



Original: English

No.: ICC-02/11-01/11
Date: 3 September 2013

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public redacted version

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)”

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Mr Emmanuel Altit
Ms Agathe Bahi Baroan
Ms Natacha Fauveau Ivanovic

Legal Representatives of the Victims

Ms Paolina Massidda
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Mr Herman Von Hebel
Mr Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 23 November 2011, Pre-Trial Chamber III (the “Chamber”) issued an arrest warrant for Mr Laurent Gbagbo,¹ who was surrendered to the Court on 30 November 2011. During the first appearance of Mr Gbagbo, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

2. On 4 June 2012, the Single Judge of the Chamber (the “Single Judge”) issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”³ by which she granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings.⁴ Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims (the “OPCV”) as the common legal representative of all the victims admitted to participate in the proceedings (the “Common Legal Representative”).⁵

3. On 13 July 2012, the Single Judge issued the “Decision on the ‘*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (the “Decision on Interim Release of 13 July 2012”), in which the request for interim release advanced by the Defence was rejected.⁶

¹ See the “Warrant Of Arrest For Laurent Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 23 November 2011.

² See the transcripts of the hearing of 5 December 2011, No. ICC-02/11-01/11-T-1-ENG, p. 8.

³ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012.

⁴ *Idem*, p. 25.

⁵ *Ibid.*, p. 26.

⁶ See the “Decision on the ‘*Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-180-Red, 16 July 2012 (the “Decision on Interim Release of 13 July 2012”).

4. On 23 July 2012, the Defence filed an appeal against the Decision on Interim Release of 13 July 2012.⁷

5. On 3 August 2012, the Single Judge decided that the “*commencement of the confirmation of charges hearing is postponed until the issue of Mr Gbagbo’s fitness to take part in the proceedings against him is resolved*”.⁸

6. On 19 October 2012, the Single Judge issued the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence”,⁹ in which she convened a hearing on 30 October 2012 to receive observations from the Prosecutor, the OPCV and the Defence on the issue of continued detention or release of Mr Gbagbo.

7. On 26 October 2012, the Appeals Chamber issued the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (the “Judgment of 26 October 2012”),¹⁰ dismissing the appeal of the Defence and confirming the Decision on Interim Release of 13 July 2012.

8. On 30 October 2012, a hearing on Mr Gbagbo’s detention was held and the victims were allowed to make observations on the issue at stake.¹¹

⁷ See the “Defence appeal against Pre-Trial Chamber I’s decision denying the interim release of President Gbagbo”, No. ICC-02/11-01/11-193-Conf OA, 23 July 2012.

⁸ See the “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-201, 3 August 2012 (dated 2 August 2012), p. 8.

⁹ See the “Order scheduling a hearing pursuant to rule 118(3) of the Rules of Procedure and Evidence” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-270, 19 October 2012.

¹⁰ See the “Public redacted version - Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled ‘Decision on the *Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo*’” (Appeals Chamber), No. ICC-02/11-01/11-278-Red OA, 26 October 2012 (the “Judgment of 26 October 2012”).

¹¹ See the transcript of the hearing of 30 October 2012, No. ICC-02/11-01/11-T-9-ENG ET, pp. 12-19.

9. On 2 November 2012, Pre-Trial Chamber I (the “Chamber”) issued the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court”, finding that Mr Gbagbo was fit to take part in the proceedings before the Court.¹²

10. On 12 November 2012, the Single Judge issued the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (the “First Decision on the review of Mr Gbagbo’s detention”), deciding that Mr Gbagbo shall remain in detention.¹³

11. On 18 January 2013, the Single Judge issued the “Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment”, rejecting Mr Gbagbo’s request for conditional release.¹⁴

12. On 6 February 2013, the Single Judge issued the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”¹⁵ by which she granted to other 60 victims the right to participate at the confirmation of charges hearing and in related proceedings.¹⁶

13. From 19 until 28 February 2013, the Chamber held the confirmation of charges hearing in the present case.¹⁷

¹² See the “Public redacted version - Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” (Pre-Trial Chamber I), No. ICC-02/11-01/11-286-Red, 2 November 2012.

¹³ See the “Decision on the review of Laurent Gbagbo’s detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-291, 12 November 2012 (the “First Decision on the review of Mr Gbagbo’s detention”).

¹⁴ See the “Public redacted version of Decision on the request for the conditional release of Laurent Gbagbo and on his medical treatment” (Pre-Trial Chamber, Single Judge), No. ICC-02/11-01/11-362-Red, 18 January 2013.

¹⁵ See the “Corrigendum to the Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 8 February 2013.

¹⁶ *Idem*, pp. 22-23.

¹⁷ See the transcripts of the hearings of 19 February 2013, No. ICC-02/11-01/11-T-14-ENG; 20 February 2013, No. ICC-02/11-01/11-T-15-Red-ENG; 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG; 22 February 2013, No. ICC-02/11-01/11-T-17-Red-ENG; 25 February 2013, No. ICC-02/11-01/11-T-18-Red-

14. On 12 March 2013, the Single Judge issued the “Second decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute” (the “Second Decision on the review of Mr Gbagbo’s detention”), deciding that Mr Gbagbo shall remain in detention.¹⁸

15. On 3 June 2013, the Chamber issued a “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Decision Adjourning the Confirmation Hearing”),¹⁹ wherein it decided by majority, with Judge Fernández de Gurmendi dissenting,²⁰ to adjourn the confirmation of charges hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.²¹

16. On 12 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 “Impugned Decision”), deciding that Mr Gbagbo shall remain in detention.²²

17. On 19 July 2013, the Defence submitted an “Acte d’appel [...] relatif à 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”.²³

ENG; 26 February 2013, No. ICC-02/11-01/11-T-19-Red-ENG; 27 February 2013, No. ICC-02/11-01/11-T-20-Red-ENG; and 28 February 2013, No. ICC-02/11-01/11-T-21-ENG.

¹⁸ See the “Public redacted version of the Second decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-417-Red, 12 March 2013.

¹⁹ See the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013 (the “Decision Adjourning the Confirmation Hearing”).

²⁰ See the “Corrigendum - Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute - Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013.

²¹ See the Decision Adjourning the Confirmation Hearing, *supra* note 19, p. 22.

²² See the “Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-454, 12 July 2013 (the “Impugned Decision”).

²³ See the “Acte d’appel de la Défense relatif à 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”, No. ICC-02/11-01/11-459-Red OA4, 19 July 2013.

18. On 23 July 2013, the Common Legal Representative submitted 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”.²⁴

19. On 19 August 2013, the Defence submitted a “Document à l’appui de l’appel [...] 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)” (the “Defence Appeal”).²⁵ On 22 August 2013, the Defence submitted a public redacted version of its Appeal.²⁶

20. On 26 August 2013, the Prosecution submitted a response to the Defence Appeal (the “Prosecution’s Response”).²⁷

21. On 27 August 2013, the Appeals Chamber authorised the 199 victims authorised to participate in the proceedings by Pre-Trial Chamber I to present their

²⁴ See the “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”, No. ICC-02/11-01/11-460 OA4, 23 July 2013 (dated 22 July 2013).

²⁵ See 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)”, No. ICC-02/11-01/11-485-Conf OA4, 19 August 2013 (the “Defence Appeal”).

²⁶ See a public redacted version of 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)”, No. ICC-02/11-01/11-485-Red OA4, 22 August 2013.

²⁷ See the “Prosecution’s response to the Defence’s “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)”, No. ICC-02/11-01/11-490-Conf OA4, 26 August 2013 (the “Prosecution’s Response”).

views and concerns on the issues raised in the Defence's Appeal, by 3 September 2013 at 16:00.²⁸

22. Consequently, the Common Legal Representative presents the following observations on the issues raised in the Defence Appeal.

23. The present observations are filed on a confidential basis following the classification given by the Defence to its Appeal. A public redacted version of the observations is filed simultaneously.

II. OBSERVATIONS BY THE COMMON LEGAL REPRESENTATIVE

24. The Common Legal Representative fully supports the arguments submitted by the Prosecution in its Response to the Defence Appeal.²⁹ Accordingly, she endorses said arguments and will not repeat them.

25. In addition, the Common Legal Representative submits the following observations.

- 1) General observations with regard to all ten grounds of appeal raised by the Defence

26. As a preliminary matter, the Common Legal Representative wishes to underline that the current jurisprudence of the Court, as indicated by the Prosecution in its Response,³⁰ provides for a clear difference between the standard of proof with regard to decisions under article 60(2) and the ones pursuant to article 60(3) of the Rome Statute. In particular, according to said jurisprudence which has

²⁸ See the "Decision on the application by victims for participation in the appeal" (with Separate Opinion of Judge Sang-Hyun Song) (Appeals Chamber), No. ICC-02/11-01/11-491 OA4, 27 August 2013, p. 3.

²⁹ See the Prosecution's Response, *supra* note 27.

³⁰ *Idem*, paras. 18-21.

been established by the Appeals Chamber, while a decision under article 60(2) of the Rome Statute requires the determination *de novo* of the conditions of article 58(1), a decision under article 60(3) of the Rome Statute requires only a review of a prior decision on detention and does not necessitate the re-evaluation of the conditions of article 58(1).³¹

27. Indeed, the only obligation binding upon the Pre-Trial Chamber under article 60(3) of the Rome Statute is to determine whether or not “changed circumstances” occurred since the issuance of a prior decision on the detention of the person concerned that have a bearing on the conditions under article 58(1) of the Rome Statute. In other words, should the Chamber determine that no such changed circumstances occurred, the conditions under article 58(1) of the Rome Statute should be deemed met without any need to be determined *de novo*. This interpretation is in line with the Appeals Chamber’s jurisprudence referred to in the Prosecution’s Response and reiterated in the Impugned Decision.³²

28. The Appeals Chamber also clarified that “*the scope of the review carried out in reaching a decision under article 60(3) is potentially much more limited than that to be carried out in reaching a decision under article 60(2) of the Statute.*”³³

29. The Common Legal Representative contends that the Defence Appeal is thoroughly based on a wrong conception of the standard of proof under article 60(3) of the Rome Statute and is supported by the jurisprudence of the Court which is not relevant to the present instance. The said misconception deprives of any merit and any legal basis the Defence’s allegations as to the Pre-Trial Chamber’s omission to determine *de novo*, in the Impugned Decision, the conditions under article 58(1) of the Rome Statute, as well as its line of reasoning regarding the obligation to motivate decisions.

³¹ *Ibid.*, para. 18.

³² See the Impugned Decision, *supra* note 22, paras. 29-31.

³³ See the Judgment of 26 October 2012, *supra* note 10, para. 24.

30. In particular, in attempting to demonstrate that the Impugned Decision lacks of reasoning and that the Chamber should have made a *de novo* determination with respect to the conditions under article 58(1) of the Rome Statute, the Defence refers to the Appeals Chamber's Judgment of 26 October 2012 and the Decision on Interim Release of 13 July 2012.³⁴

31. However, both the Appeals Chamber's Judgment of 26 October 2012 and the Decision on Interim Release of 13 July 2012 were rendered in accordance with article 60(2) of the Rome Statute which provides for completely different conditions to be met from the ones needed for the assessment under article 60(3). The same applies to the dissenting opinions of Judges Ušacka and Kourula quoted by the Defence³⁵ and appended to the Judgment of 26 October 2012.

32. Consequently, said decisions, as well as both dissenting opinions, are not relevant to support the Defence Appeal and thus the Defence's corresponding submissions should be dismissed for being unfounded and without merit.

33. In this regard, the Common Legal Representative observes that, while having been criticised for a certain deficiency in reasoning, the Decision on Interim Release of 13 July 2012 was nevertheless upheld by the Appeals Chamber and now constitutes a valid legal basis for the Chamber to rely on.

34. Second, the Common Legal Representative contends that the Defence failed to fulfil the only requirement under article 60(3) of the Rome Statute, and in particular it failed to demonstrate the existence of "changed circumstances".

35. The Appeals Chamber has defined "changed circumstances" under article 60(3) of the Rome Statute as "*new circumstances that have a bearing on the conditions*

³⁴ See the Defence Appeal, *supra* note 25, paras. 15-16, 19, 20, 27, 40-41, 90, 92 and 97-98.

³⁵ *Idem*, paras. 17-18.

under article 58(1) of the Statute".³⁶ The Appeals Chamber has further clarified that the notion of "changed circumstances" within the meaning of article 60(3) of the Rome Statute "entails a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary"³⁷ and "[i]f there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention".³⁸

36. The Common Legal Representative submits that, contrary to the Defence's allegations,³⁹ the Decision Adjourning the Confirmation Hearing does not constitute a "changed circumstance" within the meaning of article 60(3) of the Rome Statute as it has no bearing on the conditions under article 58(1). 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.⁴⁰

³⁶ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1019 OA 4, 19 November 2010, para. 52.

³⁷ See the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'" (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 60.

³⁸ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'" (Appeals Chamber), No. ICC-01/05-01/08-2151-Red OA 10, 5 March 2012, para. 1.

³⁹ See the Defence Appeal, *supra* note 25, paras. 20-33.

⁴⁰ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges - Dissenting opinion of Judge Silvia Fernández de Gurmendi", No. ICC-02/11-01/11-464-Anx, 31 July 2013.

37. In the same vein, contrary to the Defence's allegations,⁴¹ the Group of Experts Final Report does not either constitute a "changed circumstance" within the meaning of article 60(3) of the Rome Statute due to a lack of any bearing on the conditions under article 58(1). In fact, as correctly pointed out by the Chamber, *"the existence of new or additional evidence for the same facts does not, as such, constitute a changed circumstance, insofar as it does not establish previously unknown facts that could amount to changed circumstances"*.⁴²

38. Finally, the Defence's allegations that [REDACTED]⁴³ are purely speculative as they are not supported, at least in the Common Legal Representative's knowledge,⁴⁴ by any evidence. Indeed, said allegations reveal a mere disagreement of the Defence with previous findings by the Single Judge contained in her First Decision on the review of Mr Gbagbo's detention dated 12 November 2012,⁴⁵ and therefore should be dismissed in light of the Appeals Chamber's jurisprudence, according to which *"[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention"* and does not have to *"entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions"*.⁴⁶ In this regard, the Defence did not appeal either the First or the Second Decision on the review of Mr Gbagbo's detention.

⁴¹ See the Defence Appeal, *supra* note 25, paras. 44-56.

⁴² See the Impugned Decision, *supra* note 22, para. 40.

⁴³ *Idem*, para. 89.

⁴⁴ The Common Legal Representative has to date no access to the confidential documents related to the health conditions of the suspect and she relies upon the Prosecution's arguments. See the Prosecution's Response, *supra* note 27, paras. 59-63.

⁴⁵ See the First Decision on the review of Mr Gbagbo's detention, *supra* note 13, para. 52.

⁴⁶ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'", *supra* note 36, para. 53.

2) Observations with regard to certain specific issues raised by the Defence

39. The Common Legal Representative contends that contrary to the Defence's allegations,⁴⁷ 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.

40. Indeed, in the procedure related to the issuance of a warrant of arrest or summons to appear, it is the Prosecution who carries the initial burden of providing the Chamber with sufficient information and evidence to establish that the conditions under article 58 of the Rome Statute are met. After the issuance of a warrant of arrest or a summons to appear, however, the 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.

41. Placing the burden of proof on the party requesting for review of a Chamber ruling on the release or detention, after the Prosecution has satisfied its initial burden of proof that the conditions under article 58(1) of the Rome Statute are met, is consistent with the universally-accepted principle of fairness in criminal proceedings. Furthermore, placing the burden of proof on the party requesting for review of a Chamber ruling on the release or detention is supported by the widely-accepted legal principle that the party raising a motion before a court should provide the proof upon which his/her motion is based.

42. This principle, also known as *actori incumbit probatio*,⁴⁸ 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. Therefore,

⁴⁷ See the Defence Appeal, *supra* note 25, paras. 10-11.

⁴⁸ See TRAYNER (J.), *Latin Phrases and Maxims*, Harvard University, 1861, p. 15.

according to this principle, it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute.⁴⁹ Said principle has been upheld before international courts such as the Iran-United States Claims Tribunal, the European Court of Justice, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia.⁵⁰

43. Consequently, the Common Legal Representative submits that it is therefore not only appropriate but indeed necessary for the Chamber to require the Defence to present proof that the criterion of “changed circumstances” under article 60(3) of the Rome Statute has been fulfilled in order for the latter to hold that the ruling on Mr Gbagbo’s detention should be reviewed.

44. As far as the Defence alleges the lack of reasoning in the Impugned Decision, although providing irrelevant legal basis in support,⁵¹ the Common Legal Representative agrees that the need to have reasoned judicial decisions is an important requirement of a fair trial which is generally supported by the international human rights jurisprudence. However, said requirement is not absolute and is subject to limitations. In particular, in accordance with the jurisprudence developed by the European Court of Human Rights (the “ECHR”), courts and tribunals are not obliged to give a detailed answer to each argument raised and the reasoning should be based on objective arguments only and should sufficiently address only essential issues of the case.⁵²

⁴⁹ See KAZAZI (M.), *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals*, Kluwer Law International, 1996, pp. 221 and 222.

⁵⁰ *Idem.* See also KOKOTT (J.), *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, Kluwer Law International, 1998, p. 149.

⁵¹ See *supra* paras. 29-33.

⁵² See ECHR, *Taxquet v. Belgium*, Application No. 926/05, 16 November 2010, paras. 90-91; *Boldea v. Romania*, Application No. 19997/02, 15 February 2007, para. 30; *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, para. 29; *Van de Hurk v. the Netherlands*, Application No. 16034/90, 19 April 1994, para. 61; *Hadjianastassiou v. Greece*, Application No. 12945/87, 16 December 1992, para. 33.

45. The Common Legal Representative contends that insofar, as submitted *supra*,⁵³ the Chamber was not required to determine the conditions under article 58(1) of the Rome Statute *de novo*, but only the existence of “changed circumstances” under article 60(3) of the Rome Statute, the Impugned Decision fully complies with the requirement of reasoning as interpreted by the international human rights jurisprudence. Indeed, the Chamber’s reasoning is based on objective arguments and the Impugned Decision sufficiently addresses the essential issues in relation to the matter at stake, as well as the arguments presented by both parties and the Common Legal Representative. The mere disagreement of the Defence with the Chamber’s findings cannot constitute a basis to conclude that an error of law or of fact was committed.

46. Consequently, the Common Legal Representative submits that the Defence failed to establish how the Chamber, that was not required to determine the conditions under article 58(1) of the Rome Statute *de novo*, failed to comply with the requirement of reasoning in relation to the only issue to explore under article 60(3) of the Rome Statute, namely whether “changed circumstances” occurred.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Appeals Chamber to dismiss the Defence Appeal.



Paolina Massidda
Principal Counsel

Dated this 3rd day of September 2013

At The Hague, The Netherlands

⁵³ See *supra* paras. 26-33.