referred to in article 5" indicates that the term "crime in question" in article 12 (3) of the Statute refers to the categories of crimes in article 5 of the Statute, i.e. genocide, crimes against humanity, war crimes and the

¹⁴⁸ Mr Gbagbo's Response, para. 42; *see also* Jurisdictional Challenge, para. 79.

¹⁴⁹ *See* Document in Support of the Appeal, para. 93; *see also* Jurisdictional Challenge, para. 79. The French version reads: "à l'égard du crime dont il s'agit".



crime of aggression,¹⁵⁰ and not to specific events in the past, in the course of which such crimes were committed.

81. The Appeals Chamber also finds that, in the absence of a stipulation in the declaration under article 12 (3) of the Statute, the acceptance of jurisdiction is not limited to a given “situation” in terms of article 13 of the Statute, as appears to have been the view of the Pre-Trial Chamber.¹⁵¹ The Appeals Chamber accepts that it could be argued that the reference point of a declaration under article 12 (3) of the Statute has to be a specific “situation” because rule 44 (2) of the Rules of Procedure and Evidence refers to “the acceptance of jurisdiction with respect to the crimes referred to in article 5 of *relevance to the situation*” (emphasis added). However, it must be recalled that the question of whether a “situation” exists only becomes relevant when the Court considers whether it may exercise its jurisdiction under article 13 of the Statute. Pursuant to articles 13 (a) and (b) of the Statute, a State Party or the Security Council may refer a “situation” to the Court and, pursuant to articles 13 (c) and 15 of the Statute, the Prosecutor may initiate an investigation *proprio motu*.

82. In contrast, article 12 of the Statute addresses, according to its title, the “Preconditions to the exercise of jurisdiction”. The acceptance of jurisdiction upon ratification of, or accession to, the Statute is general and is not limited to specific “situations”. Likewise, subject to any stipulations made in the declaration of acceptance, if a State accepts the jurisdiction of the Court under article 12 (3) of the Statute, the acceptance is general and the question of whether a “situation” exists becomes relevant only once the Court considers whether it may exercise its jurisdiction pursuant to article 13 of the Statute.

83. In this context, the Appeals Chamber notes that the Statute also serves the purpose of deterring the commission of crimes in the future, and not only of addressing crimes committed in the past. This supports the interpretation that article 12 (3) of the Statute does not prevent a State from accepting the jurisdiction of the Court prospectively, with the consequence that the Court has jurisdiction in respect of

¹⁵⁰ See articles 15*bis* and 15*ter* of the Statute with respect to the Court’s exercise of jurisdiction over the crime of aggression.

¹⁵¹ Impugned Decision, paras 59-64.

any future events that may fall within one or more of the categories of crimes in article 5 of the Statute, as applicable.

84. The Appeals Chamber therefore concludes that the phrase “crime in question” in article 12 (3) of the Statute neither limits the scope of a declaration to crimes that occurred in the past nor to crimes committed in a specific “situation”. A State may accept the jurisdiction of the Court generally. This is not to suggest that a State, when accepting the jurisdiction of the Court, may not further limit the acceptance of jurisdiction within the parameters of the Court’s legal framework.¹⁵² However, unless such a stipulation is made, the acceptance of jurisdiction is neither restricted to crimes that pre-date the declaration nor to specific “situations”. Therefore, the Appeals Chamber rejects the third ground of appeal raised by Mr Gbagbo.

(b) Limitations based on the 2003 Declaration

85. Mr Gbagbo argues under his fourth ground of appeal that the 2003 Declaration should be read as limiting the acceptance of jurisdiction to crimes committed before the conclusion of the Linas-Marcoussis Agreement.¹⁵³ He makes this argument based on the text of the Linas-Marcoussis Agreement and the annex thereto and draws a parallel to the 2003 Amnesty Law, which only refers to past crimes.¹⁵⁴

86. The Appeals Chamber notes that an amnesty law necessarily refers to past crimes and is a mechanism distinct from, and not related to, a declaration under article 12 (3) of the Statute. The Appeals Chamber also notes that the 2003 Amnesty Law specifically excluded crimes under articles 5 to 8 of the Statute from its scope of application.

87. The Appeals Chamber further notes that the 2003 Declaration did not expressly limit the acceptance of jurisdiction to crimes committed before the Linas-Marcoussis Agreement. In fact, the Linas-Marcoussis Agreement is not even mentioned in the 2003 Declaration. To the contrary, the last paragraph of the 2003 Declaration suggests

¹⁵² In the context of the present appeal, the Appeals Chamber does not have to address which specific limitations to a declaration under article 12 (3) of the Statute may be acceptable under the Court’s legal framework.

¹⁵³ Document in Support of the Appeal, para. 105; Mr Gbagbo’s Response, para. 42.

¹⁵⁴ Document in Support of the Appeal, para. 105; Mr Gbagbo’s Response, para. 42.

that the Court's jurisdiction has also been explicitly accepted with respect to crimes committed after the 2003 Declaration without any temporal restrictions.

88. In any case, Mr Gbagbo's argument that the 2003 Declaration should nevertheless be read restrictively is not convincing. Mr Gbagbo refers to Principle 7 of the Guiding Principles, which were adopted by the International Law Commission in 2006.¹⁵⁵

89. The Guiding Principles draw on the jurisprudence of the International Court of Justice (hereinafter: "ICJ"), as is evident from the International Law Commission's commentary to each article.¹⁵⁶ However, the ICJ does not restrictively interpret declarations which confer jurisdiction on the ICJ pursuant to article 36 of the ICJ Statute.¹⁵⁷ Rather, it takes the wording of such a declaration including reservations thereto "as it stands".¹⁵⁸ Furthermore, and leaving aside the status of the Guiding Principles and their applicability to declarations under article 12 (3) of the Statute, according to Principle 7 of the Guiding Principles, a restrictive interpretation is, in any event, only necessary if there is doubt as to the declaration's interpretation. However, in the case at hand, the 2003 Declaration's text does not create such doubt. While it determines the starting point of the acceptance of jurisdiction, it does not indicate that this acceptance is limited to crimes that pre-date the declaration.

90. In conclusion, the Appeals Chamber rejects Mr Gbagbo's fourth ground of appeal as there is no basis upon which the 2003 Declaration could be read as limiting the acceptance of jurisdiction to crimes committed before the conclusion of the Linas-Marcoussis Agreement.

(c) The 2010 and 2011 Letters

91. Mr Gbagbo's fifth ground of appeal relates to the 2010 Letter and the 2011 Letter. He argues that the Pre-Trial Chamber should not have given any weight to the

¹⁵⁵ Document in Support of the Appeal, para. 103; *see also supra* paragraph 65, footnote 119.

¹⁵⁶ *See generally*, Guiding Principles.

¹⁵⁷ *See* C. Tomuschat, "Article 36", in: A. Zimmermann, et al. (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) (hereinafter: "C. Tomuschat in A. Zimmermann"), paras 33, 65; *see also* ICJ, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, "Preliminary Objections", 26 May 1961, ICJ Reports 1961, pp. 17-22, and ICJ, *Fisheries Jurisdiction (Spain v. Canada)*, "Jurisdiction of the Court", 4 December 1998, ICJ Reports 1998 (hereinafter: "ICJ Fisheries Jurisdiction"), para. 44.

¹⁵⁸ *See* C. Tomuschat in A. Zimmermann, para 65; *see also* ICJ *Fisheries Jurisdiction*, para. 47.

two letters because Mr Ouattara was not the president of Côte d'Ivoire when he sent the Letters and the Pre-Trial Chamber therefore erred when it noted that both the 2010 and 2011 Letters 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".¹⁵⁹

92. The Appeals Chamber finds that the statements made in relation to the Letters were akin to *obiter dicta* as the Pre-Trial Chamber had already established that the Court has jurisdiction. Therefore, any alleged error in respect of the Pre-Trial Chamber's treatment of the 2010 Letter and 2011 Letter does not need to be addressed as such error could not, in any event, materially affect the Impugned Decision. The Appeals Chamber therefore rejects the fifth ground of appeal.

C. Sixth to tenth grounds of appeal (pertaining to the stay of the proceedings)

93. Under the remaining grounds of appeal, Mr Gbagbo submits that the Pre-Trial Chamber erred in how it addressed his arguments in the Jurisdictional Challenge that his fundamental rights have been violated to the extent that the Court should not exercise its jurisdiction and should permanently stay the proceedings against him.

1. The Impugned Decision

94. In relation to Mr Gbagbo's arguments that the proceedings against him should be stayed because of alleged violations of his rights from the time of his arrest by the domestic authorities, on 11 April 2011, to his transfer to the Court, on 29 November 2011, the Pre-Trial Chamber, with reference to the Appeals Chamber's "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"¹⁶⁰ (hereinafter: "*Lubanga OA 4 Judgment*"), concluded that these arguments do not challenge the jurisdiction of the Court.¹⁶¹ The Pre-Trial Chamber nevertheless addressed the alleged violations of Mr Gbagbo's rights, stating that, "[b]earing 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

¹⁵⁹ Impugned Decision, para. 66.

¹⁶⁰ 14 December 2006, ICC-01/04-01/06-772 <<http://www.legal-tools.org/doc/1505f7/>>.

¹⁶¹ Impugned Decision, para. 88.

of the Chamber to stay proceedings in case of abuse of process”.¹⁶² The Pre-Trial Chamber then discussed Mr Gbagbo’s submissions that his rights under articles 55 and 59 of the Statute were violated.¹⁶³ Furthermore, the Pre-Trial Chamber addressed 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”.¹⁶⁴ As to the alleged violations of Mr Gbagbo’s rights under articles 55 (1) and 59 (2) of the Statute, as well as his other fundamental rights, the Pre-Trial Chamber concluded that “Mr Gbagbo was not detained at the behest of [the] Court nor did the Court have any involvement with the domestic proceedings of the Ivorian authorities”.¹⁶⁵ With reference to the *Lubanga OA 4 Judgment*, the Pre-Trial Chamber found that “the mere fact that the Prosecutor was in contact with Ivorian authorities does not suggest that there was any involvement” by him in Mr Gbagbo’s detention.¹⁶⁶ It also dismissed the argument that the Prosecutor had a duty of care during Mr Gbagbo’s detention by national authorities because “the powers of the Prosecutor may only be exercised in the context of, or in relation to, proceedings before the Court”.¹⁶⁷

2. Parties and participants’ submissions

95. Mr Gbagbo alleges that the Pre-Trial Chamber erred: as to the scope of application of article 55 (1) of the Statute (ground 6);¹⁶⁸ as to the ambit of the Court’s oversight over compliance with article 59 (2) of the Statute by the national authorities (ground 7);¹⁶⁹ by failing to find that article 59 (2) of the Statute had been violated during the procedure of his surrender to the Court (ground 8);¹⁷⁰ by re-characterising Mr Gbagbo’s request to stay proceedings as an abuse of process claim (ground 9);¹⁷¹ and as to the conditions necessary to find a lack of jurisdiction (ground 10).¹⁷² In particular, and as relevant for the determination of these grounds of appeal, Mr Gbagbo notes that the Pre-Trial Chamber treated his arguments in relation to the

¹⁶² Impugned Decision, para. 90.

¹⁶³ Impugned Decision, para. 94.

¹⁶⁴ Impugned Decision, para. 94; *see also* paras 107-112.

¹⁶⁵ Impugned Decision, para. 108.

¹⁶⁶ Impugned Decision, para. 109, referring to the *Lubanga OA 4 Judgment*, para. 42.

¹⁶⁷ Impugned Decision, para. 111.

¹⁶⁸ Document in Support of the Appeal, paras 115-134; Mr Gbagbo’s Response, paras 59-82.

¹⁶⁹ Document in Support of the Appeal, paras 136-145; Mr Gbagbo’s Response, paras 83-94.

¹⁷⁰ Document in Support of the Appeal, paras 146-151.

¹⁷¹ Document in Support of the Appeal, paras 152-154; Mr Gbagbo’s Response, paras 95-105.

¹⁷² Document in Support of the Appeal, paras 155-165.

alleged violation of his fundamental rights as a request for stay of proceedings based on abuse of process, and not as a jurisdictional challenge.¹⁷³ Mr Gbagbo acknowledges that, in the *Lubanga OA 4 Judgment*, the Appeals Chamber distinguished a request for the stay of proceedings based on the violation of the suspect's rights from a jurisdictional challenge.¹⁷⁴ However, Mr Gbagbo refers to Pre-Trial Chamber III's "Decision on application for interim release" of 20 August 2008 in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (hereinafter: "*Bemba Decision*"),¹⁷⁵ in which Pre-Trial Chamber III considered, as he argues, alleged violations of Mr Bemba's rights at the time of arrest in the course of a decision on interim release. On that basis, Mr Gbagbo observes that the legal character of a stay request based on the violation of the suspect's rights is still uncertain.¹⁷⁶ He invites the Appeals Chamber to determine which legal basis can be invoked for such requests.¹⁷⁷

96. The Prosecutor submits that a request for a permanent stay of the proceedings based on allegations of serious violations of the suspect's fundamental rights is correctly classified as a request for stay of the proceedings based on abuse of process.¹⁷⁸ She further submits that the Pre-Trial Chamber correctly applied the relevant principles enunciated by the Appeals Chamber¹⁷⁹ and avers that Mr Gbagbo misrepresents the *Bemba Decision*.¹⁸⁰ She argues furthermore that Mr Gbagbo "failed to demonstrate how the alleged error could invalidate the [Impugned D]ecision".¹⁸¹ She submits that articles 55 and 59 of the Statute "should be construed in accordance with their clear and unambiguous meaning" and that, accordingly, the Pre-Trial Chamber took the correct approach in rejecting Mr Gbagbo's arguments.¹⁸²

97. The OPCV reiterates the submissions made in the OPCV's Observations on the Jurisdictional Challenge, including the submission that the alleged violations of Mr Gbagbo's rights were committed before the opening of an investigation pursuant to

¹⁷³ Document in Support of the Appeal, para. 152.

¹⁷⁴ Document in Support of the Appeal, paras 152-153; Mr Gbagbo's Response, paras 96-97.

¹⁷⁵ ICC-01/05-01/08-80-Anx <<http://www.legal-tools.org/doc/08f9d3/>>.

¹⁷⁶ Document in Support of the Appeal, para. 153; Mr Gbagbo's Response, para. 102.

¹⁷⁷ Document in Support of the Appeal, paras 153-154; Mr Gbagbo's Response, para. 102.

¹⁷⁸ Response to the Document in Support of the Appeal, paras 79, 82.

¹⁷⁹ Response to the Document in Support of the Appeal, para. 80.

¹⁸⁰ Response to the Document in Support of the Appeal, para. 81.

¹⁸¹ Response to the Document in Support of the Appeal, para. 82.

¹⁸² Prosecutor's Response, para. 23.

article 55 of the Statute.¹⁸³ Furthermore, the OPCV submits that Mr Gbagbo had been arrested and detained by Côte d'Ivoire based on charges related to economic crimes “which have no link with the crimes falling under the jurisdiction of the Court”.¹⁸⁴ The OPCV further notes that Mr Gbagbo “simply invites the Appeals Chamber to determine, for the future, which legal basis to invoke in case of similar requests”.¹⁸⁵

98. Côte d'Ivoire recalls that the legal regime to be applied to stay requests was set out in the *Lubanga OA 4 Judgment* and that neither the Statute nor the Rules of Procedure and Evidence refer to it.¹⁸⁶ It requests that grounds 6 to 10 be dismissed *in limine* as they do not relate to the jurisdiction of the Court.¹⁸⁷ Côte d'Ivoire addresses the substance of grounds 6 to 8 together.¹⁸⁸ More generally, Côte d'Ivoire submits that the Pre-Trial Chamber correctly focused on the fundamental rights of the accused, and that a restrained approach towards abuse of process is supported by the jurisprudence of the international criminal tribunals.¹⁸⁹ It avers that, “while abuse of process must protect suspects in the enjoyment of their rights, they must not ‘abuse’ it by construing their rights extensively, at the risk of unduly paralysing judicial action”.¹⁹⁰

3. Determination by the Appeals Chamber

99. The first question for the Appeals Chamber to consider is whether the grounds of appeal relating to the Pre-Trial Chamber’s decision on Mr Gbagbo’s request to stay the proceedings against him pertain to a “decision with respect to jurisdiction” in terms of article 82 (1) (a) of the Statute.

100. As noted by all participants to the present appeals proceedings, including Mr Gbagbo, in its *Lubanga OA 4 Judgment*, the Appeals Chamber distinguished requests for a stay of proceedings based on an alleged violation of a suspect’s fundamental rights from jurisdictional challenges. The Appeals Chamber held that the doctrine of abuse of process was not applicable before the Court and that the correct legal basis

¹⁸³ OPCV’s Observations, paras 42, 45.

¹⁸⁴ OPCV’s Observations, para. 45.

¹⁸⁵ OPCV’s Observations, para. 51.

¹⁸⁶ Côte d’Ivoire’s Observations, paras 24-26.

¹⁸⁷ Côte d’Ivoire’s Observations, paras 17-18.

¹⁸⁸ Côte d’Ivoire’s Observations, paras 27-38.

¹⁸⁹ Côte d’Ivoire’s Observations, para. 28, referring to ICTY, *Prosecutor v. Dragan Nikolić*, “Decision on Interlocutory Appeal Concerning Legality of Arrest”, 5 June 2003, IT-94-2-AR73 <<http://www.legal-tools.org/doc/c8648d/>>, para. 30.

¹⁹⁰ Côte d’Ivoire’s Observations, para. 28.

for dealing with such requests was article 21 (3) of the Statute.¹⁹¹ As to the character of such requests, the Appeals Chamber noted:

Article 19 of the Statute regulates the context within which challenges to jurisdiction and admissibility may be raised by a party [...]. Jurisdiction under article 19 of the Statute 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. As earlier noted, the conclusion to which the Appeals Chamber is driven is that the application of Mr. Lubanga Dyilo [based on an alleged violation of his rights] and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19 (2) of the Statute. What the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo.¹⁹²

101. The *Lubanga OA 4 Judgment* thus clarifies that requests for a stay of proceedings based on alleged violations of the suspect's fundamental rights are *not* jurisdictional in nature. Accordingly, the Pre-Trial Chamber's decision to reject Mr Gbagbo's request for a stay of proceedings was not a "decision with respect to jurisdiction" in terms of article 82 (1) (a) of the Statute. Rather, it was a separate decision, contained in the Impugned Decision, which was unrelated to the question of the jurisdiction of the Court. It could therefore only be appealed with the leave of the Pre-Trial Chamber under article 82 (1) (d) of the Statute. In the view of the Appeals Chamber, the fact that the decision on the request for a stay of proceedings was contained in the same Impugned Decision that rejected Mr Gbagbo's challenge to the jurisdiction of the Court does not render the decision on the stay request appealable under article 82 (1) (a) of the Statute. If this were the case, parties to the proceedings could unduly expand their right to appeal under article 82 (1) (a) of the Statute by attaching other requests to jurisdictional challenges, which, if the Chamber ruled on them in the same document, would render them directly appealable.

102. The Appeals Chamber has not overlooked that, in the *Lubanga OA 4 Judgment*, it did not dismiss Mr Lubanga's appeal as inadmissible. Instead, it considered, and eventually rejected, the substance of his arguments. This was because the *Lubanga*

¹⁹¹ See *Lubanga OA 4 Judgment*, paras 34-35. It is noted that several participants to these appeals proceedings as well as the Pre-Trial Chamber itself in the Impugned Decision referred to the "abuse of process doctrine".

¹⁹² *Lubanga OA 4 Judgment*, para. 24.

OA 4 Judgment was the first decision rendered by the Appeals Chamber relevant to requests for stays of proceedings. At that time, it was considered necessary to clarify the legal basis of a request for stay of proceedings based on allegations of violations of a suspect's fundamental rights. Since then, it is settled that a decision on such a request is not jurisdictional in nature, and cannot therefore be appealed under article 82 (1) (a) of the Statute. This is demonstrated by the fact that, in respect of subsequent decisions on stay requests in the case of *Prosecutor v. Thomas Lubanga Dyilo*, the appellants obtained leave to appeal under article 82 (1) (d) of the Statute.¹⁹³

103. The Appeals Chamber also recalls that, in the cases of *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* and *Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang*, it declined to consider the interpretation of a contextual element of article 7 (1) of the Statute in appeals brought under article 82 (1) (a) of the Statute, finding that those issues were not jurisdictional in nature and therefore not properly before it; consequently, the Appeals Chamber rejected the appeals as inadmissible.¹⁹⁴

104. Mr Gbagbo's argument that, in the *Bemba* Decision, Pre-Trial Chamber III considered a request for stay of proceedings in the context of a decision on interim release and that the legal nature of a stay request is therefore unclear is factually incorrect.¹⁹⁵ In that case, Mr Bemba submitted that, because of procedural irregularities in his surrender to the Court, the arrest warrant was null and void and that he should therefore be released; he did not argue that the proceedings should be stayed because of an alleged violation of his fundamental rights.¹⁹⁶

¹⁹³ See Trial Chamber I, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused'", 2 July 2008, ICC-01/04-01/06-1417 <http://www.legal-tools.org/doc/798121/>; see also Transcript of 15 July 2010, ICC-01/04-01/06-T-314-ENG <<http://www.legal-tools.org/doc/d1d118/>>, p. 14, line 5 - p. 17, line 7, where leave was granted orally.

¹⁹⁴ See "Decision on the appeal of Mr Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 24 May 2012, ICC-01/09-02/11-425 (OA 4) <http://www.legal-tools.org/doc/b6aad9/>; see also "Decision on the appeal of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 24 May 2012, ICC-01/09-01/11-414 (OA 3 OA 4) <<http://www.legal-tools.org/doc/8f555e/>>.

¹⁹⁵ Document in Support of the Appeal, para. 153.

¹⁹⁶ *Bemba* Decision, para. 27, summarising Mr Bemba's submissions.

105. However, the Appeals Chamber takes this opportunity to underline that the Pre-Trial Chamber could have clarified that the Impugned Decision actually consisted of two decisions, namely a decision on Mr Gbagbo's jurisdictional challenge and a decision on the request to stay the proceedings which could have been appealed on different legal bases. In that respect, the Appeals Chamber notes, in particular, that the title and the operative part of the Impugned Decision could suggest that the Pre-Trial Chamber treated both requests made by Mr Gbagbo as challenges to the jurisdiction of the Court. This being said, the Appeals Chamber notes that Mr Gbagbo chose to combine the two requests in the Jurisdictional Challenge, even though he was aware of the *Lubanga OA 4 Judgment*, to which he referred in the Jurisdictional Challenge.¹⁹⁷ Further, the Pre-Trial Chamber clarified in the Impugned Decision that the alleged violation of Mr Gbagbo's rights was not a jurisdictional issue and that it considered the request to stay the proceedings only because of the seriousness of the allegations, based on its power "to stay proceedings in case of abuse of process".¹⁹⁸

106. In light of the above, the Appeals Chamber finds that grounds 6 to 10 are inadmissible in a jurisdictional appeal brought under article 82 (1) (a) of the Statute and dismisses those five grounds of appeal *in limine*.

V. APPROPRIATE RELIEF

107. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to confirm the part of the Impugned Decision that rejects the challenge to the jurisdiction of the Court raised by Mr Gbagbo pursuant to article 19 (2) of the Statute as the Appeals Chamber found either no error or no error that materially affected the Impugned Decision. Consequently, the appeal is dismissed in this respect. Further, the appeal against the part of the Impugned Decision that rejects Mr Gbagbo's request to stay the proceedings must be dismissed *in limine*.

¹⁹⁷ See Jurisdictional Challenge, paras 293 *et seq.*

¹⁹⁸ Impugned Decision, para. 90.

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



Judge Anita Ušacka

Presiding Judge

Dated this 12th day of December 2012

At The Hague, The Netherlands