

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 8 October 2013

PRE-TRIAL CHAMBER I

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

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

Public

**Decision on the Defence Request for Leave to Appeal the Decision Rejecting
the Postponement of the Rule 118(3) Hearing**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Emmanuel Altit

Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States Representatives

Other

Appeals Chamber

REGISTRY

Registrar & Deputy Registrar

Herman von Hebel, Registrar

Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) hereby issues the decision on the “*Demande d’autorisation d’interjeter appel de la « Decision on the « Requête de la défense en report de l’audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance du 26 septembre 2013 (ICC-02/11-01/11-512) » (ICC-02/11-01/11-522)*” submitted by the Defence (the “Application”).¹

I. Procedural History

1. On 11 July 2013, the Chamber issued the “Third decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (the “Decision of 11 July 2013”), deciding that Laurent Gbagbo (“Mr Gbagbo”) should remain in detention.²

2. On 19 July 2013, the Defence appealed the Decision of 11 July 2013.³ The appeal is currently pending before the Appeals Chamber.

3. On 26 September 2013, the Single Judge, acting on behalf of the Chamber,⁴ issued the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence”, deciding that a hearing under rule 118(3) of the Rules of Procedure and Evidence (the “Rules”) would be held on Wednesday, 9 October 2013 before the full Chamber.⁵

4. On 30 September 2013, the Defence filed the “*Requête de la défense en report de l’audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance*”

¹ ICC-02/11-01/11-525.

² Pre-Trial Chamber I, ICC-02/11-01/11-454.

³ ICC-02/11-01/11-459-Conf. A public redacted version is also available, see ICC-02/11-01/11-459-Red.

⁴ Pre-Trial Chamber I, Décision portant désignation d’un juge unique, 16 March 2012, ICC-02/11-01/11-61.

⁵ Pre-Trial Chamber I, ICC-02/11-01/11-512.

du 26 septembre 2013 (ICC-02/11-01/11-512)" (the "Request for Postponement"),⁶ asking the Chamber to postpone the hearing to a date at least one week after the determination by the Appeals Chamber on the appeal of the Defence against the Decision of 11 July 2013, but no later than 11 November 2013.⁷

5. On 2 October 2013, the Prosecutor submitted her response to the Request for Postponement,⁸ submitting that she was not opposed to a "brief adjournment" of the hearing, but that the hearing had to be held on 29 October 2013 at the latest, in order to comply with rule 118(3) of the Rules.⁹

6. On 3 October 2013, the Single Judge issued the "Decision on the Request for Postponement (the "Decision of 3 October 2013"), rejecting the Request for Postponement.¹⁰

7. On 4 October 2013, the Defence filed the Application.

8. On 7 October 2013, the Office of Public Counsel for victims (the "OPCV") filed its "*Réponse du Représentant légal commun des victimes à la «Demande d'autorisation d'interjeter appel de la 'Decision on the 'Requête de la défense en report de l'audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance du 26 septembre 2013 (ICC-02/11-01/11-512)' (ICC-02/11-01/11-522)»*" » déposée par la Défense le 4 octobre 2013" (the "OPCV Response").¹¹

9. The same day, the Prosecutor submitted the "Prosecution's Response to the Defence «Demande d'autorisation d'interjeter appel de la "Decision on the

⁶ Pre-Trial Chamber I, ICC-02/11-01/11-515.

⁷ Request for Postponement, p. 8.

⁸ ICC-02/11-01/11-519.

⁹ *Ibid.*, paras 7-11.

¹⁰ Pre-Trial Chamber I, ICC-02/11-01/11-522.

¹¹ ICC-02/11-01/11-526.

«Requête de la défense en report de l’audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance du 26 septembre 2013 (ICC-02/11-01/11-512)»” (the “Prosecutor’s Response”).¹²

II. Submissions of the parties and participants

A. *The Application by the Defence*

10. As a preliminary matter, the Defence requests that the Application be decided by the full Chamber, in accordance with rule 7 of the Rules, as the Chamber decided with respect to the warrant of arrest and the Decision of 11 July 2013. The Defence also recalls that Mr Gbagbo’s initial appearance took place and the hearing on 9 October 2013 is scheduled to take place before the full Chamber. More generally, the Defence argues that it is for the full Chamber to make the most important decisions and that those related to the liberty of the person are essential questions that need to be decided by the whole Chamber.¹³

11. The Defence requests leave to appeal the Decision of 3 October 2013 on the following issue:

[E]st-il possible à la Chambre préliminaire de se prononcer sur la question du maintien en détention sans savoir quelle est la situation juridique de la personne et s’il y a maintien en détention; ou bien : est-il possible aux parties de discuter d’une question aussi essentielle que celle de la liberté d’un homme sans disposer des éléments permettant une telle discussion ; ou bien encore : les parties peuvent-elles discuter d’un éventuel changement de circonstances et la Chambre préliminaire prendre une décision sur cet éventuel changement de circonstances en ignorant tout des circonstances qui auront été considérées comme pertinentes par la Chambre d’Appel et qui seules pourront dessiner le cadre de la discussion pouvant être tenue devant la Chambre préliminaire ?¹⁴

¹² ICC-02/11-01/11-529.

¹³ Application, paras 11-20.

¹⁴ Application, p. 9.

12. The Defence submits that this issue is essential for the determination of matters at stake as without a ruling by the Appeals on the important question of detention the Chamber cannot review its own decision. In the submissions of the Defence, review of what has not been (definitively) determined is not logically possible.¹⁵

13. The Defence also repeats certain arguments made previously in the Request for Postponement, namely that the findings of the Appeals Chamber will necessarily have an impact on the Chamber's approach to determining whether the conditions for maintaining detention are present, and on the way the parties analyse and present this question, and that to proceed to review in the absence of resolution of the appeal would risk: (i) placing the parties in a "*situation uncomfortable*" as the parties will have to address the issue of review of detention in a different way than foreseen by the Appeals Chamber; (ii) that the discussion takes place on bases other than those determined by the Appeals Chamber; and (iii) that the decision of the Chamber is inconsistent with the judgment of the Appeals Chamber.¹⁶

14. The Defence similarly repeats a previous submission, namely that the review logically depends on the determination of the appeal by the Appeals Chamber, the outcome of which cannot be predicted by the parties.¹⁷

15. The Defence also submits that the possibility of allowing further written submissions in case the Appeals Chamber rules on the appeal before 11 November 2013, referred to in the Decision of 3 October 2013, is not

¹⁵ Application, paras. 27-28.

¹⁶ Application, paras 52-57; see also Request for Postponement, paras 14-19.

¹⁷ Application, paras 60-61; see also Request for Postponement, paras 20-21.

sufficient. Rather, the Defence submits that proceeding in this manner creates the risk that the parties may have to contradict themselves.¹⁸

16. The Defence makes reference to the statement in the Decision of 3 October 2013 that pursuant to rule 118(3) of the Rules the hearing has to be held no later than 29 October 2013, and argues that the Single Judge should have postponed the hearing to the latest possible date, namely 29 October 2013, with the argument that “*dans l’intervalle la Chambre d’Appel se sera peut-être prononcée*”. In other words, the Defence argues that the Single Judge was under an obligation to take all measures to ensure that the decision of the Appeals Chamber is available to the parties and the Judges.¹⁹ The Defence adds that the Single Judge should not have balanced the most fundamental rights of the Defence with the workload of the Court.²⁰

17. However, it is apparent from the Application that the Defence’s principal submission is that the Decision of 3 October 2013 improperly considered the time limits established by rule 118(2) and (3) of the Rules as not subject to any exception. In particular, the Defence submits:

D’ailleurs, rien dans le Statut ne semble empêcher, dans un cas exceptionnel, avec l’accord de l’intéressé, dans le souci de respecter les droits de la défense et une bonne administration de la Justice, que les parties se mettent d’accord sur une prolongation raisonnable du délai et soumettent cet accord au Juge.²¹

18. The Defence also objects to a finding in the Decision of 3 October 2013 that it had explicitly acknowledged that the time limit imposed by rule 118(2) of the Rules cannot be derogated from, pointing out that it had said that this was “*en principe*”, and that this means that exceptions were possible.²²

¹⁸ Application, paras 62-65.

¹⁹ Application, paras 31-35.

²⁰ Application, para. 67.

²¹ Application, para. 37.

²² Application, paras 39-41.

19. The Defence further argues that the Decision of 3 October 2013 is incompatible with the rights of the Defence and the principle of fair trial.²³

20. The Defence argues that the issue proposed for appeal affects the fairness of the proceedings as it relates to the respect of the rights of the Defence, and in particular to its ability to present its arguments effectively.²⁴ In terms of the expeditiousness of the proceedings, the Defence submits that it is not desirable for contradictory jurisprudence to exist on the same question in the same case, thereby requiring additional time-consuming proceedings in order to achieve harmonisation.²⁵

21. Finally, the Defence submits that immediate resolution of the issue on appeal would materially advance the proceedings as it would prevent this Chamber's jurisprudence contradicting that of the Appeals Chamber and serve the good administration of justice.²⁶

B. The Response of the Prosecutor

22. The Prosecutor requests that the Application be rejected.²⁷ According to her, the issue proposed for appeal by the Defence is not clearly formulated.²⁸ Moreover, the Prosecutor submits that the Defence does not identify any particular aspect of the Decision of 3 October 2013 that it wishes to have reviewed, and points out that leave to appeal has been refused before in similar circumstances.²⁹

23. In any event, the Prosecutor submits that the issue does not arise from the Decision of 3 October 2013, as the Single Judge "did not indicate that the

²³ Application, paras 44-50.

²⁴ Application, para. 68.

²⁵ Application, para. 70.

²⁶ Application, paras 75-77.

²⁷ Prosecutor's Response, para. 28.

²⁸ Prosecutor's Response, para. 9.

²⁹ Prosecutor's Response, para. 9.

parties can discuss '*la liberté d'un homme*' in the absence of relevant elements for such a discussion; or that the [Chamber] can rule on the issue of detention without knowing the '*situation juridique*' of Mr Gbagbo or '*en ignorant tout les circonstances qui auront été considérées comme pertinentes par la Chambre d'Appel*'".³⁰ Rather, the Prosecutor points out, the Single Judge held that "although it would be desirable to conduct the review of [Mr Gbagbo's detention] in cognizance of the Appeals Chamber's judgment, the applicable law (...) does not allow for a suspension of the periodic review of detention".³¹

24. The Prosecutor also points out that the Single Judge held that, should the Appeals Chamber rule on the appeal before 11 November 2013, the parties and participants may be accorded an opportunity to make additional submissions.³² Further, the Prosecutor asserts that while the Defence makes submissions regarding the interpretation of rule 118(2) and (3) of the Rules, the issue "makes no mention of this provision".³³ Accordingly, the Prosecutor claims that since the proposed issue does not relate to any of the findings of the Decision of 3 October 2013, it cannot be said to arise out of it.³⁴

25. The Prosecutor also objects to the Defence submission that the issue affects the fair conduct of the proceedings.³⁵ She argues that while the Defence claims that the Decision of 3 October 2013 touches upon the Defence rights, it "does not explain *how* its ability to present its case will be affected by the Decision".³⁶ In her view, "[t]he [a]pplicant cannot speculate in the abstract that the Decision of 3 October 2013 causes a prejudice to the rights of the

³⁰ Prosecutor's Response, para. 10.

³¹ *Ibid.*

³² Prosecutor's Response, para. 11.

³³ Prosecutor's Response, para. 12.

³⁴ Prosecutor's Response, para. 13.

³⁵ Prosecutor's Response, para. 22.

³⁶ Prosecutor's Response, para. 14.

[suspect] in order to invoke that the fairness of the proceedings [is] affected”.³⁷ The Prosecutor further maintains that the impact of the Appeals Chamber’s judgment on the Decision of 3 October 2013, “if any, is unknown”.³⁸ In this context, the Prosecutor argues that the Decision of 3 October 2013 took into consideration any such potential impact by envisaging the possibility of allowing additional submissions. In addition, the Prosecutor submits that the Defence may at any time request the Chamber to review its previous ruling on detention “on the grounds of new and relevant Appeals Chamber’s jurisprudence”.³⁹ It is highlighted that the Decision of 3 October 2013 “does not *preclude* or *prejudice* in any way a future challenge regarding the detention of Mr Gbagbo”.⁴⁰ In relation to the Defence argument that there is a risk of contradictory jurisprudence, the Prosecutor is of the view that this argument is speculative.⁴¹ She further maintains that in the event of “new jurisprudence from the Appeals Chamber” which would impact on a prior decision of the Chamber, “the Chamber may always review that prior ruling *proprio motu* or may do so upon request of the Defence”.⁴²

26. Moreover, the Prosecutor finds it speculative on the part of the Defence to assume that the Appeals Chamber may rule prior to 29 October 2013 and reiterates the possibility of making additional submission.⁴³ Finally, the Prosecutor is of the view that the reference to the workload of the Court in the Decision “was not determinative regarding the substantive findings” and does not have an impact in the fair conduct of the proceedings.⁴⁴

³⁷ Prosecutor’s Response, para. 14.

³⁸ Prosecutor’s Response, para. 16.

³⁹ Prosecutor’s Response, para. 16.

⁴⁰ *Ibid.*

⁴¹ Prosecutor’s Response, para. 18.

⁴² Prosecutor’s Response, para. 18.

⁴³ Prosecutor’s Response, para. 19.

⁴⁴ Prosecutor’s Response, para. 21.

27. The Prosecutor further contends that the issue presented by the Defence does not significantly affect the expeditious conduct of the proceedings.⁴⁵ To this end, she purports (i) that it is unknown whether the judgment of the Appeals Chamber will have any impact on the upcoming decision on detention; (ii) that “if the Appeals Chamber issues a decision in the future that justifies the provisional release of [Mr] Gbagbo, the Defence can immediately make an application for the same or the Chamber may review its decision *proprio motu*”; and (iii) that “triggering *another* appeal at this point will result in extensive delay with no appreciable advantage gained from the exercise”.⁴⁶

28. Lastly, the Prosecutor argues, on a similar basis, that the immediate resolution of the appeal will not materially advance the proceedings. In particular, the Prosecutor states that the purported issue is likely to be rendered moot as the Appeals Chamber will rule on it after the issuance of its judgment on the appeal against the Decision of 11 July 2013.⁴⁷

C. The Response of the OPCV

29. As regards the Defence preliminary question, the OPCV maintains that this matter goes beyond the scope of a request for leave to appeal within the meaning of rule 155 of the Rules and should be dismissed *in limine*.⁴⁸

30. The OPCV submits that the Defence has already presented in the Request for Postponement the same arguments that now form the basis of the Application. According to the OPCV, these arguments were already addressed in the Decision of 3 October 2013 and, accordingly, the Application constitutes no more than an expression of disagreement with the Decision,

⁴⁵ Prosecutor’s Response, para. 24.

⁴⁶ Prosecutor’s Response, para. 24.

⁴⁷ Prosecutor’s Response, para. 26.

⁴⁸ OPCV Response, para. 28.

and does not identify an issue within the meaning of article 82(1)(d) of the Statute.⁴⁹

31. Furthermore, the OCPV argues that because the Defence merely repeats its previous submissions without advancing any additional arguments and without demonstrating the existence of an appealable issue, the Application resembles a request for reconsideration rather than an application for leave to appeal.⁵⁰

32. In this respect, the OPCV recalls that various chambers of the Court have systematically rejected applications for leave to appeal which sought to re-argue decisions already taken. For this reason, the OPCV submits that the Application should be rejected.⁵¹

33. In the event that the Chamber accepts that the Defence has identified an appealable issue, the OPCV argues that the Defence has failed to show how the issue proposed significantly affects the fairness of the proceedings or how immediate resolution of the issue would materially advance the proceedings.⁵²

34. In particular, the OPCV submits that in light of the legal texts, the Chamber is obliged to re-examine its ruling on detention every 120 days, and to hold a hearing for this purpose at least once every year. According to the OPCV, this review can only take place on the legal basis in force at the time. However, the OPCV submits that the Chamber is in no way bound by its prior decisions concerning the review of detention, and may modify its ruling if it is satisfied that changed circumstances so require. Thus, the OPCV submits that the findings of the Appeals Chamber in relation to a previous

⁴⁹ OPCV Response, paras 15-16.

⁵⁰ OPCV Response, para. 17.

⁵¹ OPCV Response, paras 18-19.

⁵² OPCV Response, para. 20.

decision on the review of detention are not determinative for the purpose of a new review decision.⁵³

35. In addition, the OPCV warns that if leave to appeal were granted, the review of the suspect's detention could be delayed indefinitely and at least by several months.⁵⁴

III. The Applicable Law

36. The Chamber notes articles 57(2) and 82(1)(d) of the Rome Statute (the "Statute"), rules 7 and 155 of the Rules and regulation 65 of the Regulations of the Court.

37. Article 82(1)(d) of the Statute states:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

38. The Chamber, mindful of the exceptional character of the remedy of the interlocutory appeal,⁵⁵ recalls that for leave to be granted, the following specific requirements must be met:

(a) the decision must involve an "issue" that would significantly affect (i) *both* the "fair" and "expeditious" conduct of the proceedings; *or* (ii) the outcome of the trial; and

⁵³ OPCV Response, paras 21-23.

⁵⁴ OPCV Response, para. 24.

⁵⁵ See Pre-Trial Chamber I, Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, ICC-02/11-01/11-464, para. 7; Pre-Trial Chamber II, Decision on the Prosecutor's Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), 6 September 2013, ICC-01/09-01/11-912, para. 16.

(b) in the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

39. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An “issue” is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.⁵⁶

40. “Fairness” in the context of article 82(1)(d) of the Statute “is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)”.⁵⁷ According to established jurisprudence, “fairness” is preserved “when a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”.⁵⁸ “Expediency”, an “attribute of a fair trial”,⁵⁹ is closely linked to the concept of proceedings “within a

⁵⁶ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

⁵⁷ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 11.

⁵⁸ Pre-Trial Chamber III, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, para. 14.

⁵⁹ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 11.

reasonable time”, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.⁶⁰

41. According to the jurisprudence of the Appeals Chamber, the “outcome of the trial” is affected “where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon”.⁶¹ In deciding a request under article 82(l)(d) of the Statute, the Pre-Trial Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.⁶²

42. The Chamber recalls that the requirements set out in (a) and (b) above are cumulative. Failure to demonstrate that one of the requirements in (a) or (b) is fulfilled is fatal to an application for leave to appeal and makes it unnecessary for the Chamber to address the remaining requirements under article 82(l)(d) of the Statute.

IV. Conclusions of the Chamber

A. Preliminary Matter

43. The Defence requests that the present decision be issued by the full Chamber. Article 57(2)(a) of the Statute instructs the Chamber to make decisions pursuant to articles 15, 18, 19, 54(2), 61(7) and 72 of the Statute as a full Chamber. This list of decisions is exhaustive. Article 57(2)(b) of the Statute clarifies that all other decisions may be rendered by a Single Judge, acting on behalf of the Chamber, “unless otherwise provided for in the Rules (...) or by

⁶⁰ Pre-Trial Chamber III, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, para. 18.

⁶¹ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 13.

⁶² Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 13.

a majority of the [Chamber]”. That said, it is evident from the wording of the Statute that a decision on the question of interim release of the suspect (article 60 of the Statute) or a request for leave to appeal (article 82(1)(d) of the Statute) must not be made by the full Chamber.

44. However, rule 7(3) of the Rules stipulates that the Chamber *may*, at the request of a party, decide that the functions of the Single Judge be exercised by the full Chamber. It follows from the above that it is *fully* within the Chamber’s discretion to determine that a decision be taken by the full Chamber. Considering the Defence request and the particular circumstances of the request in which it is made, the Chamber agrees to accede to the Defence request.

B. The Issue

45. For the reasons set out below, the Chamber finds that the issue, as presented by the Defence, is not an “appealable issue” within the meaning of article 82(1)(d) of the Statute and furthermore does not fulfil the specific requirements of said provision.

46. The Chamber observes that the Defence, in essence, disagrees with the ruling in the Decision and seeks to achieve its reconsideration. Most of the arguments placed before the Chamber in the Application have been presented before to the Single Judge who has considered them for the purposes of the Decision of 3 October 2013. Yet, it does not suffice to present “a conflict of opinion” over a particular decision⁶³ but, rather, arguments must be advanced which will satisfy the legal requirements of article 82(1)(d) of the Statute.

⁶³ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

47. In this context, the Chamber observes that the “fairness”-prong of the statutory test in article 82(1)(d) of the Statute has been argued by the Defence with a general reference to the rights of the Defence and, in particular, the “*possibilité pour la défense de présenter ses arguments de manière effective ainsi que sur le droit à un process équitable ell-même*”. The Chamber notes the generic nature of this assertion and finds that the Defence argument lacks any detail. For that reason, the Chamber is unable to draw any conclusion with regard to the question whether and how the issue *in this particular case* significantly affects the fair conduct of the proceedings. To remain within the framework of the statutory test of article 82(1)(d) of the Statute: the Chamber remains unconvinced by the sweeping statement of the Defence that by reason of the Decision of 3 October 2013, it is not able to present its arguments and “be appraised of and comment on the observations (...) submitted to the Court that might influence its decision”.

48. To the contrary, it is recalled that the parties have been given the opportunity to provide written submissions in advance of the hearing on 9 October 2013 with a view to presenting their arguments on the upcoming article 60(3) review of Mr Gbagbo’s detention.⁶⁴ Further, in holding said hearing on 9 October 2013, the Defence is given further ample opportunity to present its arguments and material for the purposes of article 60(3). As regards the Defence argument that it would be compelled to do so prior to the judgment of the Appeals Chamber on the Decision of 11 July 2013, the Chamber recalls that the Single Judge, in anticipation of such circumstance, indicated the Chamber’s readiness to receive further submissions “in light of

⁶⁴ It is noted that on 7 October 2013, submissions were made by the Defence (ICC-02/11-01/11-527-Conf with 52 public annexes, 2 confidential annexes, and 19 confidential, *ex parte* annexes) and the Prosecutor (ICC-02/11-01/11-528-Conf with annexes) in preparation of the hearing of 9 October 2013.

the content of the Appeals Chamber's judgment".⁶⁵ The Defence's assertion that the rights of the Defence have been infringed and, in particular, the "*possibilité pour la défense de présenter ses arguments de manière effective*" is therefore without merit.

49. Most importantly, having pondered the possible implications of the Decision on the judicial process, the Chamber is of the view that such misgivings, as advanced by the Defence, are not warranted. Should the Defence consider that this "procedural irregularity" prejudiced the rights of the suspect, it may still advance these arguments on appeal against the Chamber's decision pursuant to article 60(3) of the Statute.

50. In sum, as this Chamber held on a previous occasion, it is incumbent on the party requesting leave to appeal to clearly identify the issue. Shortcomings such as those identified above cannot be remedied by the Chamber.⁶⁶ In the present circumstances, the Chamber is therefore unable to proceed with the assessment of the remaining elements of article 82(1)(d) of the Statute. The request for leave to appeal the Decision must be denied.

⁶⁵ Decision of 3 October 2013, para. 13.

⁶⁶ Pre-Trial Chamber I, Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, ICC-02/11-01/11-464, para. 26.


FOR THESE REASONS, THE CHAMBER, BY MAJORITY,

REJECTS the Application.

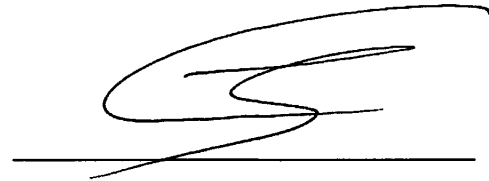
Judge Silvia Fernández de Gurmendi appends a dissenting opinion to this decision.

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

Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Tuesday, 8 October 2013

At The Hague, The Netherlands

Dissenting opinion of Judge Silvia Fernández de Gurmendi

1. I respectfully disagree with the decision of my colleagues to reject the Defence application as I am of the view that the requirements of article 82(1)(d) of the Statute are met, and that leave to appeal should have been granted.

2. I recognise that the Defence has not framed the issue with sufficient clarity and that many of its submissions inappropriately relate to the merits of the prospective appeal rather than to the criteria of article 82(1)(d) of Statute. Nevertheless, I am of the view that an appealable issue can be discerned from the submissions of the Defence, namely whether the Chamber can undertake its periodic review of Mr Gbagbo's detention while the appeal on its previous decision on his detention is still pending.

3. I am of the view that this issue clearly arises from the Decision, which stated:

The Single Judge shares the view that it would be useful for the parties and participants, as well as for the Chamber, to conduct the review of Mr Gbagbo's detention in cognizance of the Appeals Chamber's determination of the appeal against the Decision of 11 July 2013. However, the Single Judge considers that the applicable law does not allow for suspension of the periodic review of detention.¹

The finding that periodic review cannot be suspended pending the appeal was essential for the Decision, and therefore gives rise to an issue within the meaning of article 82(1)(d) of the Statute.

4. I am equally of the view that the issue affects the fair and expeditious conduct of the proceedings, as it compels the parties and participants to present submissions on the review of a Chamber's decision in circumstances where the validity of the findings of that decision is uncertain. In particular, I accept the submission of the Defence that this creates a real risk of additional litigation becoming necessary. This is explicitly recognised in the Decision when it envisages the possibility of additional

¹ Decision, para. 11.

submissions should they become necessary in light of the content of the Appeals Chamber's judgment.² Finally, I am of the view that resolution of the issue by the Appeals Chamber would materially advance the proceedings at hand and would, in addition, provide useful guidance should similar situations occur in this case in the future. I note that a similar issue on the relationship between proceedings on appeal following a decision under article 60(2) of the Statute and the proceedings for the purpose of reviewing that decision before the Pre-Trial Chamber has indeed arisen before in this case.³

5. For the foregoing reasons, I would have granted leave to appeal as requested by the Defence.



Judge Silvia Fernández de Gurmendi

Dated this Tuesday, 8 October 2013

At The Hague, The Netherlands

² *Ibid.*, para. 13.

³ See ICC-02/11-01/11-277 and ICC-02/11-01/11-280, paras 12-13.