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

ANNEX 51
PUBLIC DOCUMENT

Memorandum to the President of the ICC and the United Nations High Commissioner for Human Rights from counsel for Alassane Ouattara, 9 March 2011

THE PRESIDENT OF THE INTERNATIONAL CRIMINAL COURT,
THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT,

AND FOR INFORMATION, THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS,

9 March 2011

MEMORANDUM ON THE HUMANITARIAN AND HUMAN RIGHTS SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE FALLING WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

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Introduction

We are honoured to convey to you in our capacity as counsel for the Republic of Côte d'Ivoire, the memorandum hereunder. It recapitulates issues already publicly known, and gives details of the most recent developments which reflect an alarming deterioration in the situation in the Republic of Côte d'Ivoire and reveal crimes falling within the jurisdiction of the International Criminal Court.

This memorandum sets out the facts, the characterisation of the crimes and the grounds upon which we believe the International Criminal Court may and must forthwith assume jurisdiction to investigate known events and prevent any recurrence in future, and builds upon President Alassane Ouattara's letter to the President, the Prosecutor and the Registrar of the International Criminal Court of 14 December 2010, just over two weeks after the proclamation of the results of the presidential elections in Côte d'Ivoire.

The memorandum focuses on the offences committed from 28 November 2010 to the date of the letter and specifically highlights the critical nature of the political and humanitarian situation during the last three months.

We are of the view, in particular, that the International Criminal Court's acceptance of jurisdiction over the current events would force people in future to acknowledge the serious criminal consequences of their actions and deter future violence.

Furthermore, the memorandum reflects the concerns of Ms Fatou Bensouda, the Deputy Prosecutor of the International Criminal Court, who stated on 5 March 2011: "[TRANSLATION] if things continue at this rate, I think that the ICC will act very swiftly, with or without a UN referral."[1]

[1] AFP, 5 March 2011.

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1. Article 12 of the Rome Statute provides:

> Preconditions to the exercise of jurisdiction
>
> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> 2. In the case of article 13, paragraph (a) or (c),[2] the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
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> 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, 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.

[2] Article 13: Exercise of jurisdiction: 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; […]; (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
Article 14: Referral of a situation by a State Party: 1. 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. 2.
Article 15: Prosecutor: 1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. 2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. [Paragraphs 3 to 6 omitted].

2. The Republic of Côte d'Ivoire signed the treaty on 30 November 1998 but has not yet ratified it. The Ivorian Constitutional Council declared that authority to ratify the treaty called for a constitutional review but the authorisation did not materialise due to the crisis that has befallen Côte d'Ivoire. Nonetheless, even though the ratification of the Rome Treaty is still pending, there is no doubt that Côte d'Ivoire's signature already produces legal effects.

3. According to the 23 May 1969 Vienna Convention on the Law of Treaties, the signature of a treaty produces legal effects, even before ratification. Article 18 of the Convention provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; […]

That provision is a manifestation of the principle of good faith which binds the subjects of international law in all legal transactions, particularly before the creation of a contractual bond.[3] Indeed, the Permanent Court of International Justice recognised the existence and legitimacy of an obligation linked to the signature of a treaty in the case of *German Interests in Polish Upper Silesia* in 1926.[4] The judges of the International Court of Justice (ICJ) expressed the same opinion in 1969, in the North Sea Continental Shelf case.[5]

Several judgments in national courts confirm the existence in general international law of the obligations formulated in article 18(a) of the Vienna Convention.[6] It can be inferred therefrom that a State seeking to have its declaration accepted as an expression of its intention not to be bound must, a *contrario* and in good faith, so indicate. As noted by Judge Lachs in the North Sea Continental Shelf case:

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[3] See Yearbook of the International Law Commission, 1962, vol. II, p. 193; and Boisson de Chazournes, L. La Rosa, A.-M., Mbengue, M. M., "Commentary of article 18", in Corten, O. and Klein, P. (dir.), The Vienna Conventions on the Law of Treaties, A Commentary, Oxford University Press, 2011, p. 371.

[4] PCIJ, 1926, Series A, No. 7, p. 30.

[5] ICJ., 1969, Rep., p. 98 for the opinion of Judge Morelli and pp. 219-240 for the opinion of Judge Lachs.

[6] Supreme Court of Poland, *Polish State Treasury v. Von Bismarck, A. D.*, vol. 2 (1923/1924), p. 80; Supreme Court of Poland, *Schrager v. Workmen's Accident Insurance Institute for Moavic and Silesia*, A. D., vol. 4, (1927-1928), p. 399; Supreme Court of Austria, *Termination of Employment (Austria) Case* 156, I.L.R., vol. 23, 1956, pp. 470-471; Netherlands, *X. v. Mayor and Aldermen of Haarlem*, N.Y.I.L., 1978, p. 474.

> States may obviously change their intentions, conduct and policy, but it would seriously undermine the worth of and reliance upon statements made by governments if value-judgments of so important a nature were disregarded or held as not binding upon the governments which made them.[7]

Similarly, the ICJ held in the Anglo-Norwegian Fisheries case that:

> "Language of this kind [State declarations] can only be construed as the considered expression of a legal conception […]."[8]

4. Accordingly as noted in the commentary of article 18 of the Vienna Convention:

> In no case is silence deemed to signal rejection of the treaty in question. Article 18 presumes acceptance of a signed treaty, and that presumption can only be reversed by express evidence of the contrary: the declaration of the intent not to ratify the treaty in question. Accepting silence is tantamount to creating a loophole *ratione temporis*. Indeed, time should not serve as an excuse for a signatory State to impugn the object and purpose of the treaty.[9]

As noted by the ICJ in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case, "the object and purpose of the Convention" is:

> "what is essential to the object of the Convention, otherwise without the purpose 'the Convention itself would be impaired both in its principle and in its application'".[10]

5. With regard to becoming a party to the Statute of the International Criminal Court, this approach is clearly illustrated by the United States of America which, conscious of its obligation had to declare on 6 May 2002 that it did not wish to be bound by the Rome Treaty despite having signed it on

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[7] ICJ, 1969, Rep., p. 136.

[8] ICJ, 1951, Rep., p. 136. On the scope of unilateral declarations, see. ICJ, Judgement, 20 December 1974, *Nuclear Tests Case,* Rep, 1974, p. 267, para. 43 and p. 472, para. 46; See also the Guiding Principles applicable to unilateral declarations of States likely to create legal obligations adopted by the International Law Commission in 2006 and, particularly, guiding principles nos. 1 and 3; See, the Report of the International Law Commission on the work of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006), General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), p. 385.

[9] Boisson de Chazournes, L., La Rosa, A.-M., Mbengue, M. M., *op. cit*., p. 626, furthermore: "[TRANSLATION] Not only is it difficult to elucidate the period from which a signatory State can no longer feel bound by the obligation contained in article 18, experience has also shown that sometimes a signatory State may wait a very long time before ratifying the Treaty."

[10] ICJ, Rep. 1951, p. 27.

3 December 2000.[11] However, if signature of the Rome Treaty were nugatory, such a declaration would have been superfluous. In the instant case, by signing the Rome Treaty, the Republic of Côte d'Ivoire assumed a legal obligation with which it fully intends to comply, and the Treaty has not been ratified because, and only because, of the acute domestic crisis. Any effort to discern an intention on the part of Côte d'Ivoire not to be bound by the Treaty would be in vain.

It is on this basis that the Court may and should consider whether, pursuant to article 12 of the Statute, Côte d'Ivoire's signature should produce its effects at this stage. Furthermore, the Court should consider whether the signature of the Rome Treaty on 30 November 1998 can produce certain legal effects by virtue of article 12 of the Statute and article 18 of the 1969 Vienna Convention on the Law of Treaties.

6. In any event, Côte d'Ivoire's explicit and unambiguous intention was later expressly confirmed by the two declarations accepting the Court's jurisdiction under article 12(3) of the Statute.

b. The declaration of 18 April 2003 accepting the ICC's jurisdiction and the subsequent confirmation letter of 14 December 2010 (art 12(3) of the Statute)

7. On 18 April 2003, the Republic of Côte d'Ivoire declared its acceptance of the Court's jurisdiction pursuant to article 12(3) of the Statute. On 12 February 2005, the Court's Registrar acknowledged receipt of the declaration. Acceptance of jurisdiction was subsequently reaffirmed on 14 December 2010 when the ICC Prosecutor was asked to open an investigation into the events that occurred in Côte d'Ivoire after the proclamation of the presidential election results. The declaration of 18 April 2003 is worded as follows:

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

[11] See the text of the letter at http://www.state.gov/r/pa/prs/ps/2002/9968.htm and the statement of the Defence Secretary on the Rome Statute at http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html.

> This declaration shall be valid for an unspecified period of time and shall enter into effect on being signed.
>
> Done at Abidjan, 18 April 2003.
>
> For the Government of the Republic of Côte d'Ivoire, the *Ministre d'État*, Minister of Foreign Affairs.
>
> [signed]: M.B.

8. What is the scope of the 18 April 2003 declaration and its subsequent reaffirmation on 14 December 2010? The wording leaves no room for doubt that it is operational "from 19 September 2002" and "for an unspecified period." It is indubitably in force at present and enables the Court to determine the conditions for the exercise of its jurisdiction. Concerning the *ratione temporis*, by accepting the ICC's jurisdiction for offences committed after 1 July 2002 (the date on which the Rome Statue entered into force), the abovementioned Ivorian declarations also strictly adhere to the terms of article 11 of the Statute.[12]

9. It must be noted from the outset that, in determining the scope of the declarations, it is for the ICC to define its jurisdiction and the limits imposed on the exercise thereof, on the basis of its interpretation of the provisions of the Statute and in accordance with the *kompetenz kompetenz* [jurisdiction to determine its own jurisdiction] principle, under which the Court is the judge of its own jurisdiction. More precisely, in case of doubt about the jurisdiction of an international court, the principle stipulates that the court should make a determination because it is empowered to do so. This is a general principle of international dispute settlement [13] whose specific conditions of implementation by the ICC are specified in articles 18 and 19 of the Statute. That determination must be made in accordance with the "general rule of interpretation" codified in article 31(1) of the 23 May 1969 Vienna Convention on the Law of Treaties:

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[12] Article 11 – Jurisdiction *ratione temporis*.
1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12(3).

[13] See in this regard, Pellet, A.: "The effects of Palestine's recognition of the International Criminal Court's jurisdiction.", available at http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281927/PelletENGCLEAN1.pdf and the references therein: ICJ., Judgment, 21 March 1953, *Nottebohm (Liechtenstein v Guatemala)*, *Preliminary Objection*, Rep. 1953, p 7, para. 119, or ICTY, Appeals Chamber, Decision of 2 October 1995, IT-94-1-T, *Prosecutor v. Dusko Tadić*, para. 17.

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

10. In this case, the context, as well as the object and purpose of the Statute – and article 12 – are particularly important because the intent is to prosecute and try individuals accused of genocide, crimes against humanity or war crimes. This involves, to quote the terms of the preamble, crimes of such gravity that they "threaten the peace, security and well-being of the world" which, being of concern "to the international community as a whole must not go unpunished" and whose "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[14]

11. More specifically, in the determination of their own jurisdiction, international judges generally adopt a teleological interpretation of the provisions of their constitutive instruments. As noted by the ICTY in its landmark ruling:

> 10. [J]urisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legal power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.
>
> [...]
>
> 11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided) […] Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character",[…] Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.[15]

12. It has been properly noted that the ICJ has faced similar issues in dealing with cases pertaining to *genocide* and *legality of the use of force* in the context of the Yugoslavia crisis.[16] Without delving into the meanderings of the

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[14] See Pellet, A., *op. cit.*, pp. 7 *et seq*.

[15] See Pellet, A: *Ibidem*: Judgement s*upra*., paras. 10-11. For a further illustration see: ICJ, Advisory Opinion of 16 October 1975, *Western Sahara*: "the references to 'any legal question' in the abovementioned provisions of the Charter and Statute are not to be interpreted restrictively" (Rep. 1975, p. 20, para. 18).

[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Provisional Measures*, Order of 8 April 1993, Preliminary

Court's successive opinions in those cases, it can be noted that except in those cases where the applicant itself had in fact disputed the competence of the World Court to make a ruling,[17] in the final analysis the ICJ always ultimately retained its competence. It is clearly apparent that in doing so, despite the legal "difficulties" of which it was aware, the ICJ gave full effect to the provisions governing its jurisdiction – in cases dealing with what is unquestionably the most serious of international crimes: genocide.[18]

13. Moreover, the ICC cannot possibly overstep the mission with which it is charged by the State Parties to the Rome Statute nor substitute its intentions for theirs. Neither is the problem one of "extensive" or "restrictive" interpretation of the Statute.[19] The purpose is only to interpret a provision of its constitutive instrument in its context and within the framework of the specific issue on which the ICC might be called upon to rule for the purpose of determining the scope (and the limits) of its jurisdiction in the circumstances in question.[20] For that purpose, the sensible guideline in the International Law Commission's Report on its final Draft Articles on the Law of Treaties should be borne in mind:

> "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects

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Objections, 11 July 1996, Merits, 26 February 2007; Application for Revision of the Judgment of 11 July 1996 in the Case concerning the *Application for the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment of 3 February 2003. *Legality of Use of Force (Serbia and Montenegro v. Belgium), Provisional Measures*, Order, 2 June 1999, Preliminary Objections, 15 December 2004 (and seven other similar cases): *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections,* Judgment of 18 November 2008. See also, ICTY, Decision of 6 May 2003, *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-PT, Motion Challenging Jurisdiction (Trial Chamber III), all cited by Pellet, A., *passim*.

[17] Despite the lack of notice of discontinuance, (Rep. 2004, pp. 293-295, paras. 31-36), see also the Decision of 28 November 2008, para. 89; for the Preliminary Objections, see pages 327- 328, paras. 127-129: in its ruling on the merits of 2007, in the *Genocide* case (Bosnia Herzegovina), the Court also comments that "No finding was made in those [eight similar] judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time" (Rep 2007, para. 83), cited *ibidem*.

[18] Pellet, A., *op. cit.* pp. 9-11.

[19] On all other points: Pellet. A., *op. cit.*, pp. 9-11 and cited references: De Visscher, C, *Problèmes d'interprétation judiciaire en droit internationalpublic*, Pedone, Paris, 1963, 263 p., or Simon, D., *L'interprétation judiciaire des traités d'organisations internationales – Morphologie des conventions et fonction juridictionnelle*, Paris, Pédone, 1981, XV-936 p., *passim* – in particular pp 319-466.

[20] Pellet, A., *ibidem.*

> and purposes of the treaty demand that the former interpretation should be adopted."[21]

14. As its very title shows, article 12 of the Statute establishes the "[p]reconditions to the exercise of jurisdiction" by the ICC. Participation in the Statute (article 12(1)) or the declaration provided for in article 12(3) are therefore conditional acts without which the Court would be unable to exercise its jurisdiction. It is indeed only if this declaration is made that the Court can fulfil its mission (to which article 12 formally refers, mentioning "the crimes specified in article 5"):[22] the trial of persons accused of the crime of genocide, crimes against humanity or war crimes. This involves, again to quote the terms of the Preamble, crimes of such gravity that they "threaten the peace, security and well-being of the world", which, being "of concern to the international community as a whole, must not go unpunished" and whose "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[23]

15. Under article 12(3), the jurisdiction of the Court is established whenever a State which can claim a territorial title *or* a personal title has agreed to its jurisdiction.[24] As a result, the Court may exercise its jurisdiction for events that took place under the jurisdiction of States which have not ratified the Statute or made the declaration specified in article 12(3), or with regard to nationals of States that are neither parties nor have made a declaration.[25] Hence, the ICC is not compelled in the exercise of its jurisdiction by the requirement of mutual consent, which is essential for the jurisdiction of most international courts (including the ICJ). The option open to the Security Council, acting under Chapter VII of the UN Charter by Article 13(b) of the

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[21] ILC, Yearbook 1966, vol. II, p. 219, para. 6 of the Commentaries under Draft Article 28, *ibidem*.

[22] Article 5(1): "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression."
See also the heading of article 13, which is referenced in article 12(2): "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute …"

[23] Pellet, A., "The effects of Palestine's recognition …," *op. cit.* pp. 9-11.

[24] *Ibidem* and the references cited during the preparatory work on the Rome Statute: see Hans Peter Kaul "Preconditions to the Exercise of Jurisdiction", in Antonio Cassese, Paola Gaeta and John W D Jones (eds), The Rome Statute of the International Criminal Court: A Commentary", Oxford UP 2002, pp. 593-605.

[25] See, in particular, Condorelli (L.), "*La Cour Internationale en débat*", *RGDIP* 1999-1, p. 18.

Statute, to refer to the Prosecutor "a situation in which one or more of such crimes appears to have been committed" confirms this conclusion.[26]

16. In the present case:

- The general interpretation rule set forth in article 31 of the 1969 Vienna Convention should be applied to article 12 of the Rome Statute.

- This provision applies when a State (holding a territorial or personal title) lodges a declaration pursuant to article 12(3), and this undoubtedly applies to Côte d'Ivoire.

- It reflects the intention of the authors of the Rome Statute to deter a State from unilaterally impeding the ICC from exercising its jurisdiction and also confers upon the ICC the broadest possible powers to fight against impunity for the crimes set forth in article 5 – the treaty's primary purpose.

- It may be inferred that one or more of the Contracting Parties cannot prevent the Côte d'Ivoire declarations from producing their effects on Ivorian territory. Were it to deprive them of effect, the Court would be sanctioning the establishment of a zone of impunity in Côte d'Ivoire, which is contrary to the intentions of the authors of the Rome Statute and its very object and purpose, as, in these circumstances, *no* State could grant the Court the power to exercise jurisdiction on Ivorian territory.[27]

17. It ensues that the Court has discretion to determine its jurisdiction under article 12(3) of the Statute and that in this instance, the Republic of Côte d'Ivoire's declaration of 18 April 2003 and its 14 December 2010 confirmation letter fully establish jurisdiction. The ICC's refusal to give effect to the declarations of 2003 and 2010 accepting the Court's jurisdiction would be "profoundly shocking"[28] and would have dire consequences, especially as by its nature, the Statute seeks to safeguard the fundamental interests of the international community. With regard to provisions of such significance, the ICJ observed that:

> In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the

[26] See Pellet, A., *op. cit.* pp. 7 *et seq.*
[27] For an alternative argument: Pellet, A., *ibidem*, pp. 14-15.
[28] *Ibidem.*

> convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[29]

The ICJ continued:

> The object and purpose of the Genocide Convention [in the instant case, the Rome Statute] imply that it was the intention of the General Assembly [in the instant case the Assembly of State Parties] and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.[30]

This analysis is fully applicable in the present case.

18. Additionally, in this case, jurisdiction *ratione temporis* and *ratione personae* may be exercised in conjunction with the principle of complementarity.

I.2. The admissibility of the application in light of the principle of complementarity (art 17 of the Statute)

19. As recalled in Côte d'Ivoire's declaration of 14 December 2010, according to paragraph 10 of the Preamble and article 1 of the Rome Statute, "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Therefore, the Court does not supersede national criminal jurisdictions. It can only intervene in the event that a State neglects to prosecute a case in its national jurisdiction. In this case, the inability of Ivorian judicial system to conduct proceedings fully justifies the intervention of the Court pursuant to article 17 of the Statute.

20. According to article 17 of the Rome Statute on issues of admissibility:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

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[29] Advisory Opinion, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Rep 1951, p 23. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Rep. 1996, p. 611, para. 22, and Judgment of 26 February 2007, para. 161; and the *Advisory Opinion, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons*, Rep. 1996, p. 257. All cited in Pellet. A., "The effects of Palestine's recognition …," *op. cit*. pp. 16-17.

[30] *Rep.* 1951, p. 24; see also *Rep.* 1996, p. 612, para. 22.

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

21. With respect to Côte d'Ivoire, the International Commission of Inquiry clearly highlighted the inability of the Ivorian justice system to fulfil its duties. According to the Commission:

> "[TRANSLATION] At present, the observer will see an enormous discrepancy between the texts concerning the administration of justice and judicial practices. Indeed, the Ivorian constitution of 1 August 2000 dedicates the majority of its fundamental principles to guaranteeing that the justice system operates in a sound and consistent manner.
>
> However, hit hard by events, the Ivorian justice system followed the events of the conflict closely and yet proved itself wanting, thereby highlighting that Côte d'Ivoire desperately lacks a neutral, impartial and independent body, operating sufficiently efficiently to ensure the peaceful resolution of conflicts. Thus, for example, all those who have committed blood crimes, whether putschists, government soldiers, *gendarmes*, policemen or others, have not had criminal proceedings brought against them, or those criminal proceedings that were instituted did not reach term. This has,

inevitably, caused frustration among victims, who are yet to receive justice, while the perpetrators of the crimes enjoy total impunity".

22. The dysfunction of the justice system stems from the manner in which the members of the judiciary were appointed; the appointments were in flagrant violation of the Ivorian constitution, the instrument governing the organisation of the judiciary or the implementing decrees thereof. Thus, appointments were made without names being proposed by the Minister of State, Minister of Justice and Keeper of the Seals, and without the advice of the supreme council of the judiciary. The result is a certain "regimentation" of justice with the judiciary following orders. The Ivorian justice system's inability to carry out its duties, as established following several in-depth and independent inquiries, is more than enough to justify the admissibility of the present application.

23. Furthermore, the amnesty granted under Ivorian law for certain crimes, not only does not impede the admissibility of the application, but justifies it yet further. In this respect, it is worth recalling that an amnesty was granted by order no. 2007-457 of 12 April 2007. Article (4)(d) of the first amnesty law no. 2003-309 of 8 August 2003 stipulated that it did not apply to any offences listed in articles 5 to 8 of the Rome Statute of the International Criminal Court or to set forth in the African Charter on Human and Peoples' Rights. However, order no. 2007-457 of 12 April 2007 granting amnesty does not include any such provisions, implying that it also applies to offences listed in articles 5 to 8 of the Rome Statute of the International Criminal Court and the relevant articles of the African Charter on Human and Peoples' Rights.

Hence it must be recognised that the purpose of that order is, in reality, to allow the perpetrators of the most serious crimes to escape criminal prosecution. In that particular instance the State's decision was therefore intended to shield those persons concerned from their criminal responsibility for crimes falling under the Court's jurisdiction and enumerated in article 5 of the Statute. Such a decision by the State certainly falls within the scope of article 17 of the Court's Statute and thus further justifies the admissibility of the present action.

I.3. The inability to initiate any legal proceedings in respect of the violence in Côte d'Ivoire

24. As detailed below (see point II.1 of the current application establishing the facts), there is no question that the crimes referred to here are framed

principally by the significant unrest and acts of violence that have been taking place in Côte d'Ivoire since the end of the presidential election on 28 November 2010.

It is worth emphatically reiterating that the violence and destabilisation attempts, which are the work of groups which refuse to accept the results of a free and fair election, neither affect the jurisdiction of the Court or the admissibility of the application in any manner, nor have any legal consequences in terms of the relationship between Côte d'Ivoire and the International Criminal Court.

25. At this point, it should be noted that whilst the Court should consider certain legal consequences, specifically the impossibility of giving legal effect, in respect of the unrest in Côte d'Ivoire, the Court is in no way required to rule on the unrest in itself. It should only – and, in fact, can only – consider whether, with regard to article 12 of the Rome Statute, effect may be given to the Ivorian declarations of Côte d'Ivoire. "[TRANSLATION] It is incumbent upon it *only* to rule on whether the conditions for exercising its statutory jurisdiction are fulfilled."[31] This means that the Court performs an essentially judicial task, and it would be futile to seek reasons why it should not do so.

26. "[TRANSLATION] To this end, it is necessary and sufficient for the Court to interpret the provisions of its Statute relating to jurisdiction".[32] It is in light of those provisions that the Court should rule on the admissibility of the declaration made by the Republic of Côte d'Ivoire; for this reason, and for this reasone alone, the Court must determine whether the acts of violence from which Côte d'Ivoire is suffering so acutely affect that State's acceptance of the Court's jurisdiction *within the meaning of article 12(3) of the Statute*.

27. It is a straightforward observation that in international law, the illegal use of force cannot produce legal effects or create a lawful judicial situation. Affirmed in the 1928 Kellogg-Briand Pact and forcefully reaffirmed in the United Nations Charter (article 2(4)), the prohibition of the use of force is one of the cornerstones of international law and a *sine qua non* condition of international peace and security; one of the elements of this system is that no situation, no treaty and no agreement can be recognised if it results from an unlawful use of force.

28. Moreover, it has been clearly established in international law that acts which constitute the use of force, internal unrest or internal rebellion are not

[31] See in this regard, Pellet, A., *op. cit.*, pp. 2-3.
[32] *Ibidem*.

to be taken into consideration and do not, legally-speaking, affect the State's international commitments, even when those violent acts take the most extreme form.[33]

29. According to the principle of State continuity, the State's international legal personality is not affected and the international commitments it undertakes continue to be binding upon it. Here also, it should be noted that the ICJ, in the cases of *genocide* and *legality of the use of force*, which were brought before it in the context of the Yugoslavia crisis,[34] in the end, except except in those cases where the applicant itself had disputed the ICJ's competence to make a ruling,[35] in the final analysis the ICJ always ultimately retained its jurisdiction.[36] It is clearly apparent that in so doing, the ICJ gave full effect to the provisions governing its jurisdiction, even when the situations at stake had developed in the most extreme manner.

30. The situation at the International Criminal Court in regard to Côte d'Ivoire should not be any different. Whilst the current unrest in the country prevents implementation of the ratification of the Court's Statute, this is offset by the declarations of 18 April 2003 and 14 December 2010 made by the Republic of Côte d'Ivoire pursuant to article 12(3) of the Statute. To accept

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[33] In this regard, see Daillier, P., and Pellet, A., "International Public Law", 6th ed., Paris, LGDJ, 1999, p. 414: "[TRANSLATION] 'States survive their Governments', as stated in the London Protocol of 1831 on the occasion of the Belgian crisis of 1830. The former State remains, pursuant to the principle of State continuity, and it continues to be bound by former international commitments". See also CANSACCHI, G., "[TRANSLATION] Identity and Continuity of International Subjects", RCADI, 1970-II, vol. 130, pp. 587-704.

[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*). (*Bosnia and Herzegovina v. Serbia and Montenegro*), Provisional Measures, Order of 8 April 1993, Preliminary Objections, Judgment of 11 July 1996, Merits, Judgment of 26 February 2007; Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment of 3 February 2003. Legality of Use of Force (*Serbia and Montenegro v. Belgium*), Provisional Measures, Order of 2 June 1999, Preliminary Objections, Judgment of 15 December 2004 (and seven other similar cases); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Preliminary Objection, Judgment of 18 November 2008; See in this regard, Pellet, A., "The effects of Palestine's recognition…", *op. cit.*, p. 7 *et seq*.

[35] Although it had not formally given notice of the discontinuance of the proceedings (Rec. 2004, pp. 293-295, paras. 31-36) – see also the ruling dated dated November 28, 2008, para. 89; for the Preliminary Objections, see pages 327- 328, paras. 172-129: in its ruling on the merits of 2007, in the *Genocide* case (Bosnia Herzegovina) , the Court also comments that "No finding was made in those [eight similar] judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant period", (Rec. 2007, para. 83), mentioned by Pellet, A., "The effects of Palestine's recognition…", *ibidem*.

[36] On all of the above, Pellet, A., "The effects of Palestine's recognition…", *ibidem*.

that such unrest would have a bearing on the international commitments of Côte d'Ivoire would not only be contrary to the aforementioned fundamental rules and principles of international law, but would also result in an extremely serious implications for the authority of the ICC and the international criminal justice system as a whole: in fact, it would mean that, as soon as internal unrest arose, or rebellions or acts of violence took place, the International Criminal Court would find itself unable to act and would have to decline jurisdiction or rule that an application was inadmissible.

31. Not only is such a situation unacceptable from a legal perspective, but, further, it would negate the modalities for the Court's exercise of jurisdiction in almost all cases. In effect, it is often during such unrest and violent acts that the most serious crimes falling under the Court's jurisdiction pursuant to article 5 of the Statute are committed.

32. It is therefore not possible to conclude that events such as those that have occurred in Côte d'Ivoire might have any sort of legal consequence on the Court's jurisdiction in the current case. It would also be unthinkable for the Court to send such a signal to persons in Côte d'Ivoire or elsewhere in the world who become perpetrators, in the terms used in the Preamble, of the most serious crimes which "threaten the peace, security, and well-being of the world", and which are of concern to "the international community as a whole, [and] must not go unpunished", and "[the] effective prosecution [of which] must be ensured by taking measures at the national level and by enhancing international cooperation". Any such solution would be gravely worrying for the fight against impunity for the most heinous crimes.

II. THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION *RATIONE MATERIAE*

This submission aims to compile as accurately as possible a list of the murders, all forms of sexual assault, forced disappearances of individuals, inhumane acts, and calls to persecute a national, ethnic or political group, perpetrated on the territory of the Republic of the Côte d'Ivoire since 28 November 2010 (II.1).

Each of those offences is a constitutive element of the definition of a crime against humanity under article 7(1) of the Rome Statute of the International Criminal Court. Each offence falls within the jurisdiction of the Court since it was committed in the context of a widespread or systematic attack against a civilian population (II.2).

For reasons linked to the impossibility of travelling to the Republic of Côte d'Ivoire, the enumeration of human rights violations committed is not exhaustive. This memorandum endeavours to highlight certain dated events which reveal the scale of the current humanitarian crisis, in regard to which the number of victims, perpetrators and accomplices, the location and motives are specified.

II.1. Establishing the offences committed in the territory of the Republic of Côte d'Ivoire

After the election of President Alassane Ouattara by the Ivorian people on 28 November 2010, the former Head of State Laurent Gbagbo and his inner circle perpetrated a wide array of human rights violations in order to retain power by force.

Among the human rights abuses that took place, the most common were murders, rapes, forced disappearances, inhumane acts of all kinds and calls to persecute a national, ethnic or political group.

By way of introduction, it must be stated that we had access to the following documentary sources: the reports published by major humanitarian organisations [37] and by the United Nations [38] and all reports from press agencies.

Furthermore, the present submission reveals that the worst acts of violence were committed following political events such as the announcement of the election results on 2 December 2010, the demonstration of supporters from *Rassemblement des Houphouëtistes pour la Démocratie et la Paix* [Union of Houphouetists for Democracy and Peace] (RHDP) on 16 December 2010, the murders of seven policemen in Abobo on 11 and 12 January 2011, and the peaceful demonstration of unarmed women last 3 March.

Situated in the North of Abidjan, Abobo district, a stronghold of President Alassane Ouattara, was the stage for flagrant human rights violations, contributing to a mass exodus of people.

[37] Among them, Human Rights Watch, Amnesty International, the *Fédération Internationale des Ligues des Droits de L'Homme* and a group of victims whose characteristics will not be revealed.
[38] The UN Human Rights Council, the Office of the High Commissioner of Human Rights, the United Nations Operation in Côte d'Ivoire (UNOCI).

Lastly, the witness statements gathered *in situ* place the responsibility for those violent acts on the "Gbagbo system", meaning the former Head of State and his militias:

- Certain Defence and Security Forces;

- *Alliance des jeunes patriotes pour le sursaut national* [Alliance of Young Patriots for a National Awakening], often called the *Jeunes Patriotes* [Young Patriots], founded and led by Charles Blé Goudé, Minister of Youth, Vocational Training and Employment in the government of the Prime Minister Gilbert Marie N'gbo Aké appointed by Laurent Gbagbo;

- *La Fédération Estudiantine et Scolaire de Côte d'Ivoire* [Pupil and Student Federation of Côte d'Ivoire];

- *Le Centre de commandement des opérations de sécurité* [Centre for the Command of Security Operations], an elite unit of the gendarmerie.

- The Republican Guard, military unit for the personal protection of Laurent Gbagbo.

Furthermore, Ms Navanethem Pillay, United Nations High Commissioner for Human Rights, wrote personally to Laurent Gbagbo and to the commanders of the Republican Guard (Brigadier General Bruno Ble Dogbo), the National Marines (Rear-Admiral Vagba Faussignaux) and the *Centre de commandement des opérations de sécurité* (Chief of the *Gendarmerie*, Georges Guiai Bi Poin), reminding them of their obligations flowing from international human rights law and international humanitarian law.[39]

a) Murders[40]

- On 3 December, a national of a neighbouring country living in Abidjan was burnt to death while inhabitants celebrated the victory of President Alassane Ouattara.

According to researchers from the NGO Human Rights Watch, pro-Gbagbo militias fired on unarmed demonstrators with AK-47s.

[39] Agence France-Presse, Côte d'Ivoire: Intervention by Navi Pillay, 31 December 2010.
[40] Human Rights Watch, Côte d'Ivoire, "Violence Campaign by Security Forces, Militias", 26 January 2011

- On 5 December, at midnight, the Defence and Security Forces used tear gas to force families to leaving their homes and then opened fire. A young man died after he was hit in the lung by a shot fired from a distance of 15 to 20 metres.

- On 9 December, two militants of the *Union Démocratique de Côte d'Ivoire* [Democratic Union of Côte d'Ivoire] were abducted. Their bodies were found at the mortuary in Yopougon, one of the districts of Abidjan, one week later.

- In the morning of 16 December, a march was organised in Abidjan by the supporters of the *Rassemblement des Houphouëtistes pour la Démocratie et la Paix* (RHDP).

The NGO Amnesty International recorded the death of dozens of unarmed demonstrators. Photos were published on the Human Rights Watch website on 4 January 2011.[41]

- In the afternoon of 16 December in Abidjan, a young man died from four bullet wounds to the head. The perpetrators were young people from the *Fédération Estudiantine et Scolaire de Côte d'Ivoire* (FESCI) and a policeman from the *Centre de commandement des opérations de sécurité* (CECOS).

On 16 December 2010 alone, the United Nations High Commissioner for Human Rights estimated that 20 persons were killed by Defence and Security Forces and dozens of others were seriously wounded.[42]

- On 17 December, two mosques in Abobo and Grand-Bassam were attacked by armed individuals, causing the death of one person at Grand-Bassam and wounding many others.[43]

- At 8 p.m. on 17 December, a man who was a militant within the *Rassemblement des Républicains* (RDR) [Assembly of Republicans], was killed by members of the Young Patriots in front of his family. His wife stated that on the same day, she was raped by several Young Patriots.

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[41] Amnesty International, "Côte d'Ivoire Mission Report", 22 February 2011.

[42] Human Rights Watch, Côte d'Ivoire: Speech before the UN Human Rights Council, 23 December 2010.

[43] LIDHO (*Ligue Ivoirienne des Droits de l'Homme*) [Ivorian League for Human Rights], "LIDHO statement on the human rights situation following the march by supporters of the RHDP on RTI", Thursday 16 December 2010, 20 December 2010.

- On 17 December, supporters of the Defence and Security Forces led an operation in Abobo with the aim of tracking down supporters of President Alassane Ouattara. They stormed into several houses. At least 18 people were killed during this operation.[44]

- In the evening of 18 December, a 60-year-old returning officer for the RHDP was kidnapped. His body was found one week later at the mortuary in Yopougon, a district of Abidjan.

- On 10 January, four persons were killed in the Abobo district by the Police and Security Forces.[45]

- At dawn on 11 January, under the pretext of looking for weapons and dismantling roadblocks built up by the local population, the Security Forces fired on the inhabitants of PK 18, a neighbourhood of Abobo. At least seven policemen and six civilians were allegedly killed.[46]

- On 13 January, an Abobo inhabitant described in detail the murder of two young men, attacked with bricks and daggers by Young Patriots who controlled a checkpoint in the area.

In Abobo on 13 January, a total of at least ten persons died, according to *la Ligue Ivoirienne des Droits de l'Homme* [The Ivorian Human Rights League] (LIDHO).[47]

- On 19 January, Bamba Mamadou, a football player nicknamed Solo, was beaten and then shot by the Defence and Security Forces in Banfora Adjamé, a neighbourhood of Abidjan.[48]

- On 19 February in Abidjan, the Ivorian Defence and Security Forces used tear gas grenades and fired live ammunition, causing the deaths of two demonstrators who were calling for former Head of State, Laurent Gbagbo, to vacate power.

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[44] United Nations General Assembly, Report from the High Commissioner for Human Rights on the Human Rights Situation in Côte d'Ivoire, 15 February 2011.
[45] FIDH, *Fédération internationale des ligues des droits de l'homme*, [International Federation of Human Rights Leagues], *Note de situation sur la Côte d'Ivoire*, No. 554, January 2011.
[46] United Nations General Assembly, Report from the High Commissioner for Human Rights on the Human Rights Situation in Côte d'Ivoire, 15 February 2011.

[47] FIDH, *Note de situation sur la Côte d'Ivoire*, No. 554, January 2011.
[48] Amnesty International, "Côte d'Ivoire Mission Report", 22 February 2011.

- On 20 February in the Koumassi neighbourhood, inhabitants reported that soldiers had used machine guns mounted on military vehicles. At least three demonstrators were killed, according to Djaté Traoré, an inhabitant of Koumassi, who stated that he saw the bodies.[49]

Several witnesses also stated that the pro-Gbagbo Defence and Security Forces, in particular those who were part of CECOS, the elite unit of the gendarmerie, fired live bullets and threw fragmentation grenades at the crowd.

- On 20 February in the Treichville neighbourhood, the Reuters News Agency took a witness statement from a town hall employee who had seen three dead and 14 injured persons.

- On 21 February, seven protestors who were calling for Laurent Gbagbo to vacate power were killed in Abidjan.[50]

That same day in Treichville, at around 9 a.m., soldiers from the Republican Guard arrived in a convoy of goods lorries and opened fire on the demonstrators gathered at the intersection of Avenue 16 and Streets 17 and 21. According to one victim: "[TRANSLATION] They arrived and opened fire immediately with live bullets. One young man not far from me was shot in the head; it was as if a part of his face had been ripped off. He was one of at least two people I saw killed with my own eyes".[51]

In the Koumassi neighbourhood, three witnesses stated that the Defence and Security Forces threw at least two grenades using grenade-launchers directly at a crowd of more than 100 demonstrators; killing at least four and injuring several. A number of witnesses also stated that the pro-Gbagbo Defence and Security Forces, in particular those from CECOS, shot live bullets and threw fragmentation grenades at the crowd.

- On 24 February, in the town of Daoukro in central Côte d'Ivoire, two demonstrators acting in defiance of the Defence and Security Forces were killed. A little later in the day, after the intervention of UN soldiers, another three people died, including a woman of around 60 years and a child hit by a bullet as he tried to escape.

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[49] Reuters France, Press Article, 22 February 2011.
[50] The United Nations Information Service, Côte d'Ivoire: "*l'ONUCI déplore les violences des derniers jours*" ["The UNOCI deplores the latest violent acts"], 22 February 2011.
[51] Human Rights Watch, "Côte d'Ivoire: Violence Campaign by Security Forces, Militias", 26 January 2011.

Between 21 February and 24 February, at least 17 persons were killed in Abobo district in Abidjan, following heavy fighting between forces of the former Head of State Laurent Gbagbo and those fighting for the liberation of in the inhabitants of Abobo-Anyama.[52]

- On 28 February, two persons were burnt to death by Laurent Gbagbo's supporters in Yopougon, a neighbourhood of Abidjan.

- **On 3 March, seven unarmed women were killed in Abobo by pro-Gbagbo soldiers, including soldiers from the *Brigade Anti-Émeute* [Anti-Riot Brigade] (BAE), while they were demonstrating peacefully. An eighth woman succumbed to her injuries in hospital.**

- **On 8 March, following a peaceful march by women who supported President Alassane Ouattara, three men and a young woman were killed by the Republican Guard acting under the orders of General Bruno Dogbo Blé in the Treichville neighbourhood of Abidjan.**

b) Rapes[53]

- Numerous rapes are reported to have taken place from 16 December onwards,[54] including the rape of five women by members of the Defence and Security Forces and in one case, by a member of a civilian militia. The victims included a 16-year old girl and a woman who was eight months pregnant.

With every sexual assault, the assailants told their victims to report "their problem" to Alassane Ouattara.

- On 17 December, a 25-year old woman was raped by three soldiers and a civilian while her husband was killed.

- On 19 December, at around 1 a.m., three sisters were raped and one of them abducted. The unidentified attackers told their victims to "report their problem to Alassane".

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[52] Human Rights Watch, "Côte d'Ivoire: Leaders Should Prevent Abuses by Their Forces", 24 February 2011.
[53] Human Rights Watch,: "Côte d'Ivoire: Rampant Criminality, Sexual Violence in West", 22 October 2010.
[54] Human Rights Watch, "Côte d'Ivoire: Violence Campaign by Security Forces, Militias", 26 January 2011.

In the middle of that same night, six men took turns to rape a woman living in Abobo district. Her husband was killed.[55]

- On 24 December, a 44-year-old woman married to an officer was raped in Benongossou, near Abidjan, by three persons dressed in civilian clothes armed with knives and machetes. She told the investigators from the Office of the UN High Commissioner for Human Rights that she was abducted in front of her home and taken into a neighbouring bush where she was sexually assaulted for refusing to support Laurent Gbagbo.[56]

- On 4 January, in Duekoué, 19 women and young girls were raped by armed militiamen who threatened to burn them alive.[57]

- On 15 January, a 30-year-old RHDP soldier was stopped and sexually tortured by soldiers from the Republican Guard who wanted to force him to provide them with the names and addresses of other RHDP members.[58]

In her report dated 15 February 2011, the United Nations High Commissioner for Human Rights identified 23 cases of rape committed after the announcement of the Presidential election results.[59]

c) Enforced disappearances

According to witness evidence, including evidence gathered by members of the United Nations Operation in Côte d'Ivoire (UNOCI), "people have been abducted from their homes, especially at night, by unidentified armed men in military uniform, accompanied by elements from the Defence and Security Forces or militias. […] These people were forcibly taken from their homes and put in illegal detention, being held incommunicado and without trial. Others have been found dead in suspicious circumstances."[60]

[55] Amnesty International, "Côte d'Ivoire Mission Report", 22 February 2011.
[56] United Nations General Assembly, Report by the High Commissioner for Human Rights on the Human Rights Situation in Côte d'Ivoire, 15 February 2011.
[57] United Nations General Assembly, Report by the High Commissioner for Human Rights on the Human Rights Situation in Côte d'Ivoire, 15 February 2011.
[58] United Nations General Assembly, Report by the High Commissioner for Human Rights on the Human Rights Situation in Côte d'Ivoire, 15 February 2011.
[59] United Nations General Assembly, Report by the High Commissioner for Human Rights on the Human Rights Situation in Côte d'Ivoire, 15 February 2011.
[60] FIDH, Ivory Coast: FIDH denounces the stubbornness of Laurent Gbagbo and his close aides, 20 December 2010.

● At dawn on 14 December, an active leader of the *Mouvement des Forces de l'Avenir*, a party in the RHDP coalition, was forced into a grey Mercedes.[61]

● On 16 December, Dao Sago, born in 1971, was arrested at a march organised by the RHDP. According to an Amnesty International report of 22 February 2011, Dao Sago was held with some fifty others at the headquarters of the Republican Guard.[62]

Amnesty International notes that most cases of enforced disappearance occurred during the demonstration of 16 December 2010 organised in Abidjan by RHDP supporters.[63]

● At 6 p.m. on 18 December, a 40-year-old male RHDP reporting officer at an Abobo polling station was abducted. A relative reported the abduction to Human Rights Watch.[64]

● During the evening of 18 December, two members of the civil society group *Alliance pour le Changement* ("APC") were abducted in the neighbourhood of Cocody, Abidjan, by men belonging to the Republican Guard.[65]

● At around 7.30 a.m. on 24 December, an abduction attempt was made by the Republican Guard in Abobo.[66]

● On 9 January, two *Union Démocratique de Côte d'Ivoire* activists were abducted and murdered. Their bodies were found in the Yopougon mortuary a week later.

● On 8 February, at around 10 a.m., armed soldiers entered Houphouët-Boigny hospital in the neighbourhood of Abobo. At least 17 casualties had been taken there after the security forces had opened fire on demonstrators the previous night, resulting in several deaths. A witness at the hospital overheard soldiers saying "You are all rebels. Go on, get in." while forcing several of the injured into the trucks. Many of those casualties were later

[61] Human Rights Watch, "Côte d'Ivoire: Violence Campaign by Security Forces, Militias", 26 January 2011.
[62] Amnesty International, "Côte d'Ivoire Mission Report", 22 February 2011.
[63] Amnesty International, "Côte d'Ivoire Mission Report", 22 February 2011.
[64] Human Rights Watch, "Côte d'Ivoire, Pro-Gbagbo Forces Abducting Opponents", 23 December 2010.
[65] Human Rights Watch, "Côte d'Ivoire, Pro-Gbagbo Forces Abducting Opponents", 23 December 2010.
[66] Human Rights Watch, "Côte d'Ivoire: Violence Campaign by Security Forces, Militias", 26 January 2011.

found dead. The exact number of people abducted and killed as a result of that operation is not yet known.

Between 16 December 2010 and 20 February 2011, more than 831 people were arrested, of whom 57 were detained, and 100 others disappeared.[67]

d) Inhuman acts

● On 28 January, two journalists, Sanogo Aboubakar and Kangbe Yayoro Charles Lopez, were arrested in Abidjan by the Security and Defence Forces.[68] They were beaten. Amnesty International called for their immediate release unless they were charged promptly with a recognizable criminal offence.

e) Persecution on political grounds

● Persecution on political grounds, such as that which resulted in the death of seven women on 3 March 2011 at a peaceful demonstration, was a daily occurrence.

According to Human Rights Watch researchers, the worst violence by the security forces and militias occurred in the Abobo, Port-Bouët, Yopougon, and Koumassi neighborhoods – areas heavily populated by Ouattara supporters.

The pro-Gbagbo militias involved in the atrocities described by Human Rights Watch are the *Fédération Estudiantine et Scolaire de Côte d'Ivoire* (FESCI) and the Young Patriots, founded and currently led by Charles Blé Goudé, Laurent Gbagbo's newly appointed Youth Minister.

An initial analysis of the humanitarian situation as at 7 March 2011 can be provided on the basis of the description of atrocities of all kinds committed in Côte d'Ivoire. Only the investigative means available to the International Criminal Court or Côte d'Ivoire will allow us to assess the scale of the situation.

● The latest analysis published was that of the local United Nations mission, UNOCI, which, along with the Associated Press, calculated that by

[67] RHDP Community health unit, 27 November 2010 to 20 February 2011.
[68] Amnesty International, "Côte d'Ivoire Mission Report", 22 February 2011.

7 March 2011, at least 400 people had been killed since the presidential election results were announced.[69]

According to UNOCI, 50 people were killed in violence between 24 February and 3 March, including 16 in the neighbourhood of Abobo alone.

● According to the United Nations High Commissioner for Human Rights, 392 people died between 3 December 2010 and 9 March 2011, including at least 27 since last week.[70] More than 25 000 refugees, most from the far west of the country, have fled, crossing the border into Liberia.[71]

The High Commissioner for Human Rights notes that between 16 and 21 December 2010 alone, 173 people were killed, 471 arrested and 24 forcibly disappeared. Furthermore, 90 cases of torture and ill-treatment were reported.[72]

● According to the International Federation of Human Rights Leagues (FIDH), 260 people, mainly supporters of Alassane Ouattara, died between 28 November 2010 and 25 January 2011.[73]

● The community health unit of *Rassemblement des Houphouétistes pour la Démocratie et la Paix* (RHDP) recorded 515 dead and 1,191 casualties between 27 November 2010 and 20 February 2011.[74]

Lastly, various sources[75] report the existence of mass graves, including one in N'Dotré, on the outskirts of Abidjan, and one in Issia, close to Daloa, in the centre-west of the country. Pro-Gbagbo forces are, however, denying members of NGOs and the United Nations access to those sites.

According to the United Nations High Commissioner for Human Rights, Ms Navanethem Pillay, [TRANSLATION] "to prevent access to the sites of mass graves and sites containing victims' remains clearly constitutes a

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[69] Associated Press, *"Des maisons de ministres et alliés de Ouattara cibles de pillages"*, 7 March 2011.

[70] Reuters, *"La situation se 'détériore de façon alarmante'"* (United Nations Head of Human Rights), 10 March 2011.

[71] Human Rights Watch, "Côte d'Ivoire, Violence Campaign by Security Forces, Militias", 26 January 2011.

[72] Human Rights Watch, "Pro-Gbagbo Forces Abducting Opponents", 23 December 2010.

[73] FIDH, Situation Note on Côte d'Ivoire, no. 554, January 2011.

[74] RHDP community health unit, 27 November 201 to 9 February 2011.

[75] LIDHO, LIDHO declaration on the human rights situation following the RHDP militants' march on the RTI on Thursday, 16 December 2010, 20 December 2010; FIDH, Situation Note on Côte d'Ivoire, no. 544, January 2011.

violation of international human rights law and international humanitarian law."[76]

II.2. Legal characterisation of crimes against humanity

Some particularly serious crimes have been committed in Côte d'Ivoire since the end of the Presidential election on 28 November 2010.

Far from spontaneous or isolated acts of violence, it will be demonstrated that the commission of those offences falls within the characterisation of crimes against humanity as set out in article 7 of the Rome Statute establishing the International Criminal Court (ICC).

That article defines crimes against humanity and contemplates, by way of the material element of the crime, a whole series of offences which constitute a crime against humanity when committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

The list is as follows:

1. **Murder**: the intentional killing of a person, whether or not the act is premeditated.
2. **Extermination.**
3. **Enslavement**.
4. **Deportation or forcible transfer of population**: this means the expulsion of people from the area in which they are lawfully present, without grounds permitted under national or international law. That crime is clarified in article 7(2)(d) of the Rome Statute. The concept is also defined by the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Krstić* as follows (paras. 520 and 521):

> *520. The Prosecution defines deportation as the "forced displacement of civilians from the area in which they are lawfully present without grounds permitted by international law". The Prosecution submits that it is "not necessary […] for civilians to be forcibly moved across a national border in order for the offence to be established." The Defence defines deportation as the forced removal of a person to another country and emphasises that not all forcible transfers of civilians are criminal offences.*
> *521. Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not*

[76] Agence France-Presse, "*Côte d'Ivoire: intervention de Navi Pillay*", 31 December 2010.

synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.
522. However, this distinction has no bearing on the condemnation of such practices in international humanitarian law. Article 2(g) of the Statute, Articles 49 and 147 of the Geneva Convention concerning the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Article 85(4)(a) of Additional Protocol I, Article 18 of the ILC Draft Code and Article 7(1)(d) of the Statute of the International Criminal Court all condemn deportation or forcible transfer of protected persons. Article 17 of Protocol II likewise condemns the "displacement" of civilians.

5. **Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law**: the concept of imprisonment constituting a crime against humanity was clarified in the judgment of Trial Chamber III of 26 February 2001 in *Kordić & Čerkez* (Case IT-95-14/2 "Lašva Valley"). The term "imprisonment" must be understood to be the arbitrary deprivation of freedom, that is, the deprivation of the freedom of an individual with no guarantee of merits or procedure, and committed as part of a widespread and systematic attack directed against the civilian population:

302: The Trial Chamber concludes that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population.
303. Based on the aforementioned definition, the imprisonment of civilians will be unlawful where:

- *civilians have been detained in contravention of Article 42 of Geneva Convention IV, i.e., they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;*
- *the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where initial detention may have been justified; and*
- *they occur as part of a widespread or systematic attack directed against a civilian population.*

6. **Torture**: the concept of torture is defined by Article 7(2)(e) of the Rome Statute 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".

Circumscribing the concept of torture has been problematic since the original definition was given in the context of the United Nations and, subsequently, the 1984 Torture Convention. The ICTY has defined the concept of torture in various cases:

- *Delalic*, Trial Chamber II, judgment of 16 November 1998 (IT-96-21-A): in that decision, the ICTY considered that the definition of torture was broader than the definition contained in the 1975 United Nations General Assembly Declaration and the 1984 Convention against Torture and endorsed by the 1985 Inter-American Convention. In that case, the ICTY considered that the combination of different definitions was representative of customary international law;
- *Furundzija*, Trial Chamber II, judgment of 16 December 1998 (IT-95-17/1-T): in that decision, the ICTY endorsed the broader definition of torture and considered that torture included certain specific elements when used in the context of an armed conflict. It added:

> *161. The broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.*
> *162. The Trial Chamber considers however that while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that torture:*
> *(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition*
> *(ii) this act or omission must be intentional;*
> *(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;*
> *(iv) it must be linked to an armed conflict;*
> *(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity e.g. as a de facto organ of a State or any other authority-wielding entity.*

It added that torture could consist of humiliating the victim:

163. As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer talking part, in the hostilities from "outrages upon personal dignity". The notion of humiliation is, in any event, close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture.

- *Kunarac et al.* (IT-96-23&23/1) "Foca", Trial Chamber II, judgment of 22 February 2001: in that case, the ICTY adopted the definition contained in *Furundzija*, but considered, in addition:

496. The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.

7. **Sexual violence**: this type of crime is quite complex as it comprises various types of offence and behaviour. The category covers:

   (a) **Rape**: International criminal law provided no precise definition of rape. The jurisprudence of the ICTY and ICTR had to pay particular attention to the legal definition of rape. The ICTR provided a comprehensive definition of rape in *Akayesu*, ICTR Trial Chamber judgment of 2 September 1998:

596. Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.
597. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition

of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
598. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:
(a) as part of a wide spread or systematic attack;
(b) on a civilian population;
(c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

The definition was clarified in *Furundzija* (para. 460):

185. Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:
(i) the sexual penetration, however slight:
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.
186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.

It was developed further in *Kunarac* (para. 460):

In the light of the above considerations, the Trial Chamber understands that the actus reus *of the crime of rape in international law is constituted by: the sexual penetration, however slight, (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding*

circumstances. The mens rea *is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.*

(b) Sexual slavery.
(c) Enforced prostitution.
(d) Forced pregnancy.
(e) Enforced sterilisation.
(f) Any other form of sexual violence of comparable gravity.

The Rome Statue confirmed those offences under Article 7(1)(g).

8. **Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court:**
   Persecution is envisaged against any identifiable croup or collectivity, on political, racial, national, ethnic, cultural, religious, gender or other grounds. It is also referred to by the case law of the ICTY, in particular in the judgment of Trial Chamber II of 14 January 200 in *Kupreškić* (IT-95-16) "Lašva Valley", which considered that the deliberate and systematic murder of Bosnian Muslims could constitute persecution:

629. In light of the conclusions above, the Trial Chamber finds that the "deliberate and systematic killing of Bosnian Muslim civilians" as well as their "organised detention and expulsion from Ahmici" can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.

9. **Enforced disappearance of persons**: means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law.
   That definition was embraced by Article 7(2)(i) of the Rome Statute. The criminalisation of that act preceded the adoption of an International Convention on the issue on 20 December 2006.

10. **The crime of apartheid.**

11. **Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health**: the intention of that open characterisation is to make it possible to charge those having committed acts not covered by the preceding categories but which were committed in pursuit of the same aim, with crimes against humanity.

Covered by Article 6(c) of the London Agreement, that "sweeping" description was reflected in Article 7(1)(k) of the Rome Statute. That aspect was referred to in *Kupreškić* cited above:

> *562. The expression "other inhumane acts" was drawn from Article 6(c) of the London Agreement and Article II(1)(c) of Control Council Law No. 10.*
> *563. There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law. It is thus imperative to establish what is included within this category. The phrase "other inhumane acts" was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition. The importance of maintaining such a category was elucidated by the ICRC when commenting on what would constitute a violation of the obligation to provide "humane treatment" contained in common Article 3 of the Geneva Conventions:*
> *[I]t is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.*
> *564. In interpreting the expression at issue, resort to the* ejusdem generis *rule of interpretation does not prove to be of great assistance. Under this rule, that expression would cover actions similar to those specifically provided for. Admittedly such a rule of interpretation has been relied upon by various courts with regard to Article 6(c) of the London Agreement. Thus, for instance, in the Tarnek case, the District Court of Tel-Aviv held in a decision of 14 December 1951 that the definition of "other inhumane acts" laid down in the Israeli Law on Nazi and Nazi Collaborators (Punishment) of 1950, which reproduced the definition of Article 6(c), was to apply only to such other inhumane acts as resembled in their nature and their gravity those specified in the definition. This interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal.*
> *565. The Statute of the International Criminal Court (ICC) (Article 7(k)) provides greater detail than the ICTY Statute as to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious*

injury to the body or to mental or physical health". However, this provision also fails to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts.
566. Less broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1). Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5. Once the legal parameters for determining the content of the category of "inhumane acts" are identified, resort to the ejusdem generis *rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.*

Article 7(2) goes on to specify: "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

However, while the State or organisational policy criterion required that acts be committed "systematically on behalf of a State engaged in a policy of ideological hegemony",[77] the notion of crime against humanity was

[77] See, in this connection, E. Zoller, *"La définition des crimes contre l'humanité"*, *Journal du droit international*, 3, 1993, p. 549.

subsequently "relaxed somewhat"[78] in international jurisprudence, since the International Criminal Tribunal for the former Yugoslavia abandoned the requirement of a policy.[79]

The initial decisions of the International Criminal Court appear, moreover, to have followed that trend and have been undemanding as regards the contextual element of those crimes.

In that respect, the ICC, in a decision in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* of 15 June 2009, stated that: "The requirement of a State or organizational policy" implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion."[80]

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[78] Bitti, G., "*Chronique de jurisprudence de la Cour pénale internationale*", RSC, 2010, p. 959.
[79] ITCY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 98.
[80] ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009, para. 81.
See also ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 30 September 2008, para. 396.

In the instant case, the murders, rapes, enforced disappearances, inhuman acts and politically motivated persecution described above are expressly provided for by article 7 of the Statute of the International Criminal Court and have, moreover, been committed in support of the former Head of State Laurent Gbagbo by his militias or by groups of people claiming to be his militias, without him ever having attempted to distance himself or, what is more, to dissuade them.

These crimes do not constitute isolated, random acts of individuals but, rather, result from a deliberate attempt to target a civilian population, in that they form part of a "system based on terror"[81] or constitute a link in a consciously pursued policy directed against particular groups of people, the supporters of Alassane Ouattara.

In fact, instead of protecting his fellow citizens, the former Head of State Laurent Gbagbo used the means available to him through the apparatus of State, which apparatus he continued to misappropriate, despite a defeat recognised by the international community, to commit multiple crimes in the context of a widespread attack against civilian populations which he was obliged to protect.

Consequently, the material element of a crime against humanity has undeniably been established.

As regards the mental element of the crime, criminal intent is required but must be linked to the knowledge that the conduct is part of a systematic policy.

The agent must be aware of the link between his conduct and the systematic policy or practice. That position was emphasised in *Tadić*,[82] without any consideration of the actual effects of that attack. Knowledge of the risk by the agent that his act might form part of such an attack is sufficient, irrespective of his knowledge of the details of the attack.[83]

Lastly, jurisprudence does not require that the person pursue a racist or particularly inhuman aim.

In the instant case, there is no doubt that the organised and widespread attack directed by Laurent Gbagbo was planned in full knowledge of the facts

[81] ICTY, *Prosecutor v. Duško Tadić*, IT-94-1, 7 May 1997, para. 653.
[82] Ibid., para. 248.
[83] ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, op. cit., para. 434.

because, willing to do anything to retain the power removed from him via the ballot boxes, the former Head of State was fully aware that his actions and those of his supporters were to cost the lives of many civilians.
Consequently, the elements constituting a crime against humanity have been established.

The commission of those crimes is covered by the provisions of article 7 of the Statute of the International Criminal Court and should enable their prosecution on the basis of crimes against humanity.

Jean-Pierre Mignard
[signed]

Jean-Paul Benoit
[signed]

Counsel of the Republic of Côte d'Ivoire