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**International
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PRE-TRIAL CHAMBER I

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

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

**Public Document
with 15 public annexes and 37 confidential annexes**

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)

Source: Defence team for President Gbagbo

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

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Preliminary comment on the classification of the application

1. This application is a public document but some of its annexes are classified as confidential, only available to parties in accordance with article 23 *bis* of the Rome Statute. With regard to the classification of the annexes:

- Annexes 6, 7 and 23 are classified as confidential pursuant to article 23 *bis* owing to the fact that the health of the President is a private matter covered by medical confidentiality;¹
- Annex 8 – the expert physician’s report of 31 March 2011 – is classified as confidential and redacted following the Chamber’s decision of 23 May 2012;²
- Annexes 4 and 13 are classified as confidential pursuant to article 23 *bis* because the disclosure of the content of the attestations and the names of their authors would seriously endanger them. These are weighty matters that go to the process through which a political faction took power and the actuality of threats looming over judges and lawyers;
- Annexes 5, 9, 10, 11, 12, 25 to 44, 46 to 49 and 52 are classified as confidential pursuant to article 23 *bis* owing to the fact that disclosure of the names of the authors, those to whom the letters are addressed, or those mentioned in these letters or judicial documents could put them in serious danger by revealing their role in implicating the Ivorian authorities.

I. FACTS AND PROCEDURAL BACKGROUND

2. Following the second round of presidential elections held on 28 November 2010, the Constitutional Council proclaimed Laurent Gbagbo President of the Republic of Côte d’Ivoire on 3 December 2010 (see Annex 1); he took the oath of office on 4 December 2010 (see Annex 2) and assumed office as President of the Republic.

3. In January 2011, armed rebel units took control of Abobo, a neighbourhood of Abidjan. In mid-March 2011, rebel columns crossed the demarcation line between the north, which had been under rebel control since 19 September 2002, and the south, which was under the control of the legitimate authorities. The Ivorian army withdrew without joining combat. In a matter of

¹ President Gbagbo consented to the disclosure of information on his medical condition to the Pre-Trial Chamber and the parties (Annex 23).

² Decision on the “Prosecution’s preliminary requests in relation to Defence request for interim release”, 23 May 2012, ICC-02/11-01/11-126-Conf, para. 15.

days, rebel columns backed by UNOCI and French forces reached Abidjan, entering its suburbs on 27 March 2011.

4. President Gbagbo had sought refuge in the presidential palace in the Cocody neighbourhood on 25 March 2011. This elderly man, exhausted by months of crisis, was to endure a siege. His physician was on hand to ensure that he took the appropriate medicine to treat his high blood pressure, amongst other conditions. The President was joined by scores of unarmed civilians, who took up abode in the palace gardens. It must be noted that families of officials and staff stayed on the premises of the palace, among them around twenty children.

5. From 1 to 4 April 2011, the palace came under helicopter gunship fire, which resumed with greater intensity on 8 April. All official resistance ended and Ivorian army troops ceased all combat nationwide.

6. During the daytime of 10 April 2011, artillery and helicopter gunship fire further intensified. Many of the palace occupants were killed, and the wounded were treated in very difficult conditions in a makeshift infirmary set up inside the palace.

7. The situation in the palace accordingly worsened as food and medical supplies were depleted; the wounded could not be treated in adequate conditions, particularly since, with every passing hour, the number of victims increased. Medical staff had to contend with a constant stream of people who had sustained wounds as a result of bombing or snipers ensconced in the surrounding areas. Fatigue and stress levels soared amongst those who endured those grim hours.

8. In the night of 10 to 11 April, the bombing continued, with survivors attempting to evade it by fleeing from room to room. At dawn, French special forces launched an assault from the nearby embassy. They were soon replaced by groups of rebels, who were the first to enter the ruins of the palace. Before President Gbagbo's eyes, men were killed, and others, including his son and physician, were beaten. He himself was humiliated by the attackers.

9. Whilst President Gbagbo was taken to the Hôtel du Golf, the rebel headquarters, the executions of his supporters who had been seized continued. At the Hôtel du Golf, President Gbagbo was subjected to threats and pressure.

10. On 13 April 2011, further to an agreement between senior French and UN officials, President Gbagbo was transferred to Korhogo in the north of the country and placed under the

guard of a rebel military leader, Martin Kouakou Fofié. Martin Kouakou Fofié is the subject of United Nations Security Council sanctions for human rights violations, including arbitrary arrests, extra-judicial executions, sexual violence perpetrated on women, imposition of forced labour and recruitment of child soldiers.³

11. The brutal arrest of President Gbagbo, his detention at the Hôtel du Golf and transfer to Korhogo are illegal: no proceedings were instituted against him, no arrest warrant was issued, and no charges were levied against him by any judge or authority.

12. This worn and traumatised man was incarcerated in a house belonging to one of Guillaume Soro's relatives and only let out on a handful of occasions in eight months. President Gbagbo's gaolers initially feigned that he was being held at the presidential palace in Korhogo, where he was only transferred for a matter of hours to meet former United Nations Secretary-General, Kofi Annan, Desmond Tutu and Mary Robinson in May 2011 – these illustrious visitors later claimed that the conditions of the President's internment were satisfactory – and the Special Representative of the United Nations Secretary-General for Côte d'Ivoire, Young-Jin Choi, who would also find nothing untoward in the conditions of President Gbagbo's detention. In fact, the visitors had barely left when the President was taken back to his place of detention under the guard of commander Fofié's men.

13. On 4 May 2011, Alassane Ouattara was proclaimed President of the Republic by the same Constitutional Council (see Annex 3) which had proclaimed Laurent Gbagbo President five months earlier. Some members of the Constitutional Council reported the threats they had received at the time (see Annex 4).

14. Throughout his detention, which lasted until 29 November 2011, no arrest warrant or detention order was issued against President Gbagbo.

15. If such warrant or order had been issued, it would have been against the law since the Ivorian Constitution and law provide for special proceedings in the event of legal action against a former President of the Republic (see *infra*, section 2.1.3.2).

16. The only legal action taken by the Ivorian authorities was the initiation of proceedings against President Gbagbo on 18 August 2011 on the basis of articles 27, 29, 30, 110, 11, 225, 226, 227, 229, 313, 325, 327, 392, 395, 396 and 397 of the Criminal Code; these articles target,

³ Security Council committee concerning Côte d'Ivoire issues list of individuals subject to measures imposed by resolution 1572 (2004), <http://www.un.org/News/Press/docs/2006/sc8631.doc.htm>.

inter alia, embezzlement, misappropriation of public funds, spreading of false allegations likely to reduce the strength of the currency and collective pillaging (see Annex 38).

17. It should be noted that these proceedings were initiated in breach of Ivorian constitutional and legal provisions (see *infra*, section 2.1.4.2).

18. An application for the termination of the proceedings and the release of President Gbagbo relying on the violation of Ivorian constitutional and legal provisions and on the failure to respect the human rights of Laurent Gbagbo was filed on 19 August 2011; it is still pending (see Annex 5).

19. Even after 18 August 2011, at no time did any judicial and administrative authorities of Côte d'Ivoire produce any instrument to justify the detention of President Gbagbo.

20. During this arbitrary detention, President Gbagbo was a victim of daily ill-treatment and acts of torture.

21. Incarcerated in a room measuring three meters by three, unable to perform the slightest exercise, unable even to walk outside of the house, poorly fed and, most importantly, deprived of the medicine necessary to treat his medical conditions, President Gbagbo rapidly lost strength⁴ (see Annexes 6 and 7). In just a few weeks, he was unrecognisable and unable to walk unassisted. Despite his physician's requests, his gaolers refused to provide him with adequate treatment or to have him examined in a clinical environment.

22. To this regime, intended to cause his physical and mental exhaustion, was added psychological pressure: during his eight-month detention, he was denied contact with members of his family and his counsel, who were only able to visit him on very rare occasions, after overcoming substantial hurdles (see *infra*, section 2.1.2).

23. The President's health had so deteriorated that, according to the few rare visitors and his physician who was also arbitrarily incarcerated, the situation had become critical by October 2011.⁵

24. The expert physician appointed by the Defence shortly after President Gbagbo's arrival in The Hague stated in his report of 31 March 2012 that President Gbagbo's detention

⁴ First and second medical reports of President Gbagbo's personal physician (Annexes 6 and 7).

⁵ *Ibid.*

conditions “should be considered a form of ill-treatment as serious as physical abuse and even torture”. He noted that: “[i]solation is known to be used to ‘break’ prisoners”⁶ (see Annex 8). He added that the worrying condition of President Gbagbo’s health is the result of treatment which “must be regarded as ill-treatment and even torture”.⁷

25. He claimed that the current poor state of President Gbagbo’s health is the result of such torture and is typical of “hospitalisation syndrome”.⁸

26. He noted: “the present medical problems derive from the inhuman conditions of his detention.”⁹

27. The political and judicial authorities of Côte d’Ivoire and senior UNOCI officials were apprised of this state of affairs (see Annexes 9 and 10), as was the Prosecutor of the International Criminal Court (“the ICC” or “the Court”), to whose attention the worrying state of President Gbagbo’s health was brought by his counsel on several occasions, including on 28 October and 13 November 2011, when counsel wrote the following:

[TRANSLATION] [a]s you know, President Laurent Gbagbo was detained without a warrant from 11 April 2011 to 18 August 2011 and his rights have been, to this day, repeatedly breached. On 18 August 2011, he was charged with economic crimes on the basis of allegations by Ivorian authorities. These charges meet neither the substantive nor the formal criteria established by Ivorian law. Accordingly, President Gbagbo’s detention from 11 April 2011 to this day is, in legal terms, arbitrary. Moreover, as you are aware, he is at the mercy of his gaoler, commander Fofié, a warlord whose conduct prior to, during and following the electoral crisis is the subject of a number of investigations. Commander Fofié decides arbitrarily who can and cannot visit President Gbagbo, including his Counsel. Commander Fofié equally arbitrarily decides on the detention conditions of President Gbagbo, who is prohibited from leaving the house where he is incarcerated. After seven months of living in such conditions, President Gbagbo is in an alarmingly weak mental and physical state. His situation is exacerbated by the fact that he is prohibited from communicating with the outside world;

and requested that he require:

[TRANSLATION] the authorities of Côte d’Ivoire to punish those responsible for these repeated violations of the legal and constitutional provisions of Côte d’Ivoire and of the provisions of international agreements to which Côte d’Ivoire is a party; [...]

further requesting him to warn “[TRANSLATION] the Ivorian authorities that [he] would hold them responsible for any deterioration in President Gbagbo’s health.”

⁶ Report of the Expert Physician dated 31 March 2012, point 5(i) (Annex 8).

⁷ *Ibid*, point 7(a).

⁸ *Ibid*, point 7 (b).

⁹ *Ibid*, point 8(a).

President Gbagbo's counsel stated that the Prosecutor's "[TRANSLATION] failure to put an end to this intolerable abuse would be perceived as a deliberate attempt on [his] part to conceal the breaches of President Gbagbo's rights and his arbitrary detention" (see Annexes 11 and 12).¹⁰ It should be noted that there is no indication that either Ivorian officials or the ICC Prosecutor have, at any point, taken steps to end these very grave breaches of President Gbagbo's rights. Having submitted the application for a warrant of arrest against President Gbagbo to the Pre-Trial Chamber on 25 October 2011, it was for the Prosecutor to gather all the necessary information and take appropriate steps.

28. On Friday 25 November 2011, President Gbagbo's counsel were informed that the Investigating Judge would be travelling to Korhogo the following Monday, 28 November, to interview their client in the context of the proceedings initiated on 18 August 2011.

29. Despite their difficulty in securing an affordable means of transportation at such short notice, counsel arrived in Korhogo in time to assist President Gbagbo (see Annex 13).

30. The interview had barely begun when it was postponed to the next day, 29 November. That day, without prior notice, President Gbagbo's counsel were taken to a room where the Indictments Chamber of Abidjan was in session, having gathered in secret to rule on President Gbagbo's transfer to the ICC.

31. It should be emphasised that although the Ivorian judges informed counsel that they had just received the warrant of arrest and the request for transfer, the transfer had in fact been painstakingly planned. With the assistance of UNOCI, the judges, registrars, administrative staff and security guards had been secretly transported from Abidjan to Korhogo the previous Saturday, 26 November 2011. The transportation had been planned in the preceding days, prior to the ICC decision of 23 November 2011.

32. Moreover, this operation was preceded by a meeting between Alassane Ouattara and Prosecutor Ocampo.¹¹

33. The purpose of the operation was to catch President Gbagbo's counsel off guard.

¹⁰ Letter from President Laurent Gbagbo's counsel to the Prosecutor of the International Criminal Court, 28 October 2011 (Annex 11) and Letter from President Laurent Gbagbo's counsel to the Prosecutor of the International Criminal Court, 13 November 2011 (Annex 12).

¹¹ *L'Express*, Vincent Hugueux, "discrète rencontre Ouattara-Ocampo à Paris", 27 November 2011, available at http://www.lexpress.fr/actualite/monde/discrete-rencontre-ouattara-ocampo-a-paris_1055445.html.

34. The counsel's request – in accordance with Ivorian law – to postpone the hearing by a few days to afford them time to organise themselves and prepare a defence was rejected (see Annex 13).

35. Similarly, their requests to file a brief identifying the legal arguments that could serve as the basis to challenge the transfer were also rejected (see Annex 13).

36. Reduced to silence, the Defence was compelled to attend a travesty of a hearing (see Annex 13).

37. It is apparent from the documents provided to the Defence on 2 December 2011 that during the hearing, supporters of the operation were in constant contact with ICC representatives.¹²

38. During the hearing, commander Fofié's men, heavily armed and looking threatening, guarded the judges (see Annex 13).

39. It was commander Fofié himself who compelled the bench to end the hearing and make a ruling (see Annex 13).

40. At the end of the hearing, the bench assured counsel and President Gbagbo that he would be returned to his place of detention and that he would be able to appeal against the transfer in the coming days.

41. In reality, President Gbagbo was taken directly from the Korhogo courthouse to the airport. Thus he arrived in Rotterdam the following morning, without even a change of clothes.

I. DISCUSSION

Introduction

42. The ICC is the first permanent international court with jurisdiction to determine the responsibility of alleged perpetrators of the "most serious crimes of concern to the international community as a whole".¹³ The Court was born out of the oft-expressed but unrealised desire to prevent such crimes, which have stained human history and shocked the conscience of

¹² "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, Annexes 1, 3, 4, 5 and 12, ICC-02/11-01/11-12; recommendations requested by authorities of the Côte d'Ivoire on the request filed by Laurent Koudou Gbagbo for interim release, 29 November 2011, ICC-02/11-01/11-84.

¹³ Preamble to the Statute of the International Criminal Court, hereinafter "the Statute".

mankind across the centuries. It therefore revives the hopes of those, be they in embassies and ministries, in the remote countryside or in refugee camps, who saw it as the catalyst for an international criminal justice which would at last be effective and promote universal human rights values.

43. This hope, this exalted task of the Court, in turn bestows upon this institution a great responsibility – that of exemplariness. International justice cannot be credible, legitimate and by that token efficient if the Court does not properly exercise its functions such that fair trial rules are respected. It is the commitment to exemplariness that contributed to the creation of the Nuremberg and Tokyo Tribunals after World War II. Whilst Churchill and Roosevelt wanted the captured high-ranking Nazis shot without further ado, a small group of individuals argued that barbarism could not be justified by barbarism, and that it would already be a major triumph over barbarism to afford the accused persons the rights they had denied millions of individuals. In other words, the *telos* of the fight against impunity is only meaningful if it is influenced by the *ethos* of fair justice.

44. This ethic of responsibility and duty of exemplarity form the basis of our application and the Defence naturally applies to the guarantors of these principles, the judges of the Court, who, beyond their judicial functions, wear the noble mantle of bringers of justice. The judges are therefore the custodians of the legitimacy of the Court, without which the aspirations of international justice would remain, in the view of the Defence, merely a pious hope.

45. The Defence hereby requests that the Court reaffirm these principles by declaring that the repeated infringement of Laurent Gbagbo's rights throughout the procedure leading to his transfer to the Court was not only in violation of the provisions of the Statute, but also of the principles of fairness which have underpinned international justice from its first faltering steps to its most mature embodiment in Rome in 1998. This will form the subject matter of the second part of this application.

46. However, it is appropriate to begin by examining in the first part the extent to which the ICC may or may not have jurisdiction under articles 12(3) and 19(2) of the Statute over the crimes set out by the Prosecutor in the Document Containing the Charges, since Côte d'Ivoire has not ratified the Rome Statute. Therefore, in the absence of a Security Council resolution, the Court's jurisdiction can only be accepted by a declaration made pursuant to article 12(3) of the Statute, and the significance of this document warrants its further examination with due

regard to the letter and spirit of the Rome Statute and international law. It is vital that any interventions by the Court be imbued with gravitas and adhere to the strict framework of the Statute. For the Court to maintain its full capacity to act, it is essential that it should not overstep the boundaries of its jurisdiction; otherwise its status and mandate will be greatly undermined. Accordingly, it is necessary for the Court to adhere closely to both the letter and the provisions of the Statute as well as the principles of international law so as not to overstep the jurisdiction conferred upon it. In the matter at hand, the Court lacks jurisdiction, as will be demonstrated below.

1. The Court's lack of jurisdiction in light of articles 12(3) and 19(2) of the Statute

47. In the Document Containing the Charges provided to the Defence on 16 May 2012, the Prosecutor argues that although Côte d'Ivoire is not a party to the treaty, on 1 October 2000, its government had "[TRANSLATION] by declaration dated 18 April 2000 [...], accepted the jurisdiction of the Court for crimes committed on Ivorian territory since 19 September 2002. This declaration therefore authorises the Court to exercise its jurisdiction in Côte d'Ivoire in accordance with article 12(3) of the Rome Statute. On 14 December 2010, the Prosecutor, the President and the Registrar of the Court received a letter from Mr Ouattara in his capacity as President of Côte d'Ivoire, confirming the continued validity of the Declaration of 18 April 2003. A second letter to that effect was received on 4 May 2011."

48. First of all, the Defence intends to request that the Chamber examine its jurisdiction in light of the validity of the 2003 declaration made pursuant to article 12(3) (see Annex 16), as well as of Alassane Ouattara's letters of 14 December 2010 and 3 May 2011 (see Annexes 14 and 15).

1.1 The validity and scope of the declaration accepting the Court's jurisdiction

49. A State which is not a Party to the Rome Statute can accept the Court's jurisdiction by way of a declaration made pursuant to article 12(3) of the Rome Statute, which states as follows:

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.

50. This declaration must be lodged with the Registrar of the Court in accordance with rule 44(2) of the Rules of Procedure and Evidence.¹⁴ It requires that the State cooperate with the Court “without any delay or exception”.¹⁵

51. Côte d’Ivoire signed the Rome Statute on 30 November 1998 but is yet to ratify it.

52. On 18 April 2003, Mamadou Bama, Côte d’Ivoire’s Minister of Foreign Affairs lodged a declaration with the Registrar of the Court accepting the Court’s jurisdiction over crimes committed on the territory of Côte d’Ivoire “[TRANSLATION] since the events of 19 September 2002.” The Defence invites the Court to find that the nature of the request made to the Court in this letter relates – according to the provisions of 12(3) – only to a particular crime, in this instance, the coup d’état of 19 September 2002 and its aftermath: the massacres committed by the rebels. Given the political context at that time, it should most assuredly not be construed that the author of the declaration intended it to last indefinitely. The temporal scope cannot logically exceed 18 April 2003 and, in the circumstances, can only extend to the events in 2010.

53. The Defence is also of the view that Alassane Ouattara’s letter of 14 December 2010, aimed at *confirming* the 2003 declaration by Côte d’Ivoire’s Minister of Foreign Affairs, is not a valid declaration within the meaning of article 12(3) of the Rome Statute and should therefore be disregarded by the Court. When Mr Ouattara wrote the letter, he was not in fact the President of Côte d’Ivoire and hence not a representative of the State authorised to make commitments on its behalf. The 2010 declaration does not, as such, constitute a declaration pursuant to article 12(3) of the Statute or a valid confirmation of such a declaration.

54. Finally, Alassane Outtara’s letter of 3 May 2011 inviting the Prosecutor of the Court to investigate the crimes committed in Côte d’Ivoire from 28 November 2010 does not constitute a valid declaration within the meaning of article 12(3) of the Statute. Firstly, it does not fulfil the formal requirements imposed by article 12(3). Secondly, by suggesting to the Prosecutor the direction which the investigation should take, the letter rather corresponds to a referral, which is reserved to State Parties. It does not therefore constitute a declaration pursuant to

¹⁴ Rules of Procedure and Evidence, rule 44(2): “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 and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply”.

¹⁵ Rome Statute, article 12(3): “...The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”

article 12(3) of the Statute. Lastly, the Defence reiterates that at the time Mr Ouattara wrote the letter, he was not legally the President of the Republic of Côte d'Ivoire and was therefore not authorised to commit the State.

55. The Defence will first present arguments relating to the 2003 declaration made by the Ivorian Minister of Foreign Affairs, and subsequently the arguments relating to Alassane Ouattara's letters of 2010 and 2011.

1.2. The 18 April 2003 declaration¹⁶

56. The Defence observes that the 18 April 2003 declaration has not yet been interpreted by the Chamber. Hence, in an earlier decision:

The Chamber concludes that the Court has jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002, on the basis of the Declaration of acceptance of 18 April 2003 and the letters of December 2010 and May 2011. Indeed, since Côte d'Ivoire has confirmed its acceptance of jurisdiction in 2010 and 2011, the Chamber does not need to assess whether the Declaration made in 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011.¹⁷

57. However, the Defence is of the view that in light of the doubts cast on the legality and judicial relevance of the letters of 14 December 2010 and 3 May 2011, the Chamber cannot dispense with such an interpretation.

58. In this respect, the Defence calls upon the Chamber to decide, in light of the Rome Statute and applicable international law, that the purview of the acceptance contained in the declaration is limited to the events and political context of the time.

1.2.1 *Applicable law*

59. The scope of the declaration made on 18 April 2003 is governed by the following articles of the basic texts.

60. Article 12(3) provides that:

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.

¹⁶ Declaration by the Republic of Côte d'Ivoire of 18 April 2003 (Annex 16) accepting the jurisdiction of the International Criminal Court.

¹⁷ Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", ICC-02/11-14-Corr, 15 November 2011, para. 15.

61. Rule 44(2) of the Rules of Procedure and Evidence provides that:

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 and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.

1.2.2 General observations on the interpretation of article 12(3)

62. The Defence would like to highlight a number of points at this juncture.

63. First of all, a declaration made pursuant to article 12(3) is not analogous to a State Party referral made pursuant to article 13 of the Statute. The Court's practice itself confirms this to the extent that, notwithstanding a declaration, the Prosecutor was still compelled to initiate investigations *proprio motu* by virtue of article 15.

64. In this regard, the declaration serves to define the *framework for accepting jurisdiction* under which the Court may exercise its prerogatives and accordingly precedes any issues to be considered in determining the *situation*, within the meaning of the Statute, which in turn determines the context in which the Court may exercise its jurisdiction. This clarification is important because it implies that the situation, as determined by the Court depending on the evidence submitted by the Prosecutor, should not exceed the *framework for accepting jurisdiction* arising out of the declaration made pursuant to article 12(3). This difference results in two different outcomes.

65. Firstly, although the Defence disputes that the declaration of 18 April 2003 could have been intended to address the events for the period up to April 2011, it does not dispute the possibility of the existence of a single situation between 2002 and 2010, as the Court has recognised.¹⁸ These are two different issues which should not be conflated.

66. Secondly, whilst the interpretation of State Party referrals and the situations they cover falls largely within the discretion of the Chambers in the already recognised acceptance of jurisdiction which ensues from the ratification of the Statute by a State, the interpretation of a declaration made under article 12(3) must depend exclusively on the intention of the State

¹⁸ *Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010"* that could fall within the jurisdiction of the Court, 22 February 2012, ICC-02/11-36 [emphasis added].

lodging the declaration, otherwise the Court acts outside the jurisdiction with which it is *unilaterally* vested by virtue of the declaration, and therefore acts *ultra vires*.

67. This need for a strict interpretation, which depends exclusively on Côte d'Ivoire's intention, is reinforced by the fact that a declaration made pursuant to article 12(3) not only accepts the jurisdiction of the Court in a "given situation", but also creates unilateral obligations for Côte d'Ivoire to cooperate with the Court. It therefore has a dual function and the interpretation must satisfy both. In this respect, the declaration constitutes a unilateral declaration under international law.

68. However, for a unilateral declaration to have legal effect, the fundamental ingredient is the State's consent and hence its intention.¹⁹ As the International Court of Justice pointed out, in cases concerning unilateral declarations, "it all depends on the intention of the State in question".²⁰ Unlike a treaty, which merges two or more intentions in order to create legal obligations, it is uniquely the intention of a State which gives rise to obligations in the case of a unilateral declaration, and this intention deserves special attention. The importance of a State's intention is a natural consequence of the consensual aspect of international law and, as affirmed by the International Court of Justice, is the subject of numerous applications by various international institutions. Hereunder is an example of relevance to our case.

In interpreting a unilateral declaration that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it was made.²¹

69. In the circumstances, utmost caution must therefore be exercised in the interpretation of a unilateral declaration so as to afford maximum respect to the State's consent. In this regard, it should be noted that the nature of unilateral declarations is such that rules relating to the interpretation of the Vienna Convention are not directly applicable, and can only be applied where by analogy they are compatible with the unilateral nature of the declaration.²² Yet, the increased significance attached to the intention of a State in the present context justifies the application of different rules from those in the Vienna Convention.

¹⁹ Vienna Convention on the Law of Treaties, 23 May 1969, which entered into force 27 January 1980. Treaty Series, vol. 1155, p. 331 ("Vienna Convention"), Articles 34-35.

²⁰ Frontier Dispute (*Burkina Faso v. Republic of Mali*), judgment of 22 December 1986, ICJ, Reports, p. 573, para. 39.

²¹ *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* (Decision on Jurisdiction), ICSID Case No. ARB/84/3 (14 Apr. 1988), para. 10.

²² Fisheries Jurisdiction (*Spain v. Canada*) (Merits), judgment of 4 December 1998, ICJ, Reports 1998, p. 453, para. 46. See also Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*), preliminary objections, judgement of 11 June 1998, ICJ, Collection 1998, p. 293, para. 30.

70. In this regard, the Defence draws the Pre-Trial Chamber's attention to the "Guiding principles applicable to unilateral declarations of States capable of making legal obligations" adopted in 2006 by the International Law Commission based on the established practice of States. The Defence calls upon the Chamber to consider them in light of article 21(1)(b) of the Statute, which provides that the Court should apply "where appropriate, applicable treaties and *the principles and rules of international law*, including the established principles of the international law of armed conflict".²³ This document therefore echoes the principles which are relevant in the interpretation of the 18 April 2003 declaration. The Defence cites, among others, principles 3 and 7, according to which:

Principle 3: To determine the legal effects of such declarations, it is necessary to take account of their content, **of all the factual circumstances in which they were made**, and of the reactions to which they gave rise;

Principle 7: A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. **In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.** In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, **together with the context and the circumstances in which it was formulated.**²⁴

71. It is clear from these principles that: (a) the intention must be interpreted with full regard to the circumstances existing at the time the declaration was made, and (b) in case of doubt, the most restrictive interpretation should prevail.

72. It is in light of these principles that the Defence will interpret the 18 April 2003 declaration.

1.2.3 Interpretation of the 18 April 2003 declaration

73. The 18 April 2003 declaration was drafted in these terms:

[TRANSLATION]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.

²³ Emphasis added.

²⁴ International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, adopted in 2006. Yearbook of the International Law Commission, vol. II(2), p. 387, [emphasis added].

74. The Defence submits that “unspecified period of time” in the declaration concerns the possibility of the Court having jurisdiction over specific events, and not over all events that occurred during this “unspecified period of time” (1.2.3.1). As such, the Defence argues that the temporal scope of the events covered by the declaration is limited, in principle, to the time period preceding the declaration (1.2.3.2). Should the Chamber reject this argument, the Defence would contend that the declaration should at the very least be read with reference to the political context in which it was made (1.2.3.3).

1.2.3.1 The “unspecified period” of the declaration

75. The Defence argues that the term “for an unspecified period of time” which appears in the 2003 declaration must be interpreted as relating to the duration of the validity of the declaration and not its content, that is, the factual framework of the acceptance of jurisdiction under which it operates. In other words, with respect to the events covered by the declaration, which are limited as the Defence will demonstrate below, the Court is granted jurisdiction to prosecute in relation to these events for an unspecified period.

76. Any other interpretation would in effect make the ICC’s jurisdiction infinite. However, this would be contrary to the spirit of the Rome Statute in that ratification and accession alone would grant the Court jurisdiction over all crimes committed as from ratification for an unspecified period. To construe the 18 April 2003 declaration and the Statute otherwise would put State Parties and non-States Parties on an equal footing, thereby rendering ratification superfluous. The Defence maintains that article 12(3) is not intended to create State Parties.

77. This would in fact be contrary to the spirit of international law regarding unilateral declarations, as the Defence argued previously. Notably, as the Defence has recalled, a declaration should be interpreted restrictively, and to hold that the declaration relates to all events since 19 September 2002 would be contrary to this principle of international law.

1.2.3.2 The temporal scope of the acceptance of jurisdiction

78. There is a general consensus to construe the concept of the “crime in question” expressed in article 12(3) as referring to all crimes in article 5 of the Statute of relevance to the situation covered by the declaration.²⁵ This construction is consistent with the fact that the

²⁵ Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text*, volume 1, Transnational Publishers, New York, 2005, pp. 84-85; See also W. Schabas, *The International criminal court: a commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 289.

expression “of relevance to the situation” is expressly referred to in rule 44 of the Rules of Procedure and Evidence of the International Criminal Court, a rule connected to article 12(3) of the Rome Statute. Furthermore, this expression was used by Pre-Trial Chamber III on 15 November 2011, confirming, in effect, the requirement of a circumscribed declaration and the Court’s position in this regard.²⁶

79. The Defence further submits to the Court that a declaration pursuant to article 12(3) of the Statute must relate to a situation in which crimes have already been committed, and cannot be protracted in a manner that maintains only tenuous links between the relevant events. This construction is supported even by the language of article 12 of the Statute. Hence, article 12(3) refers to article 12(2), which states: “[t]he State on the territory of which the conduct in question occurred”²⁷ and “[t]he State of which the person accused of the crime is a national”.²⁸ Both expressions, particularly the former, are clearly retrospective rather than prospective and a declaration pursuant to article 12(3) should not be interpreted otherwise.

80. Accordingly, the Defence submits that the Court’s jurisprudence regarding the situation is not directly relevant for the interpretation of the framework of the jurisdiction granted to the Court by a declaration under article 12(3). Indeed, the evaluation of a situation which has been referred to the Court pursuant to article 13 of the Statute allows the Court to “trigger” jurisdiction with which it is already vested. In this wise, a liberal interpretation made in this context does not result in the Court overstepping the theoretical framework of its territorial or temporal jurisdiction. Contrarily, with respect to article 12(3), *the Court has no jurisdiction at all* in the absence of a declaration, and this justifies a restrictive interpretation of the declaration.

81. More specifically, the Defence argues that the Chamber’s decision to extend the Democratic Republic of the Congo’s referral to the *Mbarushimana* case in case of a nexus

²⁶ Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, 5 November 2011, ICC-02/11-14-Corr., para 13: “By article 12(3) of the Statute jurisdiction is accepted by a declaration lodged with the Registrar over ‘the crime in question’ and by rule 44(2) of the Rules, a declaration made under that article implies acceptance of all crimes within the jurisdiction of the Court relevant to the situation.”

²⁷ Rome Statute, article 12(2)(a).

²⁸ *Idem*, article 12(2)(b).

between that case and the original situation²⁹ is not applicable in the present case because pursuant to article 12(3), the Court simply has no jurisdiction beyond the original situation.

82. In the circumstances, the Defence argues that it should be presumed that the acceptance of jurisdiction by means of the declaration is effective up to the date of the declaration. This judicious application is consonant with the letter and spirit of the Rome Statute, as well as with the relevant applicable rules of international law.

1.2.3.3 The narrow factual ambit of the acceptance of jurisdiction

83. Should the Chamber not accept *ab initio* the temporal limit in principle of 18 April 2003, the Defence would argue that the declaration cannot be construed as extending beyond the events which could reasonably found it at that time. In the event, the 18 April 2003 declaration was drafted in the wake of the Linas-Marcoussis Peace Agreement.³⁰ At the time of drafting, the declaration could only reasonably contemplate the crimes committed in the context of the crisis which the peace agreement sought to end.

84. Indeed, the Linas-Marcoussis Agreement (see Annex 17) was concluded to end the crisis sparked by what the international commission established under the agreement³¹ itself described as the “[TRANSLATION] attempted coup d’état” mounted by Alassane Ouattara and his inner circle against President Gbagbo. The agreement envisioned power-sharing by the various stakeholders and set forth the conditions for peaceful national reconciliation. The agreement provided a dual mechanism for addressing the crimes committed.

85. Firstly, it provided for the establishment of an international commission “[TRANSLATION] 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.”³² Furthermore, the agreement explicitly envisaged that “[TRANSLATION] the perpetrators of such acts and their accomplices shall be tried before

²⁹ *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber 1, *Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-1, para. 6.

³⁰ The Linas-Marcoussis Agreement was adopted on 24 January 2003. The round-table was chaired by Pierre Mazeaud under the aegis of France.

³¹ Report of the international commission of inquiry into alleged human rights violations in Côte d’Ivoire, 25 May 2004, available at:

http://fr.wikisource.org/wiki/Rapport_de_la_Commission_d%E2%80%99enqu%C3%AAte_internationale_sur_les_all%C3%A9gations_de_violations_des_droits_de_l%E2%80%99homme_en_C%C3%B4te_d%E2%80%99Ivoire_e#Ev.C3.A9nements_des_18_et_19_septembre_2002.

³² Annex 17, Annex VI, para. 2.

international courts”.³³ This particular provision of the agreement accounts for the 18 April 2003 declaration made by the national unity government appointed in March 2003.³⁴ Of note is the fact that, despite the declaration, the Court has never instituted proceedings of any kind.

86. The second mechanism consisted of the promulgation of an amnesty law, also provided for in the peace agreement, but excluding “[TRANSLATION] the perpetrators of grave economic crimes and grave violations of human rights and international humanitarian law.”³⁵ To that end, the national unity government adopted an amnesty law on 8 August 2003 “[TRANSLATION] in the spirit of the peace agreement concluded in the context of the crisis which started on 19 September 2002”.³⁶ Of relevance is that this law, which encompasses acts predating 19 September 2002 and extends to the events of the coup d’état,³⁷ is not prospective in character. The law is also explicit in its exclusion of “[TRANSLATION] offences under articles 5 to 8 of the Rome Statute of the International Criminal Court”.³⁸

87. Accordingly, it is evident that the 18 April 2003 declaration is part of a broader fabric of a negotiated end to the crisis which had started on 19 September 2002. Against that backdrop, the drafters of the declaration cannot conceivably have intended the acceptance of jurisdiction to be prospective. In this regard, the Defence wishes to underscore that it does not dispute the actuality of a political crisis which has continuously held Côte d’Ivoire in its grip, even prior to 19 September 2002 and as far back as the 1999 coup d’état. The Defence will confine itself here to showing that the *intention* of the declaration’s drafters *at the time of drafting* was to encompass a particular and readily identifiable aspect of this crisis which lasted from 19 September 2002 until the signature of the Marcoussis Agreement on 24 January 2003.

88. From the foregoing, it is evident that a strict construction of the Statute does not allow for the extension of the ambit of the jurisdiction accepted by the declaration beyond 18 April 2003, and that an analysis of the political context would imply an end date of 24 January 2003. In any event, it appears established that the declaration does not enfold the period material to the investigation of President Gbagbo, namely between 16 December 2010 and 12 April 2011.

³³ *Idem*, Annex VI, para. 3.

³⁴ Decree of 13 March 2003 appointing the government (Annex 18).

³⁵ Annex 17, Annex VII, para. 5

³⁶ Amnesty Law No. 2003-309 of 8 August 2003, article 1(Annex 19).

³⁷ *Idem*, article 3.

³⁸ *Idem*, article 4(d).

89. Thus, Alassane Ouattara's letters of 14 December 2010 and 3 May 2011 do not affect this conclusion.

1.3 The validity and scope of Alassane Ouattara's letters of 14 December 2010 and 3 May 2011³⁹

1.3.1 *The letter of 14 December 2010*

90. The 14 December 2010 letter was written by Alassane Ouattara after the October/November 2010 presidential elections in Côte d'Ivoire. By this letter he sought to confirm the 2003 declaration:

[TRANSLATION] Accordingly, in my capacity as the new President of the Republic of Côte d'Ivoire and pursuant to article 12(3) of the Rome Statute which reads:

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;

I have the honour of confirming the declaration of 18 April 2003.

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

91. First and foremost, the Defence respectfully submits to the bench that this letter is not a "declaration" within the meaning of article 12(3). In fact, it was simply intended as confirmation of the 2003 declaration. Furthermore, the bench itself so adjudged by referring merely to the "letter" that confirmed the 2003 declaration, rather than a "declaration" proper.⁴⁰ Thus, the letter cannot be considered to have any legal effect whatsoever, particularly for the purposes of determining or extending the ambit of the jurisdiction accepted by the 2003 declaration.

92. Nonetheless, were the bench to find that the 2010 December letter does indeed constitute a declaration, the Defence submits that it is void for failure to comply with the requirements of article 12(3).

93. Article 12(3) is clear: only a "State" can make a declaration accepting the jurisdiction of the Court. For such a declaration to have any legal effect, it must be made by an organ or

³⁹ See Annexes 14 and 15.

⁴⁰ Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", 15 November 2011, ICC-02/11-14-Corr, para. 15.

person competent to bind the State. In this respect, there is no doubt that a Head of State is endowed with such capacity.⁴¹

94. The Defence argues, however that Alassane Ouattara could not be considered the legitimate Head of State of Côte d'Ivoire at the time of writing the said letter. The Defence submits that, if the authority of a State representative to bind the State internationally and hence vis-à-vis the Rome Statute is in dispute, the utmost attention must be paid to the legality of the act under domestic law, particularly the Constitution. An international organ such as the Court cannot vest with legal effect within the meaning of its Statute an act emanating from a person who is not *de facto* and *de jure* empowered to bind the State. The legitimacy of a government and its representatives is premised on the source of its power and grounded in the national Constitution, which lays down the rules governing such power.⁴² The importance of the constitutionality of accession to power is an enduring feature of international law. Indeed, the internal legality of a government speaks to its democratic effectiveness and is a touchstone of its legitimacy.⁴³ Furthermore, under the law of treaties, the Vienna Convention postulates that a manifest violation of a provision of a State's internal law may invalidate that State's consent.⁴⁴

95. Constitutionality is all the more important on the African continent, which has endured close to two hundred (attempted and successful) coups d'état since the Second World War⁴⁵ and is striving to institute a culture of rule of law. In this respect, attention must be drawn to the African Union's adoption of the 2007 *African Charter on Democracy, elections and governance*, whose signatories consider themselves "[c]oncerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent

⁴¹ International Law Commission, "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations", adopted in 2006, Yearbook of the International Law Commission, 2006, vol. II(2), p. 387, 4th principle: " ... By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations"; Vienna Convention on the Law of Treaties, 1969, United Nations Treaty Series, vol. 1155, p. 331, art 7(2)(a); ICJ, *Armed Activities on the Territory of the Congo*, (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), jurisdiction and admissibility, judgment of 3 February 2006, ICJ, Reports 2006, p. 27, para. 46, "it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments."

⁴² Jean D'Aspremont, "Legitimacy of Governments in the Age of Democracy" (2006) 38 N.Y.U. J. Int'l L. & Pol. 877 to page 905.

⁴³ See L.T. Galloway, *Recognizing Foreign Governments: The Practice of the United States* (1978), 137-138.

⁴⁴ Vienna Convention, article 46.

⁴⁵ Department for international development, *Conflict trends in Africa, 1946-2004*, Annex 2b "Coups d'Etat in Africa, 1946-2004: successful (1), attempted (2), plotted and and alleged (4)", p. 53, available at <http://www.systemicpeace.org/Conflict%20Trends%20in%20Africa.pdf>.

conflict in Africa”.⁴⁶ The Charter acknowledges this concern by prescribing robust measures in the event of an “unconstitutional change of government” which may even entail criminal prosecution of its perpetrators,⁴⁷ including before the regional African courts whose competence may be expanded to grave crimes, thereby ranking unconstitutionally-formed governments alongside genocide, war crimes and crimes against humanity.⁴⁸

96. The Defence must underscore that it has deliberately discounted the UN Security Council members’ endorsement of Alassane Ouattara on 8 December 2010.⁴⁹ The questions raised by the Security Council and certain States in the international community about the initial results of the Ivorian presidential elections as announced by the Constitutional Council do not mean that the provisions of Ivorian constitutional law applicable to the appointment and accession of the Head of State can be disregarded. The international community cannot arrogate to itself the right to intervene in a State’s internal affairs by selecting the Head of State most suited for its purposes. The endorsement by the UN is in any event at odds with its past practice of frequent reliance on constitutionality to recognise governments.⁵⁰ UN practice with regard to Côte d’Ivoire is therefore in no way conclusive of a general practice of recognising unconstitutional governments.

97. It is important to recall that the recognition of a government by certain countries or representatives of the international community does not objectively establish the legal status of the government or its representatives. Such recognition merely represents the opinion of a State or organisation.⁵¹

98. Accordingly, the Defence simply moves the Chamber to find that at the time of writing the 14 December 2010 letter, Alassane Ouattara was not *de facto* and *de jure* President of the country within the meaning of the Ivorian constitution.

99. Article 94(3) of the Ivorian Constitution casts the Constitutional Council as guarantor

⁴⁶ African Charter on Democracy, elections and governance, 30 January 2007, (“African Charter on Democracy, elections and governance”), Preamble, available at:

<http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf>.

⁴⁷ *Idem*, article 25.

⁴⁸ Open Society Initiative for Southern Africa, Don Deya, “Is the African court worth the wait?”, 6 March 2012, available at <http://www.osisa.org/openspace/regional/african-court-worth-wait>.

⁴⁹ UN news story, “Côte d’Ivoire. Le Conseil de sécurité reconnaît la victoire d’Alassane Ouattara”, 9 December 2010, available at:

<http://www.un.org/apps/newsFr/storyF.asp?NewsID=23913&Cr=ivoire&Cr1=:>

“[TRANSLATION] Meeting on Wednesday evening at the seat of the United Nations in New York, the member States of the Security Council called on ‘stakeholders to respect the outcome of the election’, namely Alassane Ouattara’s second-round victory in Côte d’Ivoire’s presidential elections...”

⁵⁰ For the examples of Haiti and Sierra Leone, see Jean D’Aspremont, “Legitimacy of Governments in the Age of Democracy” (2006) 38 N.Y.U. J. Int’l L. & Pol. 877, p. 905.

⁵¹ Stefan Talmon, *Recognition of governments in international law: with particular reference to governments in exile*, Oxford, Oxford University Press, 2001, p. 30.

of the announcement of the newly-elected President.⁵² On 3 December 2010, the Ivorian Constitutional Council proclaimed Laurent Gbagbo President.⁵³ In an opinion issued on 22 December 2010,⁵⁴ the Constitutional Council further affirmed the oath of office sworn by Alassane Ouattara as “[TRANSLATION] null and void”. From the foregoing, it is clear that the Constitutional Council recognised Laurent Gbagbo as the official President on two occasions. Alassane Ouattara, who, besides, did not hold any office in the Gbagbo government, was therefore not a representative of Côte d’Ivoire when he wrote his 14 December 2010 letter and had no valid basis on which to bind the State under article 12(3) of the Rome Statute.

100. Furthermore, Alassane Ouattara cannot draw on the 4 May 2011 decision of the Constitutional Council, which proclaimed him winner of the Presidential elections.⁵⁵ The decision itself runs counter to the Constitution. In the space of five months, the Ivorian Constitutional Council, identically constituted, “[TRANSLATION] in turn proclaimed both candidates President of Côte d’Ivoire in the presidential run-off election held on 28 November 2010”.⁵⁶ These two decisions are “[TRANSLATION] irreconcilable”⁵⁷ and the Defence contends that the 4 May 2011 opinion in fact amounts to a surreptitious appeal of the 3 December 2011 opinion, given that the 4 May 2011 opinion is antithetical to the previous position of the Constitutional Council.⁵⁸ Nonetheless, article 98 of the Ivorian Constitution is unequivocal: decisions of the Constitutional Council are not amenable to any form of appeal or review and are binding on all, including said Council.⁵⁹ There is no doubt that the very legality of the 4 May 2011 opinion is eminently contestable, as is Mr Ouattara’s status as Head of State at that time and hence as lawful representative of the State of Côte d’Ivoire with the capacity to bind the “State” within the meaning of the Rome Statute.

1.3.2 *The 3 May 2011 letter*

101. The Defence invites the Court purely and simply to disregard the 3 May 2011 letter inasmuch as that document is wholly void. Firstly, Mr Ouattara’s lack of official capacity on 3

⁵² Constitution of Côte d’Ivoire of 1 August 2000, article 94(3): “[TRANSLATION] The Constitutional Council shall announce the final results of presidential election results”, (Annex 20).

⁵³ Annex 1.

⁵⁴ Opinion No. CI-2010-A-035/22-12/CC/SG of 22 December 2010 concerning the inauguration of Alassane Ouattara and the ensuing acts (Annex 21).

⁵⁵ See Opinion No. CI-2011-EP-036/04-05/CC/SG of 4 May 2011 proclaiming Mr Alassane Ouattara President of the Republic of Côte d’Ivoire (Annex 22).

⁵⁶ Guy-Fleury Ntwari, “*Note sur la décision du Conseil constitutionnel ivoirien N°CI-2011-036 du 4 mai 2011*”, to be published in RQDI at <http://www.sqdi.org/volumesrqdi/aparaitre.html>.

⁵⁷ *Idem*.

⁵⁸ Annexes 1 and 20.

⁵⁹ Annex 20, article 98: “[TRANSLATION] The decisions of the Constitutional Council are not amenable to any form of appeal or review. They shall be binding on all administrative, judicial and military authorities and all natural and legal persons”.

May 2011, as previously demonstrated by the Defence, *ab initio* precludes this letter from having any legal effect.

102. Above and beyond that consideration, it must be noted that the letter appears never to have been intended to have legal effect, insofar as it does not correspond to any procedural measure recognised by the Statute.

1.3.3 *The 3 May 2011 letter is not a “declaration” under article 12(3)*

103. The Defence submits that the 3 May 2011 letter was clearly not intended to constitute a “declaration” under article 12(3). Firstly, the letter does not meet the formal requirements of article 12(3), namely the lodging of a declaration with the Registry of the International Criminal Court.⁶⁰ Furthermore, the terms of the letter denote instead that it serves as a reminder of the existence of the 2010 “confirmation” letter⁶¹ and an indication to the Prosecutor of the direction his investigation should take.⁶²

104. The Defence wishes to emphasise to the bench that on 15 November 2011, Pre-Trial Chamber III itself implicitly acknowledged that the 3 May 2011 letter did not signify Côte d’Ivoire’s acceptance of the Court’s jurisdiction. Although the Chamber explicitly characterised the 2010 letter as express confirmation of the 2003 declaration, it merely detailed the content of the May 2011 letter without, however, educing the ineluctable conclusion, namely that the May 2011 letter does not constitute a declaration of acceptance of the Court’s jurisdiction pursuant to article 12(3):

On 14 December 2010, the President, the Prosecutor and the Registrar of the Court received a letter from Alassane Ouattara, in his capacity as newly elected President of Côte d’Ivoire, confirming the continuing validity of the Declaration of 18 April 2003 and committing his country to full cooperation with the Court, without delay, in particular with respect to crimes and abuses committed since March 2004.

In a subsequent letter addressed to the Prosecutor on 3 May 2011, President Ouattara referred to the serious crisis that had followed the presidential elections of 31 October 2010 and 28 November 2010 “during which it is unfortunately reasonable to believe that crimes falling under the jurisdiction of the International Criminal Court have been committed”. In light of the gravity of the crimes, he requested the assistance of the Court in order to ensure that the perpetrators would not go unpunished.⁶³

⁶⁰ Rome Statute, article 12(3): “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** [...]”.

⁶¹ Annex 15: “[TRANSLATION] ... Following my election to the Presidency of the Republic of Côte d’Ivoire on 2 December 2010, one of my first decisions was to **confirm**, by letter of 14 December 2010, Côte d’Ivoire’s acceptance of the jurisdiction of the International Criminal Court”.

⁶² *Idem*: “[TRANSLATION] ... I hereby confirm that I wish your Office to undertake independent and impartial investigations in Côte d’Ivoire into the most serious crimes committed since 28 November 2010 throughout Ivorian territory and to ensure that those persons bearing the greatest criminal responsibility for these crimes are identified, prosecuted and brought before the International Criminal Court”.

⁶³ *Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”, ICC-02/11-14-Corr, 15 November 2011, paras. 11 and 12.*

1.3.4 A “referral by stealth”?

105. Ultimately, the Defence questions Alassane Ouattara’s true intentions in writing the 3 May 2011 letter. Manifestly, the sole objective of this letter is to request the Prosecutor to investigate those crimes which were committed on the territory of Côte d’Ivoire during a specific period,⁶⁴ akin to a State Party’s referral of its own situation to the Prosecutor pursuant to article 13(a). The decision to send this further letter directly to the Prosecutor hints at a desire to proceed in a manner akin to the referral of a situation to the Court.⁶⁵ The content of the above letter and the course of action lend support to the Defence view. Yet, it must be recalled that the referral of a situation to the Prosecutor is the preserve of States Parties to the Statute, as laid down by article 14(1).⁶⁶ Article 12(3) is not intended to extend this privilege to non-States Parties. Instead, it is a means of ensuring that the Court is able to exercise its jurisdiction, essentially in the event of proceedings instituted by the Prosecutor under article 15, which, in any case would have been the intention of the drafters of the Statute.⁶⁷ It must not be overlooked that article 12(3) is a pre-requisite to the exercise of jurisdiction and not a means of exercising jurisdiction. Thus, a State which has not accepted the automatic jurisdiction of the Court, either by ratifying or acceding to the Statute, is barred from such privilege.

106. In this sense, Alassane Ouattara circumvented the requirements of article 12(3), which simply serve to lay down the preconditions to the Court’s exercise of jurisdiction, by effectively attempting, through the 3 May 2011 letter, to “refer” a situation to the Prosecutor, whereas the Prosecutor had yet to seek the Pre-Trial Chamber’s authorisation to initiate an investigation and the proceedings had yet to be triggered.⁶⁸

107. This letter ultimately shows the desire of the Ivorian authorities to “use” the Court for internal political ends, as if the ICC exists to serve a political clique. This particular perception of the role of the Court is illustrated by one of Alassane Ouattara’s recent statements:

⁶⁴ Annex 15: “[TRANSLATION] I hereby confirm that I wish your Office to undertake independent and impartial investigations in Côte d’Ivoire into the most serious crimes committed since 28 November 2010 on Ivorian territory [...]”.

⁶⁵ Rule 45 of the Rules of Procedure and Evidence provides: “A referral of a situation to the **Prosecutor** shall be in writing”; Rome Statute, article 13(a): “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the **Prosecutor** by a State Party in accordance with article 14”.

⁶⁶ Article 14(1) of the Rome Statute provides: “A **State Party** may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”

⁶⁷ C. Stahn, “Why some Doors may be Closed Already: Second Thoughts on a ‘Case-by-case’ Treatment of Article 12(3) Declarations” (2006) 75:2 Nordic Journal of International Law 243, page 245.

⁶⁸ “Request for authorisation of an investigation pursuant to article 15”, 23 June 2011, ICC-02/11-01/11-3.

[TRANSLATION] If you will, let's talk about the others now, Simone Gbagbo and Blé Goudé. You will be aware that warrants have been issued for their arrest. Matters are in hand; perhaps it's up to them. We will assume our responsibilities as the government. My preference is to try them here, but they will perhaps want to go to The Hague, on the grounds that justice is fairer in The Hague. If their wish is to go to The Hague, what can I do to stop them? That's just to say that I feel completely at ease when it comes to these matters. I want to protect Ivorians, even "those who don't deserve it."⁶⁹

108. These comments betray Mr Ouattara's perception of the Court: a mere instrument to turn to when the fancy takes him. The Court should not countenance such liberties, which culminated in treatment violative of President Gbagbo's human dignity during his arrest, detention and transfer to the Court, in the face of the indifference of both the international community and the organs of the Court and in violation of international law, Ivorian law and the Rome Statute, of which this bench the guarantor.

1. Challenges to jurisdiction founded on the breach of Laurent Gbagbo's rights during his arrest and surrender to the International Criminal Court

109. The Defence maintains that Laurent Gbagbo's rights have been continuously and systematically breached since his arrest on 11 April 2011 until his arrival in the Netherlands on 30 November 2011. He was subjected to unlawful arrest and eight months of arbitrary detention. Further still, the expert physician described his conditions of detention as characteristic of inhuman or degrading treatment or even torture. The deterioration in his health during the months of captivity was rapid and acute. Such offences against human dignity constitute the most egregious breach of the rights of the defence and fundamental human rights in particular, and are proscribed by both Ivorian and international law.

110. Yet, the Statute of the Court casts the bench as guarantor of the respect for these rights. Firstly, article 55 of the Statute affords very specific safeguards during investigation, as regards arrest, arbitrary detention, torture and inhuman and degrading treatment. Furthermore, the surrender of a person to the Court under article 59 is governed by a procedure prescribing respect for the person's rights. These two articles illustrate the role of the Court in ensuring fair trial conditions, with the bench as linch-pin.

111. The systematic breach of such rights, which are enshrined in articles 55 and 59, go to the heart of a fair trial, absent which justice cannot lawfully be rendered. In accordance with this principle, which is consistently upheld by the jurisprudence of the Court, the Defence

⁶⁹ L'intelligent d'Abidjan, "Interview exclusive accordée à la RTI et à Fraternité-Matin/Alassane Ouattara 'pour la réconciliation nationale je suis prêt à aller le plus loin possible', 2 April 2012 (Annex 24).

therefore invites the bench to find that the Court lacks jurisdiction in light of the facts advanced.

1.1 Infringement of article 55

112. Article 55 of the Statute protects the rights of persons in respect of an investigation. In this regard, the provision reads:

In respect of an investigation under this Statute, a person: [...]

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; [...]

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.”⁷⁰

113. The facts set out above constitute beyond doubt a violation of the various safeguards afforded by this article.

2.1.1 Arbitrary arrest and detention

114. Laurent Gbagbo was arrested on 11 April 2011 in Abidjan by Alassane Ouattara’s forces. On 13 April, he was transferred to Korhogo, a small town in the north of the country, in a region under the control of commander Fofié, one of Alassane Ouattara’s inner circle, and was not informed of any charge to warrant his detention or transfer.

115. The arbitrariness of Laurent Gbagbo’s arrest is undoubted, both under Ivorian and international law.

2.1.2 Access to counsel

116. Before setting out the breaches of Laurent Gbagbo’s rights as regards arbitrary detention and inhuman and degrading treatment, the Defence wishes to first draw the attention of the bench to the fact that the breaches took place in the context of a grave and persistent violation of a fundamental right of the defence.

2.1.2.1 Ivorian law

117. Article 22 of the Constitution of Côte d’Ivoire of 23 July 2000 provides:

⁷⁰ Rome Statute, article 55(1).

[TRANSLATION] No one shall be arbitrarily detained. All persons charged are presumed innocent until proved guilty in accordance with a procedure offering them the guarantees necessary for their defence.

118. Furthermore, Ivorian law makes provision for the intervention of counsel as of the investigative stage. Article 76(1) of the Ivorian Code of Criminal Procedure (Law No. 98-747 of 23 December 1998) reads:

[TRANSLATION] Any person against whom there is serious and consistent evidence of participation in the commission of an offence, or who has been the victim of an offence, or who is called upon to assist in establishing the truth, may be assisted by counsel during the investigations. [...] Prosecutors or officials responsible for initiating proceedings and bringing prosecutions must afford the person notice of this right. Such notice and, where appropriate, the name of counsel [...] shall be noted in the record.

119. Article 76(2) of the Ivorian Code of Criminal Procedure (Law No. 98-747 of 23 December 1998) mandates:

[TRANSLATION] Where the person referred to in article 76(1) hereabove appears in the presence of his or her counsel, the person may be heard only in the presence of such counsel. Where the person appears and expresses a wish to be assisted by counsel, the Judicial Police Officer shall prescribe a time-limit, affording consideration to the requirements of the investigation, particularly as regards police custody. Where a person who is not released or is held in police custody expresses the wish to be assisted by counsel, the Judicial Police Officer shall immediately notify counsel or authorise the person concerned to do so by any means. A note thereof shall be entered into the record.

120. Article 76(3) of the Ivorian Code of Criminal Procedure (Law No. 98-747 of 23 December 1998) prescribes:

[TRANSLATION] Where persons are assisted by counsel, the Judicial Police Officer shall afford counsel notice of the measures taken pursuant to articles 63 and 76(1) of the present Code.

121. Article 76(4) of the Ivorian Code of Criminal Procedure (Law No. 98-747 of 23 December 1998) provides:

[TRANSLATION] The assistance of counsel consists of counsel's physical presence beside the client, the raising of any irregularity which counsel considers may prejudice the rights of the client and ensuring its entry into the record. Where counsel makes observations, he or she shall sign the record.

122. Finally, article 76(5) of the Ivorian Code of Criminal Procedure (Law No. 98-747 of 23 December 1998) reads:

[TRANSLATION] Breach of the formal requirements prescribed by articles 76(1) paragraph 2, 76(3) and 76(4) paragraph 2 is sanctioned by nullity. Nullity of the act also ensues where the irregularity or omission is found to have had the effect of vitiating or fundamentally altering the determination of the truth. However, the parties may waive the assistance of counsel where it is not in their interest.

123. As regards persons charged, article 676 of the Ivorian Code of Criminal Procedure further provides:

[TRANSLATION] Persons charged, persons in custody awaiting trial and accused persons shall be afforded every possibility to consult counsel and every facility for the purposes of their defence, subject to the requirements of prison discipline and security.

2.1.2.2 International law

124. In resolution 43/173 adopted on 9 December 1988 to harmonise interpretations concerning the rights of arrested, detained and imprisoned persons, the United Nations General Assembly principles state:

Principle 11: A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

Principle 17: 1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it. 2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18: 1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel. 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

125. Article 7(1)(c) of the African Charter on Human and Peoples' Rights provides:

[Everyone has] the right to defence, including the right to be defended by counsel of his choice.

126. Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms provides:

3. Everyone charged with a criminal offence has the following minimum rights: [...] (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

127. Finally, the Defence underscores that this right is also recognised under the Rome Statute, both at the investigation and trial stage. Thus, article 55 of the Rome on the rights of a person during an investigation provides:

Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: [...] (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.

128. Similarly, article 67 of the Rome Statute mandates that the accused is entitled:

To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.

2.1.2.3 The breach of the right of access to counsel in the case at bar

129. Despite their repeated requests, President Laurent Gbagbo was able to meet with his counsel on just six occasions after 11 April 2011. The President's counsel requested the right to visit their client on several occasions in accordance with the hierarchical order specified by the Ivorian judicial and political authorities (see Annexes 25 to 36).⁷¹

130. They were only able to meet their client on rare occasions. Counsel were able to meet their client on 26 May 2011, 16 July 2011, 29 August 2011 and 16 October 2011.

131. Yet, under Ivorian and international law, counsel need not seek any particular authorisation to meet with their client.

132. Mindful, however, of the complexity and sensitivity of the case, they diplomatically acquiesced to submitting the requests for authorisation required of them, but were continuously thwarted by the unavailability of interlocutors or referrals to other interlocutors, as the various pieces of correspondence with the services concerned attest (see Annexes 27, 28 and 37).⁷²

133. When the perseverance and endeavours of counsel secured a permit on 14 September 2011 (visiting permit [*permis de communiquer*] from the Sixth Office of the Investigating

⁷¹Letter from Mr Baroan to the President of the Republic c/o the Minister of Justice, 3 August 2011 (Annex 25); letter from Mr Altit to the Public Prosecutor of the *Tribunal de première instance* of Abidjan, 15 June 2011 (Annex 26); letter from Mr Altit to the Minister of Justice, 17 June 2011 (Annex 27); letter from Mr Altit to the Minister of Justice, 14 July 2011 (Annex 28); e-mail from Mr Altit to the Head of Cabinet of the Ministry of Justice, 15 July 2011 (Annex 29); e-mail from Mr Altit to the Minister of Justice, 29 July 2011 (Annex 30); copy of the letter of 15 June 2011 from Mr Altit to the Public Prosecutor with an acknowledgment of receipt from UNOCI dated 17 June 2011 (Annex 31); e-mail from Mr Altit to the head of UNOCI's Human Rights Division, 19 June 2011 (Annex 32); e-mail from Mr Altit to the head of UNOCI's Human Rights Division, 4 July 2011 (Annex 33); e-mail from Mr Altit to the Head of UNOCI's Rule of Law Division, 19 June 2011 (see Annex 34); e-mail from Mr Altit to the Head of UNOCI's Rule of Law Division, 4 July 2011 (Annex 35); e-mail from Mr Altit to the Head of UNOCI's Political Affairs Division, 24 June 2011 (Annex 36).

⁷² Annexes 27 and 28. E-mail to Mr Altit from the Head of the Protection and Documentation Unit (PDU), UNOCI Human Rights Division, 5 July 2011 (Annex 37).

Judge [*sixième cabinet d'instruction*] of the *Tribunal de Première Instance* of Abidjan) (see Annex 39),⁷³ that document was issued for the following day, preventing counsel from travelling to Korhogo on time since the journey takes around ten hours' drive from Abidjan and can only be made by day for security reasons. The authorities thus "toyed" with counsel in blatant contempt for President Gbagbo's rights (see Annex 40). This example is telling insofar as, against all odds, some counsel for the President were in Korhogo on 15 September, taking by surprise the authorities who finally blocked their visit outright despite counsel being in possession of the vaunted "visiting permit".

134. Finally, through their endeavours and representations to the political and judicial authorities, counsel obtained a document entitled "Access of counsel to their client" [*communication des conseils*] dated 30 September 2011, authorising them to visit their client no more than twice a month (see Annexes 41 to 43).⁷⁴

135. Hence, despite all their patience and having to submit to the unlawful procedure of seeking authorisation to meet with their client, counsel were prevented by the Ivorian authorities from discharging their duties.

136. Faced with this untenable situation, on 26 October 2011, counsel turned to the Chair of the National Human Rights Commission of Côte d'Ivoire (CNDHI), as they had on 8 August 2011, for the CNDHI to examine the matter of the breaches of President Laurent Gbagbo's rights (see Annex 44).

137. As the European Court of Human Rights has held, it must be noted that to deny access to counsel for a prolonged period "[wherein] the rights of the defence might [...] be irretrievably prejudiced is detrimental to the rights of the defence to which the accused is entitled by virtue of Article 6".⁷⁵

⁷³ Visiting permit of 14 September 2011 granted for 15 September 2011 (Annex 39).

⁷⁴ "Access of counsel to their client" issued by the Investigating Judge of the Sixth Office of the Investigating Judge of the *Tribunal d'Abidjan* on 30 September 2011 (Annex 41); letter from counsel for President Gbagbo to the designated President of the Sixth Office of the Investigating Judge, 21 September 2011 (Annex 42); letter from counsel for President Gbagbo to the designated President of the sixth office of the Investigating Judge of the *Tribunal de première instance* of Abidjan, 28 September 2011 (Annex 43).

⁷⁵ European Court of Human Rights ("ECHR"), Grand Chamber, Judgment, *Öcalan v. Turkey*, Application No. 46221/99, 12 May 2005, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ocalan%20%7C%20tukey&sessionid=98797462&skin=hudoc-en>, para. 131.

138. The panoply of obstacles which the Ivorian Authorities put in the path of President Gbagbo's counsel betrays their desire to violate President Gbagbo's rights and their contempt for legal and constitutional provisions.

139. Already deprived of the most basic rights, President Gbagbo was further subjected to inhuman and degrading treatment and torture.

2.1.3 *Arbitrary arrest under Ivorian law*

2.1.3.1 Unlawfulness ensuing from the status as President

140. On 11 April 2011, Laurent Gbagbo was the constitutionally-recognised and therefore legitimate President of the Republic of Côte d'Ivoire. Indeed, in its 3 December 2010 decision, the Constitutional Council announced the final results of the 28 November election, recognising Laurent Gbagbo's victory (see Annex 1). He took the oath of office on 4 December 2010 (see Annex 2). Only on 5 May 2011 did the Constitutional Council revisit the Ivorian election results, recognising Mr Ouattara as the President-elect (see Annex 22), who was sworn into office the following day (see Annex 45).⁷⁶ It is therefore clearly established that under Ivorian law, Laurent Gbagbo was the sitting President of the Republic of Côte d'Ivoire at the time of his arrest.

141. In this respect, Ivorian law invests the sitting President with a particular status, both as regards the sphere of his criminal responsibility and the modalities of his indictment and arrest.

142. Thus, under article 109 of the Ivorian Constitution:

[TRANSLATION] The President of the Republic shall only bear responsibility for acts performed in the exercise of his functions and shall only be brought before the High Court of Justice [*Haute Cour de Justice*] in the event of high treason.

143. Article 111 of the Ivorian Constitution states:

[TRANSLATION] The indictment of the President of the Republic shall be subject to a secret ballot of the National Assembly and shall require a two-thirds majority.

144. The Organic Law on the Composition, Functioning and Procedure of the High Court of Justice No. 2002-05 of 3 January 2002 ("the organic law") prescribes the conditions for the prosecution and arrest of the President of the Republic.

⁷⁶ Report of the Constitutional Council of 6 May 2011 on the inauguration of the President of the Republic (Annex 45).

145. The High Court of Justice alone is invested with the competence to try the President of the Republic for acts characterised as high treason, particularly in the event of violation of the obligations laid down by articles 34 and 39 of the Constitution (article 5 of the organic law).

146. Article 21 of the organic law reads:

[TRANSLATION] The resolution of indictment before the High Court voted by the National Assembly in accordance with the conditions set forth in article 111 of the Constitution shall contain the identity and full filiation of the accused, a summary statement of the charges against them and attestation of the legal provisions in pursuance whereof the indictment is brought.

147. As regards the President of the Republic, the indictment resolution must also contain an exhaustive description of those facts constituting grave acts or omissions antithetical to the duties of the office of President.

148. In any event, final adjudication of such acts or omissions lies with the High Court trial bench.

149. Article 23 of the organic law further states:

[TRANSLATION] Any indictment resolution shall be promptly transmitted by the Speaker of the National Assembly to the Principal Public Prosecutor [*Procureur Général*] of the Court of Cassation who shall acknowledge its receipt. Denial of an application to indict shall be by way of resolution of the National Assembly. The resolution shall be public.

150. The facts make clear that none of the procedures for the indictment of a sitting President were followed. Hence, the arrest of Laurent Gbagbo on 11 April was arbitrary within the meaning of the applicable Ivorian law.

2.1.3.2 Unlawfulness of the arrest ensuing from the status of former President

151. Were Laurent Gbagbo's status as sitting President to be contested, he would nonetheless still enjoy the status of former President, which further mandates a special procedure as regards arrest. Thus, article 1 of the Law on the Status of Former President of the Republic reads:

[TRANSLATION] The former President of the Republic shall not enjoy immunity from jurisdiction following expiry of his term of office. However, prosecution or arrest of the former President of the Republic shall be subject to a special procedure.

152. Article 2 of the Law on the Status of Former President of the Republic states:

[TRANSLATION] A former President of the Republic shall only be prosecuted or arrested for commission of serious or ordinary offences upon authorisation of the National Assembly.

153. Article 3 of the Law on the Status of Former President of the Republic further provides:

[TRANSLATION] Where a former President of the Republic is amenable to prosecution or arrest in respect of serious or ordinary offences, the Principal Public Prosecutor of the Court of Cassation, apprised of the facts by any means, shall seize the Bureau of the National Assembly by means of written application.

154. The Principal Public Prosecutor never seized the Bureau of the General Assembly, as the law prescribes. It follows that were Laurent Gbagbo's status of sitting President to be contested despite its recognition by the Constitutional Council, his arrest would nonetheless be arbitrary under the regime applicable to his undeniable status of former President.

155. Furthermore, were Laurent Gbagbo only to be considered as former President, he would additionally benefit from the legal regime applicable to him as a member of the Constitutional Council. Under article 89 of the Constitution:

[TRANSLATION] The Constitutional Council shall be composed of: a Chair; former Presidents of the Republic, save for their express waiver.

156. At no time did Laurent Gbagbo expressly waive his membership of the Constitutional Council. Hence, as a member of the Constitutional Council, he may only be arrested upon its authorisation. Article 93 of the Constitution provides:

[TRANSLATION] Members of the Constitutional Council may, for the term of their membership, only be prosecuted, arrested, detained or tried for serious offences upon authorisation of the Council.

157. This analysis is further confirmed by the conduct of the Ivorian authorities. In fact, they sought the authorisation of the Constitutional Council to prosecute on two occasions. An initial request in May 2011, submitted after President Gbagbo had been questioned, was withdrawn in July 2011 before the Constitutional Council could rule. Moreover, on 25 August 2011, that is, one week *after* the President was charged on 18 August 2011, a further request for authorisation to prosecute was filed with the Chair of the Constitutional Council; it too was withdrawn (See Annex 46).⁷⁷

158. Thus, from the legal provisions and the conduct of the Ivorian authorities, it appears that the lawful procedures were not respected, thereby rendering the arrest of President Gbagbo arbitrary under the applicable Ivorian law.

⁷⁷ Letter from the Constitutional Council to Mr Dako, 19 October 2011 (Annex 46).

2.1.3.3 Unlawfulness of the arrest ensuing from the agents of the arrest

159. Finally, besides non-compliance with all of the procedures governing the arrest of a sitting or former President, further consideration must be afforded to the function of those persons who effected the arrest. The armed men who arrested Laurent Gbagbo could not wield any official public authority empowering them to proceed as they did. The arrest was made by Alassane Ouattara's forces, who, at the time, were not vested with police authority. What is more, they were supported by UNOCI and French troops.⁷⁸ As such, his putative "arrest" may be akin to abduction within the meaning of Ivorian law.⁷⁹

2.1.4 Arbitrary detention under Ivorian law

160. Following his arbitrary arrest, Laurent Gbagbo was transferred to Korhogo, without being informed of the reasons for his arrest and continued detention.

161. In vain, counsel for Laurent Gbagbo repeatedly requested from various Ivorian authorities a copy of the order placing him under house arrest. On 17 May 2011, they wrote to the Secretary-General of the Government (see Annex 47);⁸⁰ on 3 August 2011 they wrote to the Minister of Justice (see Annex 48)⁸¹ and to Alassane Ouattara (see Annex 25), with whom they pursued the matter on 9 August 2011 (see Annex 49).⁸²

162. Only in August 2011 was Laurent Gbagbo charged with the commission of economic crimes.⁸³ Once again, he was not formally notified of any charge.

163. The facts establish with certainty the arbitrariness of Laurent Gbagbo's detention, under both Ivorian and international law.

⁷⁸ Amnesty International report, "Six months of post-electoral violence in Côte d'Ivoire", CIV-OTP-0002-0647, p. 12 (CIV-OTP-0002-0657).

⁷⁹ Article 373 of the Ivorian Criminal Code, 31 August 1981, available at: http://www.childsrights.org/html/site_en/law_download.php?id=116,

⁸⁰ Letter from Mr Zahui Toussaint Dako to the Secretary-General of the government of 17 May 2011 (see Annex 47).

⁸¹ Letter from Mr Baroan to the Minister of Justice of 3 August 2011 (Annex 48).

⁸² Letter from Mr Baroan to the President of the Republic of 9 August 2011 (Annex 49).

⁸³ *Le Nouvel Observateur*, "Côte d'Ivoire. Laurent Gbagbo inculpé pour crimes économiques", 19 August 2011, available at: <http://tempsreel.nouvelobs.com/monde/20110819.OBS8778/cote-d-ivoire-laurent-gbagbo-inculpe-pour-crimes-economiques.html>; *Le Figaro*, Caroline Bruneau, "Le couple Gbagbo inculpé de crimes économiques", 18 August 2011, CIV-OTP-0003-0761.

2.1.4.1 Absence of a house-arrest order

164. Article 7 of Law No. 63-4 of 17 January 1963 on the use of persons for the purpose of promoting the economic and social development of the nation (“1963 law”) provides for house arrest for “[TRANSLATION] any person whose acts are prejudicial to the economic or social development of the nation”. This measure is a restriction or deprivation of liberty subject to explicit conditions intended to ascertain the lawfulness of the measure, and must be ordered by decree.

165. Furthermore, article 12 of the 1963 law states that “[TRANSLATION] the implementation of the present law shall be governed by a decree which shall, *inter alia*, fix the conditions of accommodation and monitoring of persons under house arrest”. The relevant details governing the implementation of the 1963 law are set out in Decree No. 63-48 of 9 February 1963 implementing Law No. 63-4 of 17 January 1963 on the use of persons for the purpose of promoting the economic and social development of the nation (“Decree 63-48”).

166. Under Chapter III of Decree 63-48, the house-arrest order shall:

- state “[TRANSLATION] the full particulars of the person concerned, the designated location, the monitoring formalities with which the person concerned must comply, the duration of the measure” (article 25 of Decree 63-48).
- “[TRANSLATION] be served by the police or gendarmerie on the person concerned, who shall receive a personal booklet consistent with the template provided in Annex II” (article 26 of Decree 63-48).
- From the time of notification, “[TRANSLATION] the order shall be enforceable unless otherwise specifically provided” (article 26 of Decree 63-48).

167. Annex II to Decree 63-48 is a model house-arrest booklet. A document based on this template should have been provided to Mr Laurent Gbagbo. Interestingly, the date and the person issuing the notification must be recorded on the house-arrest booklet.

168. However, in spite of these procedural requirements, there is no trace of a house-arrest order. Counsel made several, unsuccessful attempts to obtain a copy of this purported order or any equivalent documents. The Ivorian counsel wrote four letters to the various competent authorities seeking communication of the said order (see Annexes 25, 47, 48 and 49).

169. All of these attempts were in vain. No judicial, political or administrative authority was able to provide counsel with a house-arrest order in any manner, shape or form as justification for President Laurent Gbagbo's detention, or even to inform them whether such an order had ever been issued.

170. Even allowing that a house arrest order existed, at no time was Laurent Gbagbo served with a house-arrest booklet; he was therefore not informed of the grounds for his detention. Furthermore, service signals the entry into force of the order, which is not enforceable until it is served. Accordingly, even if a house-arrest order did exist, it would still not be enforceable if not served. Detention for the purposes of a potential house arrest is inconsistent with domestic substantive and procedural standards. President Gbagbo was therefore arbitrarily detained.

2.1.4.2 After the indictment of 18 August 2011: unlawful detention following the indictment

171. The indictment of 18 August 2011 might ground President Laurent Gbagbo's detention. However, if this were the case, his detention could be justified only if the procedure set out in the Code of Criminal Procedure of Côte d'Ivoire had been followed.

172. Under article 137 of the Code of Criminal Procedure of Côte d'Ivoire, "[TRANSLATION] liberty shall be the general rule, and detention pending trial the exception".

173. Moreover, under article 120 of the Code of Criminal Procedure of Côte d'Ivoire:

[TRANSLATION] As circumstances require, the Investigating Judge may issue a summons to appear, a warrant to apprehend, a committal order or an arrest warrant. [...] A committal order is an order issued by the judge to the prison superintendent to receive and detain the suspect. Such order also authorises the collection or transfer of the suspect, provided the suspect has received prior notification. An arrest warrant is an order issued to law enforcement agents to find and transfer a suspect to the prison indicated on the warrant, where he or she will be received and detained.

174. Under article 121 of the Code of Criminal Procedure of Côte d'Ivoire:

[TRANSLATION] Every warrant or order shall state the identity of the indicted person; it shall be signed, dated and sealed by the issuing judge. Warrants for immediate appearance, committal orders, and arrest warrants shall also state the nature of the charges and the applicable legal provisions. [...] A warrant for immediate appearance or an arrest warrant shall be served and enforced by an officer or agent of the judicial police or by an agent of the law enforcement authorities, who shall show the warrant or order to the suspect and provide the suspect with a copy thereof. If the individual has already been detained on another charge, the warrant or order shall be served by the senior superintendent, who shall also provide the suspect with a copy. In urgent cases, warrants for immediate appearance and arrest warrants may be served by any possible means. In such case, the substance of the original, especially the identity of the indicted person, the nature of the charges, and the name and position of the issuing judge, shall be specified and notified to the indicted person by the enforcing officer.

175. Article 9 of Decree No. 69-189 of 14 May 1969 regulating prison facilities and fixing the conditions governing the enforcement of custodial sentences provides that:

[TRANSLATION] Defendants shall be detained at the seat of the court seized of the criminal proceedings against them.

176. Lastly, article 685 of the Code of Criminal Procedure of Côte d'Ivoire provides that:

[TRANSLATION] Under penalty of prosecution and sentence for arbitrary detention, no prison administration officer may receive or hold a person except pursuant to a conviction, a custody order, a committal order or arrest warrant, or a warrant for immediate appearance where such warrant must be followed by detention pending trial, or an arrest order issued in accordance with the law.

177. In the instant case, no committal order or arrest warrant was notified to either President Laurent Gbagbo or his counsel. No judicial or prison administration authority produced any document grounding his detention. President Gbagbo received no copy of any warrant or order bearing the obligatory information in any form whatsoever.

178. Furthermore, the court seized of the economic crimes alleged against President Gbagbo is the Sixth Office of Investigations of the *Tribunal de Première Instance* of Abidjan, which is located in Abidjan Plateau. No court in the north of the country is seized of the criminal proceedings against Laurent Gbagbo.

179. Laurent Gbagbo's detention in Korhogo following the charges brought against him for economic crimes therefore violates the provisions of Ivorian law.

180. It can be seen from the above that the custodial measure has no legal basis in national law. Laurent Gbagbo's detention following the charges brought against him is inconsistent with domestic substantive and procedural standards. It is therefore arbitrary under Ivorian law and entails the liability of the Ivorian authorities, in particular the prison authorities.

2.1.5 Arrest and arbitrary detention in international law

2.1.5.1 Recognised principles under international law

181. Laurent Gbagbo's arrest and detention also fail to comply with the requirements of international law. Protection against arbitrary arrest is a fundamental right recognised by all international human rights treaties, with which the International Criminal Court must comply pursuant to article 21(3) of its Statute.

182. Thus, the Universal Declaration of Human Rights provides that “[e]veryone has the right to life, liberty and security of person”⁸⁴ and that “[n]o one shall be subjected to arbitrary arrest, detention or exile”.⁸⁵

183. Furthermore, under article 9 of the International Covenant on Civil and Political Rights:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

184. Similarly, the European Convention on Human Rights provides that:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[...]

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.⁸⁶

⁸⁴ Universal Declaration of Human Rights (“UDHR”), resolution 217 A (III) of the United Nations General Assembly, 10 December 1948, article 3.

⁸⁵ *Idem*, article 9.

185. The American Convention on Human Rights also provides that:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.⁸⁷

186. Lastly, the African Charter of Human Rights, which has been signed and ratified by Côte d'Ivoire,⁸⁸ provides that:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.⁸⁹

2.1.5.2 Violations to which President Gbagbo has been subjected

187. The various institutions responsible for the implementation of and adherence to these standards have previously stated and reaffirmed the content of the prohibition of arbitrary arrest. In the instant case, the President was clearly arrested arbitrarily, as the Court will surely find under article 21(3) of the Rome Statute.

188. **Absence of reasonable suspicion.** For an arrest and detention to be justified, there must be reasonable suspicion of the commission of a crime;⁹⁰ the Ivorian authorities have never set forth reasonable suspicion in relation to Laurent Gbagbo, in any event before he was charged with economic crimes more than four months after his arrest.

189. **Non-compliance with national law.** Under international law, the applicable provisions of national law must also be respected.⁹¹ As the European Court of Human Rights held, “to

⁸⁶ European Convention on Human Rights (“ECHR”), 4 November 1950, entry into force 3 May 1953, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf, article 5.

⁸⁷ American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, available at <http://www.oas.org/en/iachr/mandate/Basics/convention.asp>, article 7.

⁸⁸ The list of countries which have ratified the African Charter of Human Rights is available at the African Commission’s website (<http://www.achpr.org/states/>).

⁸⁹ African Charter on Human and Peoples’ Rights (“ACHPR”), 27 June 1981, entry into force 21 October 1986, available at <http://www.afrimap.org/english/images/treaty/African-Charter-Human-Peoples-Rights.pdf>.

⁹⁰ ECHR, Judgment, *Fox, Campbell and Hartley*, Application No.12244/86; 12245/86; 12383/86, 30 August 1990, available at

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=FOX&sessionid=98384058&skin=hudoc-en>, paras. 30-36.

⁹¹ Human Rights Committee (“HRC”), General Comment No. 08: Right to liberty and security of persons (Article 9), 30 June 1982, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument), (“HRC, General Comment No. 08”).

detain a person for an indefinite and unforeseeable period, without such detention being based on a specific statutory provision or judicial decision, is incompatible with the principle of legal certainty [...] and arbitrary, and runs counter to the fundamental aspects of the rule of law”.⁹² The same also holds true for compliance with constitutional provisions.⁹³

However, in the instant case, the Ivorian authorities have never provided any document attesting to the lawfulness of the President’s arrest or detention which, as stated above also contravene the Ivorian Constitution.

190. **Failure to disclose the grounds for arrest.** The right to be informed of the grounds for one’s arrest and detention constitutes an “elementary safeguard”,⁹⁴ which is essential in order to allow a detained person to challenge the lawfulness of the detention before a court.⁹⁵ The information must be provided “[TRANSLATION] promptly”.⁹⁶ Also related to disclosure of the reasons for arrest is the formal need for an arrest warrant or committal order, which is required under human rights case law.⁹⁷

191. In the instant case, Laurent Gbagbo was never informed of the grounds for his arrest after 11 April 2011. Nor did he receive notification of the charges brought against him after 18

⁹² ECHR, Judgment, *Assanidzé v. Georgia*, Application No. 71503/01, 8 April 2004, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699751&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, para. 175.

⁹³ ECHR, Judgment, *Shamsa v. Poland*, Application Nos. 45355/99 and 45357/99, 27 November 2003, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Shamsa&sessionid=96907840&skin=hudoc-fr>, para. 55.

⁹⁴ ECHR, Judgment, *Conka v. Belgium*, Application No. 51564/99, 5 February 2002, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=conka&sessionid=98398513&skin=hudoc-en>, para. 50.

⁹⁵ ECHR, Judgment, *Abdolkhani and Karmnia v. Turkey*, Application No. 30471/08, 22 September 2009, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Abdolkhani&sessionid=98398645&skin=hudoc-en>, para. 136.

⁹⁶ ECHR, Judgment, *Saadi v. United Kingdom*, Application No. 13229/03, 29 January 2008, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Saadi&sessionid=98398645&skin=hudoc-en>, para. 84; ECHR, Judgment, *Soysal v. Turkey*, Application No. 50091/9, 3 May 2007, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Soysal&sessionid=96907840&skin=hudoc-fr>, para. 68; HRC, *Stephens v. Jamaica*, Communication No. 373/1989, 18 October 1995, available at <http://www1.umn.edu/humanrts/undocs/session55/vws37355.htm>, para. 9.6; HRC, *Berry v. Jamaica*, Communication No. 330/1988, 7 April 1994, available at <http://www1.umn.edu/humanrts/undocs/html/vws330.htm>, para. 11.1.

⁹⁷ HRC, *L. Magana ex-Philibert v. Zaire*, Communication No. 90/1981, 21 July 1983, available at <http://www1.umn.edu/humanrts/undocs/newscans/90-1981.html>; Inter-American Court of Human Rights, Judgment, *Castillo Paez v. Peru*, 3 November 1997, available at <http://www1.umn.edu/humanrts/iachr/C/43-ing.html>, para. 56.

August 2011 since, contrary to internationally recognised human rights, the Ivorian Code of Criminal Procedure does not provide for any such notification.

192. **Absence of an appropriate authority in the execution of the arrest.** In order to be lawful, “any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary”.⁹⁸ However, as the facts show, Laurent Gbagbo’s arrest was executed by the troops of Alassane Ouattara, who was not yet President, with the support of French troops; neither could be classified as an “appropriate authority” within the meaning of international human rights law.

193. **Absence of judicial remedy.** Protection against arbitrary detention implies the existence of independent judicial scrutiny, entailing the responsibility of the authorities.⁹⁹ It should be stressed that it is incumbent upon the national authorities to “bring [...] the detainee promptly before an appropriate officer at that initial stage [...] for the purpose of effectively contesting the lawfulness of his detention”.¹⁰⁰ However, in the instant case, Laurent Gbagbo was never brought before a competent court for the purpose of contesting the lawfulness of his detention. Furthermore, not having been notified of the charges, and having been prohibited from meeting with his counsel despite their repeated requests, Mr Gbagbo had no opportunity to appeal against the lawfulness of his detention before August 2011.

194. **Isolation.** Whilst there can be no doubt that Laurent Gbagbo’s isolation constitutes inhuman and degrading treatment, the Defence will show *infra* that it has also been considered relevant to an assessment of protection against arbitrary detention. Thus, in *Aksoy v. Turkey*, the ECHR held that:

[I]nsufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of

⁹⁸ ECHR, Judgment, *Ilașcu v. Moldova and Russia*, Application No. 48787/99, 8 July 2004, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ilașcu&sessionid=98399231&skin=hudoc-en>, para. 461.

⁹⁹ ECHR, Judgment, *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Kurt&sessionid=98399231&skin=hudoc-en>, para. 123; HRC, General Comment No. 08; Inter-American Court of Human Rights, *García-Asto and Ramírez-Rojas v. Peru*, 25 November 2005, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_137_ing.pdf, para. 109.

¹⁰⁰ ECHR, Judgment, *Jėčius v. Lithuania*, Application No. 34578/97, 31 July 2000, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Jecius&sessionid=98399919&skin=hudoc-en>, para. 84.

any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.¹⁰¹

195. **Lack of access to counsel.** Similarly, access to counsel, itself a safeguard of the rights of the defence,¹⁰² also falls under protection against arbitrary detention. Accordingly, it has been acknowledged that in addition to the detained person, his or her legal representatives must be notified of the reasons for detention, and that the detained person must be informed of his or her right to contact another person, such as his or her counsel.¹⁰³

196. As the Defence has already shown, in the instant case Laurent Gbagbo had no access to his counsel in the initial months of his detention, whereafter he had limited and supervised access, and his lawyers were not informed of the charges brought against their client, thereby confirming the arbitrariness of his detention.

197. **Cumulative and interdependent effect of the violations.** The Defence wishes to conclude by emphasising the cumulative effect of all these violations, which undoubtedly contribute to the arbitrariness of his detention as a whole. Furthermore, the situation illustrates the holistic nature of human rights protection and the interdependence of human rights, with respect for one bolstering support for another. Thus, condoning the breach of even one right contravenes the very spirit of the protection of human dignity which underpins and permeates the entire structure of human rights. This applies both to protection against arbitrary detention and protection against torture and other inhuman and degrading treatment.

2.1.6 Inhuman and degrading treatment and torture

2.1.6.1 Unfit conditions of President Gbagbo's detention

198. President Gbagbo remained imprisoned in a narrow cell¹⁰⁴ for eight months, without any opportunity even to set foot outdoors. Prohibited from any contact with his family and cut off from the world, he was unaware of what was happening on the outside.

¹⁰¹ ECHR, Judgment, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Aksoy&sessionid=98399919&skin=hudoc-en>, para. 83.

¹⁰² *Ibid.*

¹⁰³ Inter-American Court of Human Rights, *Tibi v. Ecuador*, 7 September 2004, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.doc, paras.106 and 112.

¹⁰⁴ Annex 8, point (b)(1).

199. He was mistreated by his gaolers, who forced him on several occasions to pretend that all was well when he was in the presence of representatives of the United Nations Secretary-General.

200. He was never informed of the reasons for his detention, was never brought before a judge and, above all, was not permitted to contact his counsel, except on rare and brief occasions, despite their repeated requests.¹⁰⁵

201. His doctor, who was incarcerated with him from the beginning, stated on 9 January 2012¹⁰⁶ that they were living in “[TRANSLATION] very harsh, almost inhuman prison conditions”. He added that the President was living in a small cell, which he was permitted to leave only at mealtimes, and added that neither he nor the President were permitted to go out into the open during their eight months of detention. Moreover, they were insulted and threatened frequently. The doctor described the food as “[TRANSLATION] meagre and basic”.

202. He was not able to provide his patient with satisfactory treatment. He stated that President Gbagbo was undergoing a number of treatments, the details of which he provided in his report, wherein he stated that he was unable to treat all the pains and illnesses which presented as the detention progressed. In light of the President’s age, the fact that he had already spent several days in refuge in the ruins of the presidential palace, his pre-existing medical condition and the poor conditions of detention, the fact that he had no access to appropriate medical care constitutes ill-treatment, especially in view of the mortal danger he faced.¹⁰⁷

203. The doctor also made reference to the constant anxiety which the President and he suffered as a result of not knowing what was happening on the outside. President Gbagbo was not kept abreast of outside events, at a time when the country was at war, he had no access to his counsel and, above all, for eight months he grappled with pain, anxiety, despair and powerlessness, not knowing what had become of his family and close allies, in particular those who had been injured before his very eyes on the day of his arrest.

¹⁰⁵ See Annexes 12, 25 and 27-30.

¹⁰⁶ See Annex 7.

¹⁰⁷ ECHR, *Popov v. Russia*, Application No. 26843/04, 13 July 2006, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=popov&sessionid=98399919&skin=hudoc-en>, paras. 207-208; ECHR, *Kudła v. Poland*, Application No. 30210/96, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=kudla&sessionid=98399919&skin=hudoc-en>, para. 94.

204. Furthermore, President Gbagbo remained in total physical isolation for eight months. He was in solitary confinement in a very small room without natural light and was not permitted to leave it except for meals, which were eaten in another room. He was not permitted to walk outside or even to see natural light.

205. In his report,¹⁰⁸ the expert physician appointed by the Defence upon the President's arrival in The Hague recorded how President Gbagbo described his detention: the President emphasised that his physical condition had deteriorated so rapidly that within a matter of weeks, he began to experience problems, particularly in walking.¹⁰⁹

206. The President stated that because his energy levels had dropped so quickly, he wondered whether he had been poisoned.

207. Moreover, it is clear that by isolating him physically and mentally from the outside world and denying him the appropriate medical care, his gaolers were seeking to break down his physical and mental resistance.

208. This is also what the expert physician stated: "[the conditions of President Gbagbo's detention] should be considered a form of ill-treatment as serious as physical abuse and even torture". He added: "[i]solation is known to be used to 'break' prisoners".¹¹⁰ He concluded that the worrying state of President Gbagbo's health results from treatment which "must be regarded as ill-treatment and even torture".¹¹¹ In his opinion, President Gbagbo's current poor health results from these acts of torture and is a typical case of "hospitalisation syndrome".¹¹² He reported: "[President Gbagbo's] present medical problems derive from the inhuman conditions of his detention".¹¹³

209. Thus, prior to his transfer to the ICC, President Gbagbo was detained for eight months in unfit conditions. He did not see the light of day or set foot outdoors for the entire duration of his imprisonment. For any medical care, President Gbagbo was constrained to short meetings with his personal physician, Dr Blé, who was himself detained arbitrarily in another room of the house. He remained cut off from the world, especially from his counsel and his family, and

¹⁰⁸ Annex 8, point 5.

¹⁰⁹ *Idem*.

¹¹⁰ *Idem*, point 5(i).

¹¹¹ *Idem*, point 7(a).

¹¹² *Idem*, point 7(b).

¹¹³ *Idem*, point 8(a).

was acutely anxious as a result. Under such conditions, his health naturally deteriorated so rapidly that he lost the ability to move unaided.

210. Viewed in isolation, these detention conditions alone constitute an accumulation of inhuman and degrading treatment and a form of torture under internationally recognised human rights. Hence it is incontrovertible that when considered as a whole, these conditions constitute a violation of human dignity and the right to physical integrity of the human being which the Chamber cannot condone from a State with which it cooperates so closely.

2.1.6.2 Detention as a key consideration in affording protection against torture and other inhuman and degrading treatment

211. The Defence must emphasise that a person's detention is a textbook example for affording protection against torture and other inhuman and degrading treatment. Detention places an individual in a situation of weakness and submission, which heightens the risk of unfit treatment. As has been underscored *supra*, protection of human dignity, in particular physical integrity, therefore requires that *all* of a person's rights be respected in a context of such marked vulnerability as detention, especially when it is arbitrary, as in the instant case.

212. This weightier onus upon national authorities in relation to detention is universally recognised. Thus, article 11 of the Convention against Torture explicitly provides that "[e]ach State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture".

213. The quite understandable nexus between detention and a risk of human rights breaches was also recognised in *Gültekin v. Turkey*, where the European Court of Human Rights stated wholly unambiguously that:

[TRANSLATION] The Court wishes to note that a State is responsible for all persons in detention since, in the hands of police officers, they are in a vulnerable situation and the authorities have a duty to protect them. A rigorous application from the very beginning of custody of the fundamental safeguards – such as the right to request an examination by a chosen doctor in addition to any examination by a doctor appointed by the police, and access to a lawyer and a

family member – when accompanied by prompt judicial intervention, may effectively enable the detection and prevention of ill treatment to which detained persons are at risk.¹¹⁴

214. In these circumstances, the Defence wishes to draw the Pre-Trial Chamber's particular attention to three aspects of President Gbagbo's detention which constitute torture and other inhuman and degrading treatment: his incommunicado detention (4.2.3), his solitary confinement (4.2.4) and his lack of access to medical care (4.2.5). When considered cumulatively, these violations necessarily fall within the legal characterisation of torture (4.2.6).

2.1.6.3 Incommunicado detention

215. The facts show that President Gbagbo was detained incommunicado. Transferred on 13 April 2011 from Ouattara's hotel to Korhogo in the north of the country, where he remained under the supervision of the warlord Fofié, he was authorised to meet his counsel only six times, and no family visits were authorised.

216. In its General Comment 20, the Human Rights Committee established that detained persons must be held solely in places designed for that purpose, and that provisions should be made to prevent incommunicado detention:

To guarantee the effective protection of detained persons, provisions should be made for **detainees to be held in places officially recognized as places of detention and for their names and places of detention**, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. **Provisions should also be made against incommunicado detention.**¹¹⁵

217. Lack of access to counsel, one of the salient aspects of President Gbagbo's incommunicado detention, whilst itself constituting a violation of a fundamental human right,¹¹⁶ is also illustrative of the arbitrariness of his detention;¹¹⁷ access to counsel has been

¹¹⁴ ECHR, Judgment, *Gültekin v. Turkey*, Application No. 52941/99, 31 May 2005, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=G%FCltekin&sessionid=97017622&skin=hudoc-fr>, para. 26.

¹¹⁵ Human Rights Committee, General Comment No. 20 on article 7 of the Convention, 10 March 1992, HRI/GEN/1/Rev.9 (Vol. I), available at [http://www.ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9\(Vol.I\)_GC20_en.pdf](http://www.ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I)_GC20_en.pdf), para. 11 [emphasis added].

¹¹⁶ *Idem.*

¹¹⁷ *Idem.*

recognised as an indispensable safeguard against the risk of torture, as the Committee against Torture recently affirmed.¹¹⁸

218. The Inter-American Court of Human Rights went further, stating that prolonged isolation and incommunicado detention constituted in themselves a form of cruel and inhuman treatment which is harmful to the physical and mental integrity of the person and to the right of all detained persons to human dignity.

Prolonged isolation and being held incommunicado constitute, in themselves, forms of cruel and inhuman treatment, harmful to the mental and moral integrity of the person and to the right of all detainees of respect for the inherent dignity of the human being.¹¹⁹

219. Similarly, in *Peers v. Greece*, the European Court of Human Rights held that the applicant's unacceptable conditions of detention diminished his human dignity, and could cause anguish and inferiority capable of jeopardising his physical and mental health, and that this amounted to degrading treatment. The Court took account of the fact that the applicant spent two months mostly confined to his bed in an unventilated cell with no window:

[...] in the present case, the fact remains that the competent authorities took no steps to improve the objectively unacceptable conditions of the applicant's detention. In the Court's view, this omission denotes lack of respect for the applicant. **The Court takes into account, in particular, that, for at least two months, the applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell with no ventilation and no window, which would at times become unbearably hot.** [...] The Court is not convinced by the Government's allegation that these conditions did not affect the applicant in a manner incompatible with Article 3. On the contrary, the Court is of the opinion that the **prison conditions complained of diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.** In sum, the Court considers that the conditions of the applicant's detention in the segregation unit of the Delta wing of Koridallós Prison amounted to degrading treatment within the meaning of Article 3 of the Convention.¹²⁰

2.1.6.4 Solitary confinement

220. During his detention, Laurent Gbagbo was not authorised to leave the house where he was imprisoned and could not communicate with the outside world. His cell was also very small and he was immobilised for several weeks.

¹¹⁸ Committee against Torture, Concluding observations of the Committee in relation to France, Forty-fourth session, 26 April-14 May 2010, available at http://www2.ohchr.org/english/bodies/cat/docs/co/CAT-C-FRA-CO-4_6.pdf, p. 6.

¹¹⁹ Inter-American Court of Human Rights, Judgment, *Cantoral-Benavides v. Peru*, 18 August 2000, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_69_ing.pdf, para. 83, [emphasis added].

¹²⁰ ECHR, Judgment, *Peers v. Greece*, Application No. 28524/95, 19 April 2001, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=peers&sessionid=98511976&skin=hudoc-en>, para. 75 [emphasis added].

221. In its General Comment No. 20, the Human Rights Committee stated that solitary confinement may constitute a violation of article 7 of the Covenant:

The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.¹²¹

222. In *Polay-Campos v. Peru*, the Human Rights Committee established that the detained person's year-long total isolation constituted inhuman treatment under article 7 and was contrary to the standards for human treatment required by article 10(1) of the Covenant. Given the clear parallels between the applicant in that case and President Gbagbo's conditions of detention in the present case, the Defence provides the Committee's reasoning hereafter:

In the Committee's opinion, **this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment** within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant.

8.7 As to Mr. Polay Campos' general conditions of detention at Callao, the Committee has noted the State party's detailed information about the medical treatment Mr. Polay Campos has received and continues to receive, as well as his entitlements to recreation and sanitation, personal hygiene, access to reading material and ability to correspond with relatives. No information has been provided by the State party on the claim that Mr. Polay Campos continues to be kept in solitary confinement in a cell measuring two metres by two, and that apart from his daily recreation, he cannot see the light of day for more than 10 minutes a day. The Committee expresses serious concern over the latter aspects of Mr. Polay Campos' detention. The Committee finds that the **conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constitute treatment contrary to article 7 and article 10, paragraph 1, of the Covenant.**¹²²

223. A **joint report of the United Nations Special Rapporteurs on the situation of detainees at Guantánamo Bay** found that "the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees under article 10, paragraph 1, of ICCPR to be treated with humanity and with respect for the inherent dignity of the human person".¹²³

224. Lastly, in *Baader v. Germany*, the European Court of Human Rights established that sensory isolation coupled with complete social isolation could ultimately destroy the

¹²¹ Human Rights Committee, General Comment No. 20, *supra*, footnote 119, para. 6.

¹²² Human Rights Committee, Communication No. 577/1994, *Polay Campos v. Peru*, 6 November 1997, CCPR/C/61/D/577/1994, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3c730ccb89509e8802566d7005d370d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3c730ccb89509e8802566d7005d370d?Opendocument) paras. 8.6 and 8.7 [emphasis added].

¹²³ Report on the situation of detainees at Guantánamo Bay, 27 February 2006, Commission on Human Rights, 62nd session, E/CN.4/2006/120, para. 87. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf>

personality and thus constituted a form of inhuman treatment which could not be justified by the requirements of security, the prohibition on torture and inhuman treatment contained in article 3 of the Convention being absolute in character.¹²⁴

2.1.6.5 Denial of access to medical treatment constitutes inhuman treatment

225. Concerning the detained person's state of health, the authorities failed to administer medical treatment and thus failed to ensure that the prisoner's detention was compatible with his state of health. In the present case, despite his age (67 years) and great physical and psychological weakness, President Gbagbo was refused appropriate access to medical care during his detention.¹²⁵ After being immobilised for several weeks, he suffered partial paralysis of his upper limbs.¹²⁶

226. In *Papon v. France*, the European Court of Human Rights established that the prisoner must be detained in conditions which are compatible with respect for his human dignity, and that the prisoner's health and well-being must be adequately secured by, among other things, providing him with the requisite medical assistance. It further held that, although the Convention does not prohibit imprisonment of persons beyond a certain age, "state of health (in which age may be an aggravating factor) may be taken into account".¹²⁷ This position was unambiguously upheld in *Cara-Damiani v. Italy*: "[TRANSLATION] Lack of appropriate medical treatment and, more generally, detaining an unwell person in inappropriate conditions may in principle constitute treatment contrary to article 3. Moreover, in addition to the prisoner's health, his well-being must also be adequately provided for."¹²⁸

227. There can be no doubt that the conditions of President Gbagbo's detention constitute inhuman and degrading treatment, on the grounds of his health and age, amongst others. In

¹²⁴ ECHR, Decision on the admissibility of the applications, *G. Ensslin, A. Baader, J Raspe v. the Federal Republic of Germany*, No. 7572/76, 7586/76, 7587/76, 8 July 1978, pp. 109-110. <http://cmiskp.echr.coe.int/tkp197/view.asp?action=open&documentId=803288&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

¹²⁵ *Le Temps*, K. K. Maurice, "Korhogo: le Président Gbagbo maltraité: tout sur ses mauvaises conditions de détention", 7 October 2011, available at <http://lacotedivoiredebout.ivoire-blog.com/archive/2011/10/07/korhogo-le-president-gbagbo-maltraite-tout-sur-ses-mauvaises.html>.

¹²⁶ See Annex 8.

¹²⁷ *Papon v. France*, Application relating to detention conditions, European Court of Human Rights, 7 June 2001, Application No. 64666/01: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=670921&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

¹²⁸ ECHR, Judgment, *Cara-Damiani v. Italy* Application No. 2447/05, 7 February 2012, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Cara-Damiani&sessionid=96970567&skin=hudoc-fr>, para. 66.

fact, it can also be seen that these conditions were designed to weaken and “break” President Gbagbo and therefore constitute acts of torture.

2.1.7 Detention conditions equivalent to torture

228. Torture and inhuman and degrading treatment are subject to such strict and unconditional condemnation from the international community that prohibition of torture is nowadays considered to be *jus cogens*.¹²⁹ This is reflected in both international and regional instruments for the protection of human rights.¹³⁰ The prohibition is therefore absolute and inalienable¹³¹ and, as set out *supra*, is especially pertinent to persons deprived of their liberty.¹³²

229. The Rome Statute itself defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.¹³³ It is of note that the Rome Statute definition, unlike the definition of torture in the Convention against Torture, does not require proof of a specific

¹²⁹ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, Trial Chamber, 10 December 1998, para. 153. <http://icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

¹³⁰ **International treaties:** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly in 1984, entry into force 26 June 1987, available at <http://www2.ohchr.org/english/law/cat.htm>; International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, available at <http://www2.ohchr.org/english/law/ccpr.htm>, article 7; Geneva Conventions, adopted on 12 August 1949, entry into force 21 October 1950, common article 3, available at <http://www.icrc.org/ihl.nsf/INTRO/365?OpenDocument>.

Regional treaties: ECHR, article 3; American Convention on Human Rights, article 5(2); African Charter on Human and Peoples’ Rights, article 5; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) Strasbourg, 26.XI.1987, entry into force 1 March 2002, available at <http://www.cpt.coe.int/en/documents/ecpt.htm>; Inter-American Convention to Prevent and Punish Torture (1985), O.A.S. Treaty Series No. 67, entry into force 28 February 1987, available at <http://www.oas.org/en/iachr/mandate/Basics/torture.asp>.

Case law: International Criminal Tribunal for Rwanda, *The Prosecutor v. Akayesu*, No. ICTR-96-4-T, 2 September 1998, paras. 593-95; ECHR, *Ireland v. United Kingdom*, Application No. 5310/71, 18 January 1978, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=Ireland%20%7C%20United%20%7C%20Kingdom&sessionId=98796418&skin=hudoc-en>, para. 163; Inter-American Court of Human Rights, *De la Cruz-Flores v. Peru*, merits, reparations and costs, 18 November 2004, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_115_ing.pdf, para. 125.

¹³¹ Human Rights Committee, General Comment No. 20, 10 March 1992, para. 3, available at [http://www.ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9\(Vol.I\).\(GC20\)_en.pdf](http://www.ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9(Vol.I).(GC20)_en.pdf); ECHR, *Selmouni v. France* 28 July 1999, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=selmouni&sessionId=98809390&skin=hudoc-en>, para. 95.

¹³² Inter-American Court of Human Rights, Judgment, *Neira Alegría et al v. Peru*, 19 January 1995, available at <http://www1.umn.edu/humanrts/iachr/C/20-ing.html>, para. 60.

¹³³ Rome Statute, article 7(e).

purpose on the part of the perpetrator, such as to elicit information.¹³⁴ It is the conditions themselves which constitute torture, not the reason provided for the conduct.

230. The conditions of President Gbagbo's detention constitute acts of torture in two respects.

231. Firstly, accumulated acts of inhuman and degrading treatment border on torture. They are designed to inflict particularly serious violations of human dignity. These are acts which are of the same nature as torture but are slightly less intense.¹³⁵ The difference is minimal and varies within societies.¹³⁶ This is why it is difficult and futile to separate the two notions. For particular conduct to be prohibited, it is important that it should reach a certain gravity threshold,¹³⁷ which is assessed according to the duration of the treatment and its physical and mental effects, as well as the gender, age, health or other status of the victim.¹³⁸

232. In this respect, the accumulated ill treatment of a person of President Gbagbo's age and state of health over a period of almost eight months cannot be construed as anything other than an act of torture.

233. Secondly, and more seriously, the Ivorian authorities' intent to weaken President Gbagbo can be inferred from the detention conditions themselves. In fact, the Ivorian authorities are purported to have been instructed to "[TRANSLATION] toughen up the detention conditions" in order to "[TRANSLATION] mentally break" Laurent Gbagbo.¹³⁹

234. This is confirmed by the report of the expert physician, who states "it is my conclusion that denial of any of these conditions should be considered a form of ill-treatment to break as serious as physical abuse and even torture. Isolation is known to be used to 'break prisoners'".¹⁴⁰ He adds: "it is my medical opinion that Mr. Laurent Gbagbo is in a bad general health state,

¹³⁴ Convention against Torture, Article 1.

¹³⁵ ECHR, *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989, para. 100, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=soering&sessionid=98809390&skin=hudoc-en>.

¹³⁶ ECHR, *Selmouni v. France*, *supra*, footnote 134, para. 101.

¹³⁷ ECHR, *Ireland v. United Kingdom*, *supra*, footnote 133, para. 162.

¹³⁸ Human Rights Committee, *Brough v. Australia*, Communication N.1184/2003, 17 March 2006, para. 9.2, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.86.D.1184.2003.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.86.D.1184.2003.En?Opendocument); ECHR, *Selmouni v. France*, *supra*, footnote 134, para. 100; African Commission, *Huri-Laws v. Nigeria*, ACHPR, Communication No. 225/1998, 28th session, 23 October-6 November 2000, para. 41, available at <http://caselaw.ihrrda.org/doc/225.98/view/>.

¹³⁹ *Le Temps*, K. K. Maurice, "Korhogo: le Président Gbagbo maltraité: tout sur ses mauvaises conditions de détention", *supra*, footnote 128.

¹⁴⁰ Annex 8, point 5(i).

physically and psychologically, not because a specific medical illness but from an imposed mental and physical inactivity that must be regarded as ill treatment and even torture”¹⁴¹ and concludes: “I have examined Mr Laurent Gbagbo, and concluded that the present medical problems derive from inhuman conditions of his detention, specifically the denial of physical, psychological and social activities”.¹⁴²

2.2 Nexus with the Prosecutor’s investigation

235. It is submitted to the Court that from the point at which the Office of the Prosecutor possessed information on the basis of which it could conduct its investigation into Laurent Gbagbo, he was covered by the aforementioned article. This conclusion relies on a number of factors.

2.2.1 *Factual link with the investigation*

2.2.1.1 The Prosecutor’s interest in Laurent Gbagbo

236. Documents in the record of the case show that the Prosecutor’s investigation focused on Laurent Gbagbo from a very early stage, in cooperation with the authorities of Côte d’Ivoire.

237. For example, during an interview with France 24 as early as January 2011, the Prosecutor warned the Gbagbo camp explicitly and exclusively of the risks of prosecution by the Court.¹⁴³ On 7 April 2011, before Laurent Gbagbo had even been arrested, Emeric Rogier, Chief of the Situation Analysis Section of the Office of the Prosecutor of the ICC, stated that Laurent Gbagbo “[TRANSLATION] may be granted amnesty at the national level, in which case he will not be prosecuted in the national courts, but that will not shield him from prosecution at the international level”.¹⁴⁴

238. Still in April 2011, during an interview in a Kenyan television documentary on Laurent Gbagbo’s prosecution by the ICC, the Prosecutor responded to the question of whether Laurent Gbagbo would be prosecuted one day by saying that he would come to a “bad ending”.¹⁴⁵ It is certain that the circumspection inherent in the position of Prosecutor of the International

¹⁴¹ Annex 8, point 7(a).

¹⁴² Annex 8, point 8(a).

¹⁴³ France 24 video, “*Le Procureur met en garde le camp Gbagbo*”, available at <http://news.abidjan.net/v/5629.html>.

¹⁴⁴ *Afrik.com*, “Côte d’Ivoire: ‘pas d’amnistie qui tienne pour Gbagbo’, selon la CPI”, 7 April 2011, available at <http://www.afrik.com/breve29638.html>.

¹⁴⁵ K24TV video, “3 sides of a coin”, at around 03:15 minutes, available at <http://www.youtube.com/watch?v=fVHpL5Ch1Pg>.

Criminal Court and respect for the presumption of innocence to which he is bound by the Court's Statute imply that he could not have reached such a conclusion without being privy to concrete facts to support his statement, and thus that he was in possession of evidence on which to base such an assertion.

239. This evidence establishes that even before Laurent Gbagbo's arbitrary arrest, the Prosecutor of the ICC was intending to focus his investigation on him alone.

240. Furthermore, the documents in the possession of the Office of the Prosecutor confirm its premature interest in Laurent Gbagbo.¹⁴⁶ It clearly focused its investigation on him, even prior to its 23 June 2011 request to the Pre-Trial Chamber for leave to open a formal investigation into the situation in Côte d'Ivoire,¹⁴⁷ or in any event shortly afterwards.¹⁴⁸

2.2.1.2 Collaboration between the Office of the Prosecutor and the authorities of Côte d'Ivoire

241. The Office of the Prosecutor's interest in Laurent Gbagbo is corroborated by its close collaboration with the authorities of Côte d'Ivoire and their statements urging the Court to take on the case.

242. In fact, there can be no doubt that Alassane Ouattara was hoping and planning that Laurent Gbagbo would be prosecuted before the ICC, even before his arrest and throughout the proceedings.

243. Thus, as early as March 2011, lawyers commissioned by Alassane Ouattara submitted to the Court a detailed memorandum (inspired by an article on Palestine, see Annex 50)¹⁴⁹ in which they set forth the reasons why they believed that there was no impediment to the Court's exercising its jurisdiction in Côte d'Ivoire, and presented a list of crimes ascribed to Laurent Gbagbo and his supporters (see Annex 51).

¹⁴⁶ RFI, "Côte d'Ivoire, Yopougon est désormais sous le contrôle des FRCI", 5 May 2011, CIV-OTP-0002-0299 [accessed and saved on 18 May].

¹⁴⁷ Office of the Prosecutor, "Request for authorisation of an investigation pursuant to article 15", 23 June 2011, ICC-02/11-3.

¹⁴⁸ See BBC News, "Ivory Coast conflict, Gbagbos face economic charges", 18 August 2011, CIV-OTP-0003-0749 [accessed and saved on 14 September]; *Le Patriote*, "Ces nombreux crimes économiques de Gbagbo", 20 August 2011, CIV-OTP-0003-0738 [accessed and saved on 14 September].

¹⁴⁹ Publication by Alain Pellet dated 14 February 2010 entitled "Les effets de la reconnaissance par la Palestine de la compétence de la CPI" (Annex 50). <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281927/PelletENGCLEAN1.pdf>

244. On 13 April, two days after Laurent Gbagbo's arbitrary arrest, Alassane Ouattara requested during a telephone interview¹⁵⁰ that an investigation be opened in Côte d'Ivoire, a view he set down in writing on 3 May 2011.¹⁵¹ In this respect, it is striking – and confirms the close collaboration between the Office of the Prosecutor and the authorities of Côte d'Ivoire – that the initial request to the Pre-Trial Chamber to open an investigation covered exactly the same dates to which Alassane Ouattara referred during his telephone interview and in his letter of 3 May 2011.

245. Again on 3 May 2011, the Prosecutor stated during an interview with Associated Press that he was in talks with the authorities of Côte d'Ivoire on the possibility of conducting local investigations, and that: "They are telling me that they cannot conduct an investigation themselves, so they agree that I should do it".¹⁵²

246. On 9 March 2011, barely a week later, the Ivorian Minister of Justice, Jeannot Kouadio Ahoussou, clearly stated regarding the initiation of a national investigation for crimes committed by Mr Gbagbo: "[TRANSLATION] We have excluded [from the investigation] what falls within the jurisdiction of the International Criminal Court [ICC], such as crimes against humanity". He pointed out that a technical delegation of the Court had been in Côte d'Ivoire since 25 April.¹⁵³

247. On 7 July 2011, a person responsible for prosecuting soldiers close to Laurent Gbagbo explained that some of the soldiers "[TRANSLATION] may end up beside the former Head of State Laurent Gbagbo in the dock of the International Criminal Court",¹⁵⁴ further illustrating the certainty of the authorities of Côte d'Ivoire that Laurent Gbagbo would be prosecuted by the ICC and not by the national authorities.

¹⁵⁰ *Jeune Afrique*, Marianne Meunier, "Juger oui mais au nom de quelle loi ?", 27 April 2011, available at <http://www.jeuneafrique.com/Article/ARTJAJA2623p015-017.xml1/>.

¹⁵¹ Annex 15.

¹⁵² *News24*, Edith M Lederer, "ICC to move ahead on Ivory Coast probe", 3 May 2011, available at <http://www.news24.com/Africa/News/ICC-to-move-ahead-on-Ivory-Coast-probe-20110503>.

¹⁵³ *L'Express*, "Côte d'Ivoire: un mois après sa chute, l'ex-président Gbagbo devant la justice", 6 May 2011, available at http://www.lexpress.fr/actualites/1/monde/cote-d-ivoire-un-mois-apres-sa-chute-l-ex-president-gbagbo-devant-la-justice_989817.html.

¹⁵⁴ *Connection ivoirienne*, "Le procureur militaire explique l'absence de poursuites contre les forces pro-Ouattara", 7 July 2011, available at <http://www.connectionivoirienne.net/le-procureur-militaire-explique-labsence-de-poursuites-contre-les-forces-pro-ouattara>.

248. This *modus operandi* was confirmed in August 2011 when formal charges were finally brought against Laurent Gbagbo only for economic crimes, which do not fall within the jurisdiction of the ICC. Considering the gravity of events that occurred during the months following the presidential elections, such a choice can only be explained by the intention of the Ivorian authorities to leave the way open for the ICC to prosecute the most serious crimes alleged, as the Public Prosecutor¹⁵⁵ confirmed at the time.

249. This negotiated “burden-sharing” was confirmed by Alassane Ouattara during an interview with *Le Figaro* on 12 September 2011. Ouattara stated that he did not wish to prosecute some post-election crimes, preferring to concentrate on economic crimes, and called on the ICC to act instead of the Ivorian authorities.¹⁵⁶

250. On 30 September 2011, the Ivorian Minister of Human Rights, Gnénéma Coulibaly, stated after a meeting with ICC officials: “[TRANSLATION] I explained to the President of the ICC the importance of this [transfer] procedure to national reconciliation. If the former president were no longer under our responsibility, in Côte d’Ivoire, it would facilitate the reconciliation process and contribute to cooling passions in further debates, in particular the legislative elections” scheduled for 11 December, added Coulibaly, who considered that ICC officials “appeared to be receptive to our arguments”. This statement clearly illustrates the political will of the Ivorian authorities that the ICC should be seized of the Laurent Gbagbo case and, above all, the intent not to complete the proceedings initiated in Côte d’Ivoire for economic crimes.¹⁵⁷

251. On 7 October, in an interview with *France 24*, Guillaume Soro, the Prime Minister of Côte d’Ivoire, in reply to a question on whether President Gbagbo would be transferred to The Hague, stated: “[TRANSLATION] I think that it is inevitable after the killings in our country. Mr Laurent Gbagbo is after all responsible for more than 3 000 deaths. During the post-election crisis, he had the opportunity of handing over power and leaving with dignity, but by refusing

¹⁵⁵ *BBC News*, “Ivory Coast conflict, Gbagbos face economic charges”, 18 August 2011, CIV-OTP-0003-0749.

¹⁵⁶ *Le Figaro*, “Ouattara, l’Etat de droit est en marche en Côte d’Ivoire”, 12 September 2011, available at <http://www.lefigaro.fr/international/2011/09/12/01003-20110912ARTFIG00622-ouattara-l-etat-de-droit-est-en-marche-en-cote-d-ivoire.php>.

¹⁵⁷ *7aubenin.com*, “La CPI étudie le transfèrement de Gbagbo à La Haye”, 30 September 2011, available at <http://www.7aubenin.com/2011/09/30/la-cpi-etudie-le-transferement-de-gbagbo-a-la-haye/>.

to do so and using the army against the people, he obviously deserves to be transferred to The Hague”.¹⁵⁸

252. As will be seen later, the alacrity with which President Gbagbo was transferred to the Court on 29 November 2011, a few days before the legislative elections of 11 December,¹⁵⁹ again illustrates the wish of the Ivorian authorities to send him to The Hague.

253. Finally, in an interview granted in April 2012, Alassane Ouattara confirmed that the President was subjected to special treatment, unlike members of his inner circle being prosecuted in Côte d’Ivoire. Ouattara thus affirmed that: “[TRANSLATION] I want Ivoirians to be tried in Côte d’Ivoire. But as I said, the transfer of Laurent Gbagbo can be attributed to his behaviour. While he was still in power, everybody had said that his acts would be considered war crimes and crimes against humanity. He was warned about that. I don’t wish to return to the past”.¹⁶⁰

254. It is apparent from the foregoing that immediately Laurent Gbagbo was arrested, the Ivorian authorities, in close collaboration with the Office of the Prosecutor, had no other wish than to be “rid” of him and the sole aim of the arrest and detention was to hold Laurent Gbagbo at the disposal of the Court at the appropriate time.

2.2.2 *Legal link to the investigation*

2.2.2.1 Legal framework of an investigation under Article 55

255. Article 55 of the Statute ensures the protection of the rights of persons falling within the scope of an investigation “initiated under this Statute”. It is clear from this Article that, *de minimis*, the Chamber should recognise that Laurent Gbagbo was afforded this protection as from 3 October 2011, when the decision granting the Prosecutor permission to start an investigation in Côte d’Ivoire was formally rendered.

256. The Defence nonetheless invites the Chamber to adopt a broader definition of the notion of “investigation”, in accordance with the jurisprudence of the ICC Appeals Chamber,

¹⁵⁸ *Le Nouveau Courrier*, “La CPI arrive, Soro sue à grosses gouttes”, 8 October 2011, available at <http://www.nouveaucourrier.info/2011/10/08/la-cpi-arrive-soro-sue-a-grosses-gouttes/>.

¹⁵⁹ http://www.lemonde.fr/afrique/article/2011/12/11/legislatives-en-cote-d-ivoire-alassane-ouattara-appelle-tous-ses-compatriotes-a-voter_1617190_3212.html.

¹⁶⁰ *L’intelligent d’Abidjan*, “Interview exclusive accordée à la RTI et à Fraternité-Matin / Alassane Ouattara : ‘Pour la réconciliation nationale, je suis prêt à aller le plus loin possible’”, 2 April 2012, available at <http://news.abidjan.net/h/430591.html>. (Annex 24).

to cover all the actions of the Prosecutor “aimed at bringing [the person] to justice”,¹⁶¹ to avoid a legal vacuum in the pre-investigation phase which would be unfavourable to the rights of persons and inconsistent with the obligation of the Court to interpret the provisions of the Statute in accordance with internationally recognised human rights pursuant to article 21(3) of the Statute. If the Chambers were not to exercise control over the pre-investigation phase, this could lead to abuses during the Prosecutor’s preliminary investigations.

257. Finally, a narrow definition based on formal permission to initiate an investigation would engender inequalities in the protection of persons, depending on the procedure which triggers the jurisdiction of the Court. Whilst the Prosecutor must indeed apply to the Court for authorisation when exercising his powers *proprio motu*,¹⁶² such is not the case for referrals by a State¹⁶³ or the Security Council,¹⁶⁴ thereby preventing the determination of a formal date for the initiation of investigations. The surprising consequence of such a narrow definition would therefore be a mechanism – that is, article 15 – designed with the objective of *overseeing* the actions of the Prosecutor, instead discharging him *de facto* from obligations incumbent upon him in other referral situations. The Chamber should therefore adopt a definition of investigation in accordance with all forms of referral and, in keeping with the spirit of the protection of individual fundamental rights, encompassing all pre-referral proceedings, including those pertaining to the situation in the custodial State, insofar as it is established that the final purpose of these actions is to bring the person before the ICC, as the Defence previously stated.

2.2.2.2 Absence of an explicit request for an arrest

258. Accordingly, the Defence requests the Pre-Trial Chamber to find that consistent with the facts, Laurent Gbagbo’s arrest fell within the scope of article 55 of the Statute governing the Prosecutor’s investigation. Finally, in this respect, the fact that the Prosecutor did not issue a formal request for detention must not be viewed as sufficient grounds to absolve him of his obligations.

¹⁶¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, 14 December 2006, ICC-01/04-01/06-772, para. 42.

¹⁶² Rome Statute, article 15.

¹⁶³ *Idem*, articles 13(a) and 14.

¹⁶⁴ *Idem*, article 13(b).

259. Under article 21(3) of the Statute, the interpretation and application of the Statute must be “consistent with internationally recognised human rights, and be without any adverse distinction”. However, limiting the protection afforded to the suspect would make it possible for a State to request an arrest based on other grounds in order to strip the potential suspect of his fundamental rights as enshrined in the Statute.

260. Moreover, this would engender a fundamental inequality between persons already in custody at the time the Prosecutor initiates proceedings, who would therefore not be afforded statutory protection, and persons at large, thereby obliging the Prosecutor to request a provisional arrest¹⁶⁵ to ensure that the persons are available for the purposes of the investigations. Such inequality is unjustifiable in light of the statutory requirement of protecting rights because of the violation of the non-discrimination principle as set forth in article 21(3). Such an interpretation of the purview of article 55 would *de facto* constitute discrimination based on the detainee status of a person, an interpretation expressly prohibited by article 55, in recognition of a principle which is accepted and reaffirmed in all human rights instruments.

261. Article 14 of the European Convention on Human Rights states that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*”.¹⁶⁶ Article 21(3) of the Statute reaffirms the interpretation and applicability of this non-discrimination principle in similar terms.

1.2 The expeditiousness obligation incumbent on the Prosecutor

262. In light of the foregoing, the Prosecutor’s statutory duty was to “fully [respect] the rights of persons”.¹⁶⁷ In fact, during one of his many visits to Côte d’Ivoire, the Prosecutor himself stated that the persons being prosecuted would be entitled to full respect of their rights.¹⁶⁸ Yet, the Prosecutor must have been aware of the legal vacuum characterising the detention of Laurent Gbagbo during those months.

¹⁶⁵ *Ibid.*, article 92.

¹⁶⁶ Emphasis added.

¹⁶⁷ Rome Statute, article 54(1)(c).

¹⁶⁸ AFP video, “War crimes, Prosecutor to probe I. Coast atrocities”, available at <http://www.youtube.com/watch?v=D0VnkHjFw1M>.

263. Laurent Gbagbo's counsel repeatedly informed the different branches of UNOCI that it was impossible for the President to have contact with his counsel and provided them with details of the general deterioration of his conditions of detention: "[TRANSLATION] without his counsel to advise him, to explain his rights to him and to discuss his defence strategy, he remains in a position of weakness, which worsens daily" (See Annex 34).

264. Local and international press, as well as international governmental and non-governmental organisations, have reported the troubling conditions in which Laurent Gbagbo and other persons arrested at the same time were being held. The list of materials in the Prosecutor's possession shows that his office was privy to this information. In particular, a HRW report, downloaded by the Prosecutor on 6 June 2011, mentioned the killing and torture of former supporters of Laurent Gbagbo.¹⁶⁹ Moreover, an internal ICC press review issued on 11 July 2011 contained reports that the north of the country, where Laurent Gbagbo and some of his supporters were transferred, had "[TRANSLATION] become the Gulag of Côte d'Ivoire".¹⁷⁰ Similarly, a report by Amnesty International from May 2011, also in the possession of the Office of the Prosecutor,¹⁷¹ emphasises the violence inflicted on Laurent Gbagbo's family members at the time of his arrest.¹⁷² Amongst other materials in the possession of the Office of the Prosecutor and specifically concerning Laurent Gbagbo are an article from the newspaper *Le Figaro* dated 18 August 2011, emphasising the "[TRANSLATION] legal vacuum" surrounding his detention,¹⁷³ and a BBC article of the same day referring to criticisms levied by NGOs in regard to his detention.¹⁷⁴

265. Moreover, on 28 October 2011 (see Annex 11) and again on 13 November 2011 (see Annex 12), President Gbagbo's Counsel informed the Court's Prosecutor of the extent to which Laurent Gbagbo's rights had been breached. He never replied. In these letters, the Prosecutor was requested to invite the Ivorian authorities to respect Laurent Gbagbo's rights and to take action. In particular, the counsel explained to the Prosecutor that:

[TRANSLATION] as you are aware, President Laurent Gbagbo was detained without a warrant from 11 April 2011 to 18 August 2011 and his rights have been, to this day, repeatedly breached. On 18

¹⁶⁹ Human Rights Watch, "Côte d'Ivoire: Gbagbo supporter tortured, killed in Abidjan", 2 June 2011, CIV-OTP-0002-0631.

¹⁷⁰ ICC, "Côte d'Ivoire, press release 11 July 2011", CIV-OTP-0003-0824, p. 11.

¹⁷¹ Amnesty International, "They looked at his identity card and shot him dead, six month of post-electoral violence in Côte d'Ivoire", 2011, CIV-OTP-002-0647.

¹⁷² *Ibid.*, 29-30.

¹⁷³ *Le Figaro*, Caroline Bruneau, "Le couple Gbagbo inculpé de crimes économiques", 8 August 2011, CIV-OTP-0003-0761.

¹⁷⁴ *BBC News Africa*, "Ivory Coast conflict: Gbagbos face economic charges", CIV-OTP-0003-0749.

August 2011, he was charged with economic crimes on the basis of allegations by Ivorian authorities. These charges are in no way compliant with the substantive and procedural provisions enshrined in Ivorian law,. As such, President Gbagbo's detention since 11 April 2011 is, in legal terms, arbitrary. Moreover, as you are aware, he is at the mercy of his gaoler, commander Fofié, a warlord whose conduct prior to, during and following the electoral crisis has come under suspicion in some quarters. Commander Fofié makes arbitrary decisions as to who can and cannot visit President Gbagbo, including his counsel, as he does with regard to detention conditions of President Gbagbo, who is prohibited from leaving the house where he is incarcerated. After seven months of living in such conditions, President Gbagbo is in an alarmingly weak mental and physical state. His situation is exacerbated by the fact that he is prohibited from communicating with the outside world;

and asked that he request:

[TRANSLATION] the authorities of Côte d'Ivoire to punish those responsible for these repeated violations of the legal and constitutional instruments of Côte d'Ivoire and violations of provisions of international conventions to which Côte d'Ivoire is party; that President Gbagbo be allowed to pursue all legal avenues available to him to prosecute those responsible for these violations and the ill-treatment that he suffers daily;

Counsel for Mr Gbagbo further requested the Prosecutor to warn "[TRANSLATION] the Ivorian authorities that [he] would hold them responsible for the any deterioration in President Gbagbo's health." They noted that the Prosecutor's "[TRANSLATION] failure to do anything to put an end to this intolerable abuse would be perceived as a deliberate attempt on [his] part to conceal the violations of President Gbagbo's rights and his arbitrary detention".

266. By refusing to perform his duty and to request that Ivorian authorities put an end to the very grave breaches of President Gbagbo's rights, the Prosecutor violated his statutory obligations. This breach is further evidenced by his refusal to take any action, despite being in constant contact with Ivorian authorities, who ceded to him the control of operations leading to President Gbagbo's transfer to the ICC.

267. In so doing, the Prosecutor sent a troubling message to all States and protagonists who claim that international justice turns a blind eye on breaches of the rights of accused persons before they are surrendered to the Court. Such an attitude is manifestly antithetical to the overarching principles of the International Criminal Court, where the rule of law and respect for rights underpin the advancement of the fight against impunity. Such negligence on the part of the Prosecutor negates the positive role that the International Criminal Court can and must play in democratic transitions currently underway in many countries around the world, or, at the very least, prevents his office from contributing to this role in spite of his protestations to the contrary. Therefore, at the very least, the Prosecutor must be consistent in his actions, such

as when he praises the stability of the Supreme Court of Côte d'Ivoire,¹⁷⁵ or when he expresses his hope for a fair trial for Saif Al-Islam Ghadafi in Lybia.¹⁷⁶

2. Infringement of article 59

268. Article 59(2) of the Statute sets forth the procedure for the arrest of a person for the specific purpose of surrendering the person to the Court. It provides that:

A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- a) The warrant applies to that person;
- b) The person has been arrested in accordance with the proper process; and
- c) The person's rights have been respected.¹⁷⁷

The article therefore provides for compliance with national procedure in which the rights of the accused are again given primacy. Yet, neither the procedure provided for in this article nor the rights enshrined therein were respected during the transfer procedure.

3.1 The facts

269. The request for arrest and surrender to the Court¹⁷⁸ was notified to the Ivorian Minister of Justice on 25 November 2011.¹⁷⁹ Barely four days later, on the night of 29 November 2011, showing the alacrity in the execution of the request, Laurent Gbagbo was surrendered to the Court.¹⁸⁰

270. The alacrity with which the Ivorian authorities executed the request is even more striking when it is considered that the formal procedure *stricto sensu* lasted slightly less than

¹⁷⁵ RTI, "Luis Moreno, le procureur de la Cour pénale internationale a rencontré le président de la cour suprême ivoirienne", 15 October 2011, available at <http://news.abidjan.net/v/7835.html>.

¹⁷⁶ CNN, Zain Verjee, "Lybia has great evidence against Gadhafi's son, ICC's prosecutor says", available at http://articles.cnn.com/2012-04-19/africa/world_africa_libya-saif-gadhafi-trial_1_libyan-people-zintan-moammar-gadhafi?s=PM:AFRICA.

¹⁷⁷ Rome Statute, article 59(2)-(5) [emphasis added].

¹⁷⁸ "Demande d'arrestation et de remise de Laurent Koudou Gbagbo", 25 November 2011, ICC-02/11-01/11-2 US-Exp.

¹⁷⁹ "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, ICC-02/11-01/11-12, Annex 1.

¹⁸⁰ *Idem.*, Annex 8.

five hours, from the time of his purported “arrest” at 13.25 on 29 November 2011¹⁸¹ to the departure of the aircraft at 18.21 on the same day.¹⁸²

271. The specific events of that day, 29 November 2011, further illustrate this alacrity. The day began with a hearing before the Investigating Judge to continue questioning begun the previous day, 28 November, in respect of the economic crimes alleged against the President (see Annex 13). The hearing was immediately interrupted and both counsel and the Accused were brought before the Principal State Prosecutor at the Abidjan Court of Appeal, who informed them that he had received a warrant of arrest from the ICC and that the notification procedures would begin “very shortly”.¹⁸³

3.2 Infringement of article 59

3.2.1 *Legality of the arrest*

272. The Defence submits that the analysis of the infringement of article 55(1) applies *mutatis mutandis* to the arrest procedure within the context of the procedure of transfer to the Court. Laurent Gbagbo cannot be stripped of his protection from an arrest that does not comply with the existing legislation on the pretext that he was already in detention at the time of execution of the procedure prescribed by the Court. Hence, once the article 59 procedure is triggered, the person’s arrest, *regardless of when it occurred*, must be considered in light of whether this article has been respected.

273. In this regard, the Chamber should not merely accept the report on the arrest procedure (*Rapport sur la Procédure d’Arrestation*) prepared by the Prosecutor of the Abidjan *Tribunal de Première Instance*,¹⁸⁴ whose artificiality is in no doubt, for two reasons. Firstly, it has been established that Laurent Gbagbo was already in detention as from 11 April 2011.¹⁸⁵ Moreover, on the day of the “arrest”, he was already in the courthouse, which he left only to be escorted to the airport and surrendered to the Court, thus giving the lie to the claim that he was being held in the Korhogo presidential palace. If the Chamber were to confine itself to formal recognition of this report on the arrest procedure, without considering when the arrest effectively occurred, it would render meaningless the role it must play to scrutinise the procedure executed by

¹⁸¹ *Idem.*, Annex 3.

¹⁸² *Idem.*, Annex 7.

¹⁸³ See Annex 13.

¹⁸⁴ “Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo”, 2 December 2011, ICC-02/11-01/11-12, Annex 3.

¹⁸⁵ *Idem.*

domestic courts and, in the case in point, wholly endorse a flagrant abuse of procedure by the Ivorian authorities.

274. In light of the foregoing, the Defence takes the view that the arrest to be taken into account pursuant to article 59 is the one which took place on 11 April 2011. It has already been established that the arrest of Laurent Gbagbo violated a number of Ivorian legal and constitutional provisions.¹⁸⁶ These violations are therefore infringements of article 59(2)(b).

3.2.2 Respect for rights

275. The rights of Laurent Gbagbo were also violated. As the events of 29 November show, the procedure for his surrender to the Court is vitiated by a number of flagrantly illegal acts committed by the Ivorian authorities.

276. Firstly, it is established that his counsel, who were informed that the procedure had been triggered only a few minutes before it started, were unable to mount a defence for their client, especially as their request for adjournment was denied in violation of the Ivorian law governing the detention of persons, which provides for such adjournment.¹⁸⁷ Moreover, counsel were not allowed to make a number of legal submissions challenging the legality of the surrender (see Annex 13).

277. Secondly, the manner in which the procedure was conducted reveals a number of flaws which cast doubt on the impartiality of the judges. Although such a hearing should have been held in closed session,¹⁸⁸ it took place in the presence of armed men, especially members of UNOCI. Moreover, counsel can attest to the presence in the courtroom of commander Fofié, who is in control of the Korhogo region, and who, during the proceedings, inveighed against the judges, demanding that they should accelerate the proceedings. Finally, the deliberations themselves, which were to have been confined to the Indictments Chamber, were openly conducted in the presence of third parties¹⁸⁹ in flagrant violation of the principle of confidentiality of deliberations.¹⁹⁰

¹⁸⁶ *Idem*.

¹⁸⁷ Ivorian Code of Criminal Procedure, article 197.

¹⁸⁸ *Idem*, article 199.

¹⁸⁹ See Annex 13.

¹⁹⁰ Ivorian Code of Criminal Procedure, article 199.

278. Thirdly, the decision of the Indictments Chamber¹⁹¹ infringes the fundamental principle of the reasoning of judicial decisions.¹⁹² The chamber's decision was entirely devoid of reasoning. In this regard, the Defence invites the Chamber, in exercising its power of scrutiny, not to be satisfied with the apparent consideration of the Defence's submissions by the Indictments Chamber: beyond affirming the legality of the procedure, the Indictments Chamber addressed no other specific argument raised by the Defence. A formal statement as to the legality of the procedure delivered in such circumstances cannot satisfy the requirements of real justice, which underpin the protection of the rights of the Accused as affirmed by the Rome Statute.

279. Fourthly, in relying directly, *inter alia*, on article 59(2) of the Rome Statute,¹⁹³ the decision of the Indictments Chamber violates domestic law in Côte d'Ivoire and therefore the obligation set forth in the same article 59(2) to respect the rights of President Gbagbo. Although this observation may initially seem incongruous, it stems from the fact that Côte d'Ivoire has not ratified the Rome Statute. In the event the Chamber were to recognise the validity of the article 12(3) declaration,¹⁹⁴ the Defence recalls that whilst the declaration obliges Côte d'Ivoire to cooperate with the Court within the framework of their bilateral relationship, it does not entail ratification of the Rome Statute and therefore the integration of the Statute in the Ivorian legal arsenal. In this regard, the Defence draws the Chamber's attention to article 87 of the Ivorian Constitution, which provides that "[TRANSLATION] [u]pon publication, legally ratified treaties or agreements shall supersede laws". To ground its decision, the Indictments Chamber therefore invoked a provision of a treaty which has no legal import in the Ivorian legal system. This argument is further buttressed by the fact that the Constitutional Council expressly stated in a decision rendered in 2003 that the Rome Statute was unconstitutional.¹⁹⁵

¹⁹¹ "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, ICC-02/11-01/11-12, Annex 4.

¹⁹² See Court of Cassation, 1st Civil Division, 28 November 2006, Bull. 2006, I, no. 521, appeal no. 04-19.031 (holding that failure to provide reasoning for judicial decisions was a violation of "international public order"); Court of Cassation, Criminal Division, 14 December 2010, appeal no. 10-85.879 (recalling that "all decisions or judgments shall contain the reasons therefore and shall address the mandatory items in the parties' submissions; insufficiency or contradiction in such reasons shall be tantamount to their absence"). See also, at the ECHR *Higgins et al v. France*, application no. 134/1996/753/952, 19 February 1998: "[TRANSLATION] under article 6(1), courts must provide reasons for their decisions" (para. 42).

¹⁹³ "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, ICC-02/11-01/11-12, Annex 4.

¹⁹⁴ *Supra*, paras. 49-89.

¹⁹⁵ See application to the Court of Cassation filed by counsel for President Gbagbo on 9 December 2011, p. 5, (Annex 22).

280. Finally, consistent with the requirements of international law, Ivorian law¹⁹⁶ grants right of appeal, which may be exercised as far as the Supreme Court. Such appeal is suspensive¹⁹⁷ and should have prevented the surrender of Laurent Gbagbo to the ICC. Instead, as the facts show, when the hearing was adjourned after notification of the Indictments Chamber's decision at about 6.00 p.m. (see Annex 13), Laurent Gbagbo was taken directly from the courthouse to the airport, where a waiting aircraft departed at 6:21 p.m.¹⁹⁸ Moreover, counsel were not informed of the actual surrender to the Court as they had been summoned for the following day for a second reading of the decision, and therefore were under the impression that the transfer would not occur in the coming days (See Annex 13).

3.3 The role of the Court

3.3.1 *The scope of judicial oversight*

281. The capacity of the Chambers to scrutinise the legality of the domestic procedure which led to the surrender of a person to the Court is in no doubt when considered in light of previous decisions of the Court.

282. In *Lubanga*, Pre-Trial Chamber I, whilst affirming that the terms of article 59(2) imply that national authorities have primacy of jurisdiction in the interpretation of the application of domestic law, further stated that:

This does not prevent the Chamber from retaining a degree of jurisdiction over how the national authorities interpret and apply national law when such an interpretation and application relates to matters which, like those here, are referred directly back to that national law by the Statute.¹⁹⁹

283. This reasoning was confirmed on appeal in the same case, the Appeals Chamber holding that:

The Court does not sit in the process [...] on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority. Its task is to see that the process envisaged by Congolese law was duly followed and that the rights of the arrestee were properly respected.²⁰⁰

¹⁹⁶ Ivorian Code of Criminal Procedure, article 217.

¹⁹⁷ *Idem.*, article 563.

¹⁹⁸ "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, ICC-02/11-01/11-12, Annex 4.

¹⁹⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, *Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute*, 3 October 2006, ICC-01/04-01/06-512, p. 6.

²⁰⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of 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*, 14 December 2006, ICC-01/04-01/06-772, para. 41.

284. Hence, it is clear that this oversight of the surrender procedure by the Chambers is settled jurisprudence, as its endorsement in subsequent cases attests.²⁰¹

3.3.2 *The factual involvement of the Court*

285. The importance of the Chamber's oversight over the execution of the warrant of arrest, though arising from settled jurisprudence, is justified in fact by the close links between the organs of the Court and Ivorian authorities during the proceedings.

286. Indeed, the surrender procedure reveals links with organs of the Court that raise suspicions of complicity, or at the very least, negligence on their part. As previously stated, the Court, and specifically the Office of the Prosecutor, could not have been unaware of the circumstances surrounding the arrest and detention of Laurent Gbagbo.²⁰²

287. Moreover, the transfer itself could not have been effected without coordination with the organs of the Court. This coordination is required by the Rules of Procedure and Evidence, which provide that:

1. The requested State shall immediately inform the Registrar when the person sought by the Court is available for surrender.
2. The person shall be surrendered to the Court by the date and in the manner agreed upon between the authorities of the requested State and the Registrar.
3. If circumstances prevent the surrender of the person by the date agreed, the authorities of the requested State and the Registrar shall agree upon a new date and manner by which the person shall be surrendered.
4. The Registrar shall maintain contact with the authorities of the host State in relation to the arrangements for the surrender of the person to the Court.²⁰³

288. With the backing of the Pre-Trial Chamber,²⁰⁴ the Registry declined to provide to the Defence the contents of its discussions with the Ivorian authorities. Nonetheless, it must be noted that at the very least, the Registry was statutorily required to keep abreast of the proceedings instituted in Côte d'Ivoire. The Defence, moreover, cannot but highlight the external signs of interaction. For example, as the Chief Public Prosecutor at the Abidjan

²⁰¹ *The Prosecutor v. Jean Pierre Bemba Gombo*, Pre-Trial Chamber III, *Decision on application for interim release*, 20 August 2008, ICC-01/05-01/08-80-Anx, paras. 42 *et seq.*

²⁰² *Ibid.*

²⁰³ Rules of Procedure and Evidence, rule 184.

²⁰⁶ *Idem.*

²⁰⁴ *Decision on the "Requête de la défense aux fins d'obtenir communication par le Greffe de tous les documents concernant l'exécution du mandat d'arrêt contre Laurent Gbagbo"*, 5 April 2012, ICC-02/11-01/11-84-Conf.

Appeals Chamber himself admitted,²⁰⁵ there was a decree signed on 31 October 2011, nearly one month before the actual surrender of President Gbagbo, authorising the Appeals Chamber of Abidjan to sit in Korhogo, which suggests that an initial proceeding for the purposes of effecting a transfer had been planned at that time. This abortive attempt cannot have been arranged by the Ivorian authorities without a concomitant indication from the ICC as to the possible issuance of a warrant of arrest. In any event, the Registry, which was kept informed of the triggering and conduct of the proceedings on 29 November,²⁰⁶ could not have been unaware of the alacrity with which the proceedings had been initiated. The Registry therefore contributed to the impunity with which the Ivorian authorities conducted the proceedings. The Chamber therefore bears responsibility for remedying these infringements.

289. This argument is all the more valid as the Pre-Trial Chamber was directly involved in the proceedings through the application for provisional release which it received from Laurent Gbagbo on 29 November, and on which it ruled expeditiously on the same day.²⁰⁷

290. Finally, as a last submission on this matter, if the Chamber were to decline to recognise the breach of Laurent Gbagbo's rights or consider that it lacks jurisdiction to recognise such breach – which would amount to the same thing – it would thereby endorse the cynicism of the Ivorian authorities and their manipulation of the Rome Statute itself. In fact, a number of the infringements discussed above were linked by invoking article 59 itself. Thus, the refusal to adjourn, like the failure to afford remedies even though they are provided for in Ivorian law, were explained by the purported expeditiousness requirement set forth in article 59,²⁰⁸ discounting the fact that above all else, article 59 requires compliance with domestic law.

291. Similarly, the Prosecutor of the Republic of Côte d'Ivoire, Simplicie Kouadio, publicly stated that the failure to notify the ICC's warrant of arrest to Laurent Gbagbo was justified by the confidentiality imposed by the ICC itself, also adding that such confidentiality was necessary to obviate the risk of abscondment...although Laurent Gbagbo had been in detention since April 2011.²⁰⁹ This is an example of the intention of the Ivorian authorities to absolve themselves of responsibility for ensuring that Laurent Gbagbo's human rights were

²⁰⁵ "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, ICC-02/11-01/11-12, Annex 12.

²⁰⁶ *Idem*.

²⁰⁷ Annexes to "Information to the Chamber and the execution of the request for arrest and surrender of Laurent Koudou Gbagbo", 2 December 2011, ICC-02/11-01/11-12.

²⁰⁸ Annex 22.

²⁰⁹ RTI video, "Le procureur de la République Simplicie Kouadio Koffi réagit après la comparution de Laurent Gbagbo à la CPI", available at <http://news.abidjan.net/v/8212.html>.

respected by transferring the responsibility for the causation of these breaches to the ICC, a situation the Chamber should not accept.

4. Challenge to the jurisdiction of the Court

292. The systematic and blatant breaches of Laurent Gbagbo's rights under Ivorian law, international law and the Statute of the Court requires a response from the Chamber commensurate with the gravity of the infringement and go to the very legitimacy of the ICC's exercise of jurisdiction.

293. This role played by the judges in determining the breaches of individual rights even before surrender to the Court, and the nexus with jurisdiction, was recognised and strongly affirmed in the very first case brought before it, *Lubanga*. Thus in December 2006, in an authoritative decision, the Appeals Chamber stated:

Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety. The Statute itself makes evidence obtained in breach of internationally recognized human rights inadmissible in the circumstances specified by article 69 (7) of the Statute. Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.²¹⁰

294. The Appeals Chamber developed and and elucidated this reasoning, further stating that:

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*⁸⁶, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.²¹¹

295. The Appeals Chamber therefore recognises that the breach of individual rights goes to the Court's very exercise of its jurisdiction and that the objective of fighting against impunity must be weighed against the duty to respect the rights of accused persons. In reaffirming this

²¹⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the Appeal of 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*, 14 December 2006, ICC-01/04-01/06-772, para. 37 [emphasis added].

²¹¹ *Idem*, para. 39 [emphasis added].

principle, the bench endorsed the rationale underpinning the abuse of procedure doctrine, even though it did not accept its application within the framework of statutory procedures.

296. This reasoning was subsequently reaffirmed by the Appeals Chamber itself,²¹² followed by Trial Chambers,²¹³ and can therefore be considered to be settled jurisprudence at the Court.

297. Referring to this principle, subsequent decisions set forth the criteria for its assessment as follows:

The Chamber therefore, in this context, needs to ask the following two questions: **first**, would it be “odious” or “repugnant” to the administration of justice to allow the proceedings to continue, or **second** have the accused’s rights been breached to the extent that a fair trial has been rendered impossible[?] ²¹⁴

298. If the answer to both these questions is in the affirmative, the Pre-Trial Chamber would have no other choice than to decline jurisdiction because it would be impossible to hold a fair trial. The Defence wishes to emphasise that this test was devised and affirmed in a situation factually identical to the one addressed herein, that is, the breach of Thomas Lubanga’s rights before he was surrendered to the Court. As the Appeals Chamber emphasised, “[t]he nature of the allegations was such that, if established, the breaches of the rights of the appellant might have led to an objectively irreparable and incurable situation. Accordingly, the Judgment of 14 December 2006 envisaged that a stay of proceedings imposed on such a basis would be absolute and permanent”.²¹⁵

299. Yet, in the instant case, the facts were much more than just “alleged”: the Defence provided all the information to satisfy the test required by the Appeals Chamber. Hence, where the Chambers found fault with Thomas Lubanga for failing to adduce evidence either of the infringement of article 59(2) or of the nexus with the ICC, or of arbitrary detention in conjunction with the court’s prosecution, or of torture or inhuman or degrading treatment, the Defence for President Gbagbo has herein provided all the information necessary for the Pre-

²¹² *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”*, rendered by Trial Chamber I on 21 October 2008, ICC-01/04-01/06-1486, paras. 77-79.

²¹³ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, *Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”*, 7 March 2011, ICC-01/04-01/06-2690-Red2, paras. 160-169.

²¹⁴ *Idem*, para.166 [emphasis added].

²¹⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, *Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”*, rendered by Trial Chamber I on 21 October 2008, ICC-01/04-01/06-1486, para. 79.

Trial Chamber to accept the challenge to jurisdiction. The Defence recapitulates the salient points hereinafter.

300. **The actuality of the breaches.** The Defence has demonstrated the systematic breach of President Gbagbo's rights from his arbitrary arrest on 11 April 2011 to the torture and other inhuman and degrading treatment he suffered in detention until his illegal and precipitate transfer to the Court on 29 November 2011. These are violations of international law, Ivorian law, and the Rome Statute (articles 55 and 59).

301. **The nexus with the procedure intended to bring the person to trial before the ICC.** The Defence has demonstrated that even before the arrest of Laurent Gbagbo, the future Ivorian authorities had formed the intention to rely on the ICC to try him. Throughout his detention, the public statements of various personalities confirmed this intention: the sole purpose of President Gbagbo's imprisonment was to make him available to the ICC.

302. **Consultation with the Prosecutor and the Registry.** The Prosecutor's numerous visits to Côte d'Ivoire and his meetings with A. Ouatarra and Ivorian authorities illustrate the close collaboration between the Office of the Prosecutor and national authorities. He could not be unaware of the conditions in which Laurent Gbagbo was held, since these were reported in the press, and crucially, the Defence informed him of these conditions directly. As for the Registry, the precipitate transfer to the Court cannot have been effected without close collaboration with Ivorian authorities and without the Registry ignoring conditions in flagrant infringement of article 59(2). Finally, the Defence recalls that regarding torture and other degrading and inhuman treatment, the evidence of consultation with the Court is not necessary in any event because of the particular egregiousness of such conduct.²¹⁶

303. In conclusion, whilst the Court might doubt the impact of each of these violations, considered individually, on the holding of a fair trial, it cannot ignore their cumulative effect. As Judge Blattman has stated:

With regard to concerns of an impact upon the rights of the accused, it is worth noting that while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial.²¹⁷

²¹⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, *Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute*, 3 October 2006, ICC-01/04-01/06-512, p. 10.

²¹⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, *Separate and Dissenting Opinion of Juge Blattmann attached to, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters*, ICC-

304. The foregoing shows that the breach of the individual rights of President Gbagbo, including torture and other inhuman and degrading treatment, with severe repercussions on his physical and mental state, are such as to make a fair trial impossible. It is in a bid to preserve not only individual rights but also the integrity and the very legitimacy of international justice that the Defence prays the Pre-Trial Chamber to recognise the breach of President Gbagbo's rights and make the only possible legal determination in this light: decline jurisdiction and therefore order a permanent stay in the proceedings. Any other finding would be tantamount to the tacit endorsement of the practices that characterised and enabled President Gbagbo's provision to the Court.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

Mindful of article 19(2) of the Rome Statute;

Mindful of articles 12 (3), 21, 55 and 59 of the Rome Statute;

Mindful of rules 44, 45 and 184 of the Rules of Procedure and Evidence;

- to find that the declaration of 18 April 2003 is not relevant to the period covered by the allegations against President Gbagbo, viz., between 16 December 2010 and 12 April 2011;
- to find that the letter from Alassane Ouattara dated 14 December 2010 is limited to confirmation of the statement of 18 April 2003 and cannot broaden the ambit of the ICC's intervention beyond 18 April 2003;
- to find that in any event, Alassane Ouattara was not empowered to make commitments to the ICC on behalf of Côte d'Ivoire in 14 December 2010;
- to find therefore that the letter of 14 December 2010 is of no judicial import and
- to find that the letter from Alassane Ouattara dated 3 May 2011 is not a declaration within the meaning of article 12(3) of the Statute;

01/04-01/06-1131-Anx3, 24 April 2008, para. 10. See also, in this regard, ICTR, *The Prosecutor v. Barayagwiza*, Judgment on Appeal, 3 November 1999, para. 73 and ECHR, *Barbera, Messegue and Jabardo v. Spain*, judgment, application no.10588/83 ("the cumulative effect of a series of procedural shortcomings, which individually may be of minor significance, [but which] may compromise the person's right to a fair trial").

Accordingly,

- to find that the ICC lacks jurisdiction for the period and events referred to in the warrant of arrest issued for Laurent Gbagbo on 23 November 2011 and in the Document Containing the Charges filed by the Prosecutor on 16 May 2012;

In the alternative,

- to find that in the eight-month detention of Laurent Gbagbo prior to his transfer to the Court, he suffered the breach of his rights, torture and other inhuman and degrading treatment;
- to find that these breaches and torture are antithetical to the provisions of article 55 of the Rome Statute;
- to find that the provisions of article 59 of the Rome Statute were infringed during Laurent Gbagbo's transfer to the ICC on 29 November 2011;
- to find that these violations render a fair trial impossible;

Accordingly,

- to entertain the challenge to jurisdiction; and
- to rule that the Court cannot exercise its jurisdiction in such circumstances.

[signed]

Emmanuel Altit
Lead Counsel for Mr Laurent Gbagbo

Done this 29 May 2012

At The Hague, The Netherlands