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No.: **ICC-02/11-01/11**
Date: **11 September 2013**

THE APPEALS CHAMBER

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

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

Public document

Response to the Observations of the Legal Representative of victims on the Defence appeal against Pre-Trial Chamber I's decision on the "review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute", ordering President Gbagbo's continued detention.

Source: Defence team for President Gbagbo

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Fabricio Guariglia

Counsel for the Defence

Mr Emmanuel Altit
Ms Agathe Bahi Baroan
Ms Natacha Fauveau Ivanovic

Legal Representatives of Victims

Ms Paolina Massidda

REGISTRY

Registrar

Mr Herman Von Hebel

I. Procedural background

1. On 11 July 2013, the Pre-Trial Chamber decided that the conditions for continued detention under article 58(1)(b) had been met, stating that it was “satisfied [...] that the circumstances requiring Mr Gbagbo’s detention have not changed since the previous ruling under article 60(3) of the Statute”,¹ and, therefore, that the continued interim detention of President Gbagbo was necessary.² Regarding conditional release, the Pre-Trial Chamber ruled that “[n]o concrete option to release Mr Gbagbo under conditions that would sufficiently mitigate does risks, is known to the Chamber. Thus, conditional release can at present not be granted”.³

2. The parties were notified of this decision on Friday 12 July 2013.

3. On 19 July 2013, the Defence lodged an appeal against this decision.⁴

4. On 22 July 2013, the Legal Representative of victims filed an “Application to Participate in the Interlocutory Appeal Filed by the Defence against the ‘Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute’ of 12 July 2013”.⁵

5. On 14 August 2013, the Prosecution filed its observations concerning the Legal Representative of victims’ application.⁶

6. On 19 August 2013, the Defence filed a document in support of its appeal, wherein it requested the Appeals Chamber to note the lack of reasoning in the impugned decision and the factual and legal errors committed by the Pre-Trial Chamber. Accordingly, the Defence requested that the Bench:

- In the main: set aside the impugned decision; rule on the matter on the basis of the applicable law, having regard to the evidence which the Pre-Trial Chamber disregarded or assessed superficially; find that the conditions of article 58 have not been satisfied in the present matter and, therefore, order President Gbagbo’s immediate interim release;

¹ ICC-02/11-01/11-454, para. 54.

² ICC-02/11-01/11-454.

³ ICC-02/11-01/11-454, para. 55.

⁴ ICC-02/11-01/11-459-Conf.

⁵ ICC-02/11-01/11-460.

⁶ ICC-02/11-01/11-476, para. 9.

- In the alternative, the Defence requested that the Appeals Chamber remand the issue of the review of President Gbagbo's continued detention to the Pre-Trial Chamber so that it may examine in detail the parties' submissions and issue a decision on the basis of the applicable law.⁷

7. On 21 August 2013, the Defence filed a response to the Legal Representative of victims' application to participate in the appellate proceedings and requested the Appeals Chamber to dismiss this application.⁸ In the alternative, the Defence invited the Appeals Chamber to order the Legal Representative to strictly limit the submissions to the views and concerns of the victims she represents and whose personal interests may be affected by the Chamber's disposal of the matter *sub judice*.⁹

8. On 26 August 2013, the Prosecution filed a response to the Defence document in support of the appeal.¹⁰ In the main, the Prosecution invited the Appeals Chamber to dismiss the Defence appeal,¹¹ and in the alternative, were it to grant one or more of the grounds of appeal, to remand the matter to the Pre-Trial Chamber for a new determination and order that Mr Gbagbo remain in interim detention pending such determination.¹²

9. On 27 August 2013, the Appeals Chamber rendered its *Decision on the application by victims for participation in the appeal*, whereby it granted the 199 victims authorised by the Pre-Trial Chamber to participate in the proceedings the right to participate in this appeal, and to present, by 3 September 2013, their views and concerns on those issues raised on appeal which concern their personal interests.¹³ The parties were authorised to respond to these observations by 11 September 2013.¹⁴

10. On 3 September 2013, the Legal Representative of victims filed the "Observations of the Common Legal Representative on the *Document à l'appui de l'appel de la Défense interjeté à l'encontre de la 'Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute' de la Chambre préliminaire I, décidant du maintien en détention du Président Gbagbo* (ICC-02/11-01/11-454)".¹⁵

⁷ ICC-02/11-01/11-485-Conf.

⁸ ICC-02/11-01/11-488.

⁹ *Ibid.*

¹⁰ ICC-02/11-01/11-490-Conf.

¹¹ *Ibid.*, para. 71.

¹² *Ibid.*, para. 72.

¹³ ICC-02/11-01/11-491.

¹⁴ ICC-02/11-01/11-491.

¹⁵ ICC-02/11-01/11-497-Conf.

II. Discussion.

11. The Defence requests the Appeals Chamber to find that the observations of the Legal Representative of victims fall outside the authorised legal scope and should therefore be dismissed (1). Furthermore, the observations of the Legal Representative are legally unfounded and would, if endorsed, affect the fairness of the proceedings and restrict the fundamental rights of President Gbagbo (2).

1. The observations of the Legal Representative of victims fall outside the scope established by the Statute and the Appeals Chamber in order to restrict the imbalance vis-à-vis a party resulting from the intervention of victims.

12. The observations of the Legal Representative of victims should be dismissed because they fall outside the authorised legal scope. In fact, the observations do not relate to the “personal interests” of the victims (1.1) and are indicative of the Legal Representative’s desire to act as a “second prosecutor (1.2).

1.1 The observations of the Representative do not concern the “personal interests” of the victims.

13. In its submissions regarding the application for the victims’ participation, the Defence was concerned about the potential risks to the balance of the proceedings, and, consequently, to the fairness of the trial, occasioned by victim intervention which exceeds simply the “views and concerns” based on the existence of a “personal interest” of the victims, as prescribed by article 68(3) of the Statute.¹⁶ It follows from the letter and spirit of the Statute, that the Legal Representative of victims’ role is not the presentation of opinions on the applicable law and the interpretation thereof.¹⁷ This role is cast on the parties and the parties alone.

14. In the decision of 27 August 2013 authorising the participation of victims, the Appeals Chamber noted the limited nature of victim participation and unequivocally stated that: “As to the manner of participation, the Appeals Chamber considers that the Victims in the present appeal will be limited to the written presentation of their views and concerns with respect to their personal interests relating to the issues raised in this appeal.”¹⁸

¹⁶ ICC-02/11-01/11-488, para. 72.

¹⁷ ICC-02/11-01/11-488, para. 73.

¹⁸ ICC-02/11-01/11-491, para. 14.

15. However, the Defence notes that at no point in the observations does the Legal Representative present the victims' "views and concerns with respect to their personal interest". At no point are any "personal interests" specified. Nowhere is it explained how the contents of the Legal Representative's observations relate to the presumed "personal interests". The Legal Representative limits her observations to abstract considerations concerning the applicable law, which clearly and greatly exceed the scope authorised, *inter alia*, by the Appeals Chamber and therefore merit dismissal.

1.2 The observations of the Legal Representative only reiterate the Prosecution's observations.

16. It appears that the Legal Representative of victim's real purpose is to bolster the Prosecution by lending support to its arguments. She does so quite overtly when, for example, stating that she "fully supports the arguments submitted by the Prosecution in its response to the Defence Appeal",¹⁹ and on numerous occasions makes express reference to the Prosecution arguments.²⁰

17. The Legal Representative's approach is in keeping with her *modus operandi* in the instant case, which entails acting as a second prosecutor, intervening particularly to support the Prosecution when it encounters difficulty.²¹ In so doing, she disrupts the balance of the proceedings, thereby disadvantaging the Defence and violating the fairness of the proceedings.

18. The Legal Representative's reassurances to the Appeals Chamber of her compliance with the texts and the terms of the decision authorising participation²² cannot conceal one simple observation: since the commencement of the proceedings, the Defence has had to fight on two fronts in every legal discussion.

19. Accordingly, the Defence respectfully requests the Appeals Chamber to disregard the observations of the Legal Representative of victims, as they exceed the legal scope imposed by the Statute and the jurisprudence in that: (1) they have no bearing on any "personal interests" of the victims and (2) they reveal the desire of the Legal Representative of victims to act as second prosecutor in the proceedings.

¹⁹ ICC-02/11-01/11-497-Conf, para. 24.

²⁰ ICC-02/11-01/11-497-Conf, paras. 26 and 27.

²¹ ICC-02/11-01/11-488, paras. 59-61.

²² ICC-02/11-01/11-460, para. 38.

2. Observations on the contents of the Legal Representatives observations.

20. In the unlikely event that the Appeals Chamber considers it appropriate to entertain the observations of the Legal Representative of victims, the Defence requests it to have regard to the following observations on the Legal Representative's arguments regarding the merits of the Defence appeal (2.1) and the issue of the burden of proof (2.2).

2.1 The observations of the Legal Representative regarding the merits of the Defence appeal.

21. The Defence notes that the Legal Representative of victims does not properly respond to any of the Defence arguments but merely invites the Appeals Chamber to dismiss them as devoid of merit.²³

22. The Defence need not reiterate the arguments adduced in support of its appeal, which are legally and factually well-founded. Nonetheless, it should be noted that it is rather the Legal Representative who refuses to support her reasoning with indisputable grounds when, for example, arbitrarily considering the grounds set forth in the Appeals Chamber's Judgment of 26 October 2012 irrelevant to the present discussion on the basis that the decision was rendered pursuant to article 60(2) and not article 60(3) of the Statute. However, how is it reasonably possible to ignore such a pivotal decision in which the majority "strongly emphasize[d] the need for the **Pre-Trial Chamber to provide fuller reasoning in future decisions on the review of Mr Gbagbo's detention, and this above all in relation to the grounds of detention under article 58(1)(b)(ii) and (iii) of the Statute, where the reasoning is not as detailed as it could be**"?²⁴ Equally, why ignore the dissents to this same decision of 26 October 2012, which are particularly illuminating and relevant, especially as the judges were concerned, that in the absence of any reasoning from the Pre-Trial Chamber, "**it will be very difficult, if not impossible, for the detained person to allege that there are changed circumstances and for the Pre-Trial Chamber to determine which circumstances might have changed since the issuance of the Impugned Decision**"?²⁵

23. In the same vein, the Legal Representative acts as if the adjournment decision of 3 June 2013 is of no import to the proceedings concerning interim release and rejects *ab initio* all arguments based on this decision.²⁶ However, this decision is crucial because it defines the

²³ ICC-02/11-01/11-497-Conf, paras. 29 and 32.

²⁴ ICC-02/11-01/11-278-Conf, para. 49.

²⁵ ICC-02/11-01/11-278-Conf, Judge Ušacka's dissenting opinion, para. 33. Emphasis added.

²⁶ ICC-02/11-01/11-497-Conf, para. 36.

Pre-Trial Chamber's position regarding the evidence presented by the Prosecution to support its allegations. The Chamber found that the Prosecution did not present any evidence to substantiate the charges,²⁷ and that the probative value was lacking, leaving the Chamber insufficiently enlightened.²⁸ The Chamber further decided that the Prosecution had not conducted a proper investigation²⁹ or followed a persuasive "line of reasoning".³⁰

24. It is therefore reasonable to submit that this decision could be considered as "changed circumstances" and to canvass the Pre-Trial Chamber's failure to do so in its examination of the factors concerning continued detention under article 58(1). The Legal Representative cannot act as if nothing has happened since the issuance of the arrest warrant, whereas for two weeks between 19 February and 28 February 2013, the Prosecution case was tested for the first time, resulting in the Pre-Trial Chamber clearly voicing its doubts on 3 June 2013 on the quality of the investigation conducted by the Prosecution and the existence of evidence.

25. The Defence observes in this regard that the Legal Representative of victims misrepresents the Defence position when she states that:

The Defence's allegations are based on a clearly wrong interpretation of the said Decision and reveal a mere disagreement with the Chamber's findings contained in both the Decision Adjourning the Confirmation Hearing and the Impugned Decision. In fact, the Defence's request for leave to appeal the Decision Adjourning the Confirmation Hearing was rejected.³¹

26. In fact, contrary to the Legal Representative's assertions, the Defence has never expressed disagreement with the aspect of the adjournment decision concerning the evaluation of the Prosecution evidence.³² The Defence simply took the view that the Pre-Trial Chamber should have acted on its own findings of the insufficiency of Prosecution evidence and dismissed the charges.³³ The Pre-Trial Chamber's rejection of the request for leave to appeal on this point is therefore immaterial to the instant proceedings. In this regard, the Defence notes the Legal Representative of victims' persistent, systematic opposition to Defence applications for leave to appeal, but unwavering support for Prosecution applications for leave to appeal. By way of example, the Defence refers to the observations of the Legal Representative of victims concerning the Prosecution application for leave to appeal against the adjournment decision.³⁴ Furthermore, when the Legal Representative opposes the

²⁷ ICC-02/11-01/11-432, paras. 15 and 17.

²⁸ ICC-02/11-01/11-432, para. 35.

²⁹ ICC-02/11-01/11-432, para. 35.

³⁰ ICC-02/11-01/11-432, para. 17.

³¹ ICC-02/11-01/11-497-Conf, para. 36.

³² ICC-02/11-01/11-439.

³³ ICC-02/11-01/11-439, para. 42.

³⁴ ICC-02/11-01/11-438.

Defence applications for leave to appeal, she systematically refuses to discuss the substantive issues raised by the Defence on the basis that they constitute a “mere disagreement” with the content of the decision.³⁵ This approach is objectionable.

27. It appears that the Legal Representative is more intent on undermining the Defence by systematically contradicting it and systematically supporting the Prosecution, instead of constructively participating in the judicial discussions ensuing from developments in the case and in hearings aimed at establishing the truth, bearing in mind that her participation in these proceedings can only, in any event, be limited and based solely on the existence of a potential violation of the “personal interests” of the victims represented. Permanent destabilisation of the proceedings, disregard for their fairness and a violation of the fundamental rights of the accused *de facto* arise from the fact that the Legal Representative’s intervention was insufficiently circumscribed, and that she is allowed to think that “victims’ participation constitutes an integral part of the concept of fair and impartial proceedings [...]. It follows that the balance of the proceedings before the Court cannot be affected by the participation of victims”³⁶ and to consider that the victims’ presence is automatic and does not require proof at each stage, on the basis of the points at issue, of the existence of personal interests that could be affected. The Legal Representative’s arguments regarding the burden of proof illustrate the consequences that could arise from giving victims too wide a margin of autonomy and casting them as quasi-parties.

2.2 The burden of proof

28. The Legal Representative of victims asserts that: “the burden of proof to establish the existence of “changed circumstances” under article 60(3) of the Rome Statute falls entirely upon the party requesting for review of a Chamber ruling on the release or detention. In the present instance, said burden entirely falls upon the Defence”.³⁷ This assertion is incorrect.

29. Firstly, this assertion is quite simply contrary to the jurisprudence of the Court. Indeed, the Appeals Chamber has previously clearly stated that the Prosecution is duty-bound to provide the Pre-Trial Chamber with information that there has been no change of circumstances. Thus, in *Bemba* it was recognised that:³⁸

³⁵ ICC-02/11-01/11-230, para. 24; ICC-02/11-01/11-298, paras. 22, 24 and 25; ICC-02/11-01/11-330, para. 19; ICC-02/11-01/11-442, paras. 31 and 39.

³⁶ ICC-02/11-01/11-460, para. 40.

³⁷ ICC-02/11-01/11-497-Conf, para. 39.

³⁸ ICC-01/05-01/08-1019, paras. 50-51.

Turning to the context of article 60 (3) of the Statute read with rule 118 (2) of the Rules of Procedure and Evidence, the Appeals Chamber notes that article 60 (2) refers to the “conditions set forth in article 58, paragraph 1”. Under article 58 (1) of the Statute, it is on the basis of the “evidence and other information submitted by the Prosecutor” that the Pre-Trial Chamber will determine whether to issue a warrant of arrest. In respect of periodic reviews of detention under article 60 (3) of the Statute, this indicates that the **Prosecutor must also provide information to enable the Chamber to satisfy itself that continued detention is warranted.**

[...] In this regard, the Appeals Chamber wishes to clarify that while it is correct that **the Prosecutor** does not have to re-establish circumstances that have already been established, he **must show that there has been no change in those circumstances.** [...] Thus, **the Prosecutor must, for each periodic review of detention, make submissions as to whether there has been any change in the circumstances that previously justified detention and he must bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release.**

30. This jurisprudence clearly shows that it behoves the Prosecution to “show” that there has been no change of circumstances and “satisfy” the Chamber that continued detention is warranted.

31. The Defence is surprised that the Legal Representative of victims did not bring this jurisprudence, as clear as it is, to the attention of the Appeals Chamber. Rather than relying on the Court’s jurisprudence, the Legal Representative develops a reasoning that seems to reveal a certain lack of understanding of the nature of the present proceedings and relies on a tenuous source of law.

32. In relation to the nature of the proceedings, the Legal Representative asserts that “[t]he burden of proof for a **request for review of a Chamber** ruling on the release or detention shifts from the Prosecution to the party bringing said request forward”.³⁹

33. Firstly, it must be recalled, contrary to the Legal Representative’s argument, that the present proceedings did not arise from a “request for review” but from the Pre-Trial Chamber’s legal obligation to review the conditions governing continued detention every one hundred and twenty days. This procedure is laid down by article 60(3) of the Statute, which the Legal Representative appears to misunderstand.

34. Above all, the Legal Representative of victims’ arguments misconceive the applicable law on continued detention. It is necessary to recall that liberty is the rule and detention the exception.⁴⁰ It is therefore incumbent on the competent judicial authority to justify the detention of a person and not the accused to prove that he or she should be released. The developments in case law on the notion of “changed of circumstances” cannot be used to

³⁹ ICC-02/11-01/11-497-Conf, para. 40 (emphasis added).

⁴⁰ ICC-01/04-01/07-426, p. 6; ICC-01/05-01/08-475, para. 36.

effect a reversal in the burden of proof, which, moreover, would be contrary to the rights of the Defence because the Statute of the Court guarantees that the accused will “not [...] have imposed on him or her any reversal of the burden of proof”.⁴¹

35. To endorse the Legal Representative’s reasoning would offend the spirit of the procedure governing continued detention and would violate President Gbagbo’s fundamental rights.

36. The Defence further notes that the Legal Representative of victims has not based her position on any actual legal arguments: she merely makes general, unsubstantiated assertions, such as the contention that the reversal of the burden of proof is “consistent with the universally-accepted principle of fairness in criminal proceedings”.⁴² In substantiation of this assertion, the Legal Representative of victims fails to draw on the Statute, the jurisprudence of the Court or even international jurisprudence relating to human rights, let alone State practice. The reason for this is simple: there is no legal basis. In fact, her assertions are contrary to the general legal principles accepted and applied by democratic States and are particularly contrary to the principles governing continued detention. In other words, to endorse the Legal Representative’s position would result in the denial of the fundamental rights of all accused persons.

37. No doubt mindful of the weakness of her arguments, the Legal Representative attempts to apply article 21 of the Statute on the applicable law, by asserting that the principle of reversal of the burden of proof is “relevant in the present instance since article 21 of the Rome Statute allows the Court to apply general principles of law derived from national and international law”.⁴³ It is not clear what the Legal Representative is seeking to demonstrate here. In fact, according to article 21, the bench shall apply “in the first place”, the Statute;⁴⁴ only where appropriate may the bench apply “in the second place” the principles and rules of international law;⁴⁵ and “failing that”, the “general principles of law derived by the Court from national laws of legal systems of the world”.⁴⁶ At no time has the Legal Representative of victims established that (1) recourse to the secondary sources of law is necessary and (2) the principle she has invoked is actually a general principle of law.

⁴¹ Article 67(1)(i), Rome Statute.

⁴² ICC-02/11-01/11-497-Conf, para. 41.

⁴³ ICC-02/11-01/11-497-Conf, para. 42.

⁴⁴ Article 21(1)(a), Rome Statute.

⁴⁵ Article 21(1)(b), Rome Statute.

⁴⁶ Article 21(1)(c), Rome Statute.

38. Above all, the Legal Representative of victims' disregards article 21(3) of the Statute which reads: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights".⁴⁷ However, as mentioned above, the competent international human rights institutions have upheld the primacy of the protection of persons against arbitrary detention and draw on the inviolable principle that detention is the exception and liberty is the rule.⁴⁸ This necessarily implies that the burden of proof is on the authority seeking to keep a person in detention.

3. Conclusion

39. The opportunity for victims to voice their views in an international judicial forum is one of the major achievements of the Rome Statute, allowing them to present their "views and concerns" relating to their "personal interests".

40. Victim participation, however, is not unfettered. It neither casts victims as "parties" in the proceedings nor as a second prosecutor. Victim participation should be in a manner that is "not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."⁴⁹

41. However, the practice followed to date by the Legal Representative of victims, which is explicitly based on an assumption – "victims' participation constitutes an integral part of the concept of fair and impartial proceedings [...]. It follows that the balance of the proceedings before the Court cannot be affected by the participation of victims" –⁵⁰ effectively upsets the balance of the proceedings, limits the rights of the Defence and breaches the fairness of the proceedings. In other words, the delicate balance between the Prosecution and the Defence is imperilled by the victims' avowed desire to carve an important and permanent status for themselves in the proceedings: the status of party or quasi-party. Here, the Legal Representative appears to conceive her role as one of informing the Bench of the applicable law, and systematically supporting and even correcting the Prosecution's legal arguments.

⁴⁷ Article 21(3), Rome Statute.

⁴⁸ European Court of Human Rights, *Al-Jedda v. United Kingdom*, Application No. 27021/08, 7 July 2008, para. 99, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105613>. Inter-American Commission of Human Rights, *Lysias Fleury and his family v. Republic of Haiti*, Case No. 12. 549, 5 August 2009, para. 42, available at: <http://www.cidh.oas.org/demandas/12.459%20Lysias%20Fleury%20Haiti%205ago09%20ENG.pdf>, ECtHR, *Ilijkov v. Bulgaria*, Application no 33977/96, 26 July 2001, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=00159613>.

⁴⁹ Article 68(3), Rome Statute.

⁵⁰ ICC-02/11-01/11-460, para. 40.

42. Most striking is the fact that this approach is taken at the expense of the victims, who are never present in the Legal Representative's observations. Consequently, it is impossible to ascertain the nature of their personal interests, if any.

43. Finally, the Legal Representative of victims' practice is *de facto* akin to the permanent intervention of amicus curiae vested with an automatic right to participation in all the legal discussions, to the detriment of the victims, whose voices may no longer be heard.

44. To afford the Legal Representative a status not bestowed by the Statute or the jurisprudence would jeopardise the entire fabric of the proceedings and affect its intrinsic balance by weakening the Defence vis-à-vis the Prosecution, thereby undermining the interests of the victims themselves.

45. For these reasons, the observations of the Legal Representatives of victims should be rejected.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 11 September 2013 at The Hague, The Netherlands