

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15

Date: 20 August 2015

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung

SITUATION IN CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public Redacted Version
of filing ICC-02/11-01/15-168-Conf-Exp

Response to the Defence's document in support of the appeal
against the ninth decision on the review of Mr. Gbagbo's detention
(ICC-02/11-01/15-161-Conf-Exp-Anx2)

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 8 July 2015, Trial Chamber I (the “Chamber”) issued the “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (the “Impugned Decision”),¹ deciding that Mr. Laurent Gbagbo shall remain in detention.

2. On 14 July 2015, the Defence of Mr. Gbagbo filed its Appeal against the Impugned Decision and a public redacted version was filed on 20 July 2015.²

3. On 16 July 2015, the Defence of Mr. Gbagbo filed the Document in Support of the Appeal against the Impugned Decision as a confidential *ex parte* submission. The Common Legal Representative was only notified of the public annex to said document.³

4. On 21 July 2015, the Principal Counsel of the Office of Public Counsel for Victims, acting as common legal representative of the victims admitted to participate in the case (the “Common Legal Representative”),⁴ submitted a request for said victims to have an automatic right to intervene in the Appeal against the Impugned Decision, and for the Appeals Chamber to set a deadline for the Common Legal Representative to file a response to the Document in Support of the Appeal taking

¹ See the “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (Trial Chamber I), No. ICC-02/11-01/15-127-Red, 8 July 2015 (the “Impugned Decision”).

² See the “Version publique expurgée: Acte d’appel de la Défense relatif à la «ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute (ICC-02/11-01/15-127-Conf) de la Chambre de première instance I décidant du maintien en détention de Laurent Gbagbo”, No. ICC-02/11-01/15-134-Red3 OA6, 20 July 2015 (the “Appeal”).

³ See the “Annex: Document à l’appui de l’appel de la «Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute » (ICC-02/11-01/15-127-Conf) du 8 juillet 2015”, No. ICC-02/11-01/15-147-Anx OA6, 16 July 2015.

⁴ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61. See also the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015, para. 74 and p. 33 (“all decisions and orders made in the Gbagbo and Blé Goudé cases shall continue to apply [...] in the joint case”).

into account the regulatory number of days provided for in Regulation 64(5) of the Regulations of the Courts (the “Request”).⁵

5. On 22 July 2015, the Appeals Chamber granted the Request, setting 27 July 2015 at 16h00 as the deadline for the Common Legal Representative to file her response to the Document in Support of the Appeal.⁶

6. On 23 July 2015, the Common Legal Representative was notified of the public redacted version of the Document in Support of the Appeal against the Impugned Decision (the “Public Document in Support of the Appeal”).⁷

7. On the same date, the Appeals Chamber ordered the Defence to file a less redacted version of the Document in Support of the Appeal by 24 July 2015, and granted the Prosecution and the Common Legal Representative the possibility to file a response thereto by 29 July 2015 (the “Decision”).⁸

8. On 24 July 2015, the Defence filed confidential *ex parte* “Observations portant sur la nature des expurgations à lever dans le document à l’appui de l’appel de la Défense en fonction de la décision de la Chambre d’Appel du 23 juillet 2015 (ICC-

⁵ See the “Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo's detention (ICC-02/11-01/15-134-Red3)”, No. ICC-02/11-01/15-152 OA6, 22 July 2015 (dated 21 July 2015) (the “Request”).

⁶ See the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3)’” (Appeals Chamber), No. ICC-02/11-01/15-158 OA6, 22 July 2015.

⁷ See the “Public expurgé - Document à l’appui de l’appel de la «Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute » (ICC-02/11-01/15-127-Conf) du 8 juillet 2015”, No. ICC-02/11-01/15-147-Red2 OA6, 23 July 2015 (the “Public Document in Support of the Appeal”).

⁸ See the “Decision on the Prosecutor’s request for an unredacted or less redacted version of the document in support of appeal” (Appeals Chamber), No. ICC-02/11-01/15-159-Conf-Exp-Red OA6, 23 July 2015 (the “Decision”).

02/11-01/15-159-Conf-Exp)" (the "Observations"),⁹ accompanied by an "Annexe 2" containing a confidential *ex parte* Document in Support of the Appeal (the "Confidential Document in Support of the Appeal").¹⁰

9. Pursuant to the Decision, the Common Legal Representative submits the following response to the Confidential Document in Support of the Appeal.

10. Pursuant to Regulation 23*bis* (2) of the Regulations of the Court, the present response is filed on a confidential *ex parte* basis following the classification given by the Defence to the Confidential Document in Support of the Appeal.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

1. On the lack of notification of the Observations to the Common Legal Representative

11. The Defence does not provide any indication of the factual and legal basis for the classification of the Observations as confidential *ex parte* vis-à-vis the Common Legal Representative. Whereas a confidential redacted version of one of its Annexes (the Confidential Document in Support of the Appeal) is available to the Common

⁹ See the "Observations portant sur la nature des expurgations à lever dans le document à l'appui de l'appel de la Défense en fonction de la décision de la Chambre d'Appel du 23 juillet 2015 (ICC-02/11-01/15-159-Conf-Exp)", No. ICC-02/11-01/15-161-Conf-Exp OA6, 24 July 2015 (the "Observations"). The Common Legal Representative has no access to this document or to its "Annexe 1" (No. ICC-02/11-01/15-161-Conf-Exp-Anx1 OA6, listed in the "Annex to the Order to the Registrar on the registration of documents in the case record relating to the appeal phase of the proceedings" (Appeals Chamber), No. ICC-02/11-01/15-165-Anx OA6, 28 July 2015, p. 3).

¹⁰ See the "Annexe 2: Observations portant sur la nature des expurgations à lever dans le document à l'appui de l'appel de la Défense en fonction de la décision de la Chambre d'Appel du 23 juillet 2015 (ICC-02/11-01/15-159-Conf-Exp)", No. ICC-02/11-01/15-161-Conf-Exp-Anx2 OA6, 24 July 2015 (the "Confidential Document in Support of the Appeal"). The Common Legal Representative has access to this document.

Legal Representative,¹¹ the Observations and the first Annex thereto have not been notified to her without any apparent reason.¹²

12. Moreover, the Common Legal Representative notices that the Confidential Document in Support of the Appeal does not fully comply with the instructions provided by the Appeals Chamber in the Decision. In fact, the Confidential Document in Support of the Appeal contains some redactions that have not been lifted by the Defence despite the instructions of the Appeals Chamber to the contrary.¹³

13. The Defence's submission of redacted and *ex parte* filings vis-à-vis the Common Legal Representative is not a new development. In this context, the Chamber has already ruled more than once that the Defence must grant the Common Legal Representative access to all confidential filings and that only exceptionally and with an express justification, the Defence may file confidential *ex parte* documents without notifying them to her.¹⁴

14. In the case at hand, the Observations and its Annex 1 have not been notified to the Common Legal Representative. As a consequence, she may have been prevented from participating in any litigation concerning the redactions lifted from the Public Document in Support of the Appeal pursuant to the Decision.

15. Accordingly, the Common Legal Representative respectfully requests the Appeals Chamber to remind the Defence that any further confidential filing pursuant to the Decision must be communicated to her.

¹¹ See *supra* note 10.

¹² See *supra* note 9.

¹³ Cf. the Decision, *supra* note 8, [REDACTED], and the Confidential Document in Support of the Appeal, *supra* note 10, [REDACTED].

¹⁴ See, for instance, No. ICC-02/11-01/15-101, 24 June 2015, para. 13; and No. ICC-02/11-01/15-150, 21 July 2015, para. 12.

2. On the applicable legal standards

16. The Appeals Chamber has consistently held that, in exercising its powers under Rule 158 of the Rules of Procedure and Evidence, it will only consider specific grounds of appeal that allege legal, factual or procedural errors that materially affect the impugned decision.¹⁵

17. In considering interlocutory appeals against decisions granting or denying interim release, the Appeals Chamber has held that it will intervene only where “clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision”¹⁶ or if the findings of the Chamber “are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues”.¹⁷

18. As a consequence, the Appeals Chamber does not review the findings of Pre-Trial or Trial Chambers *de novo*, but exercises a review corrective in nature *vis-à-vis* any manifest error committed by the Chamber concerned.¹⁸

19. Regarding questions of law, the Appeals Chamber has generally stated that it “[w]ill not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision”.¹⁹ In this regard, “[a] decision is materially affected by an error of law if the Pre-Trial or Trial Chamber would

¹⁵ See No. ICC-01/05-01/08-2151-Red OA10, 5 March 2012, para. 29.

¹⁶ See No. ICC-01/04-01/10-283 OA, 14 July 2011, para. 15; and No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 62.

¹⁷ See No. ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25. See also No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 61.

¹⁸ See *supra* note 16. See also No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

¹⁹ See No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error”.²⁰

20. As regards errors based on a misappreciation of facts in a decision on interim release, the Appeals Chamber has clarified that it “[w]ill not interfere with a Pre-Trial or Trial Chamber’s evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber”.²¹

3. On the grounds of appeal pertaining to article 58(1)(b) of the Rome Statute

*i. Alleged error of law by reversing the burden of proof under article 60(3) of the Rome Statute*²²

21. The Defence argues that the Chamber erred because it reversed the burden of proof by not demanding the Prosecution to show that there has been no change in the facts underlying the need for continued detention,²³ and by relying instead on findings that the Prosecution discharged said burden in the past.²⁴

22. The Common Legal Representative opposes this ground in whole because the challenged findings in the Impugned Decision are not misdirected on a question of law.²⁵

²⁰ See No. ICC-02/11-01/11-321 OA2, 12 December 2012, para. 44; and No. ICC-01/04-169 OA, 13 July 2006, para. 84.

²¹ See No. ICC-01/04-01/10-283 OA, 14 July 2011, paras. 1 and 17. See, for a more general definition of error of fact, No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 56; and No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 21.

²² See the Public Document in Support of the Appeal, *supra* note 7, section 1.2.

²³ *Idem*, para. 22.

²⁴ *Ibid.*, para. 23.

²⁵ See *supra* para. 17.

23. The Appeals Chamber has not referred to any “burden of proof” in the context of article 60(3) of the Rome Statute. It has simply stated that *“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”*.²⁶

24. In this context, contrary to the Defence’s contention,²⁷ the Impugned Decision does not contravene the ruling quoted above by imposing on the Defence any burden to prove that the detention is not currently justified. In fact, the Decision refers to said ruling as an authority to support its finding that it *“must weigh the [Prosecution’s] submissions against the submissions, if any, of the detained person”*.²⁸

25. Accordingly, contrary to the Defence’s arguments,²⁹ the fact that the Defence was invited –not compelled– to present its submissions before the Prosecution cannot be said to amount to a “reversal of the burden of proof” violating Article 67(1)(i) of the Rome Statute. Even more so if consideration is paid to the fact that the Prosecution was ordered to file observations on Mr. Gbagbo’s continued detention or release, to which the Defence was given an opportunity to respond.³⁰

26. The articulation of the Impugned Decision presenting first the arguments of the Prosecution to maintain Mr. Gbagbo in detention and confronting them with those of the Defence to release Mr. Gbagbo further shows that there has not been any reversal of the burden of proof.³¹

²⁶ See No. ICC-01/05-01/08-1019 OA4, 19 November 2010, para. 51.

²⁷ See the Public Document in Support of the Appeal, *supra* note 7, para. 10.

²⁸ See the Impugned Decision, *supra* note 1, para. 3 (emphasis added).

²⁹ See the Public Document in Support of the Appeal, *supra* note 7, para. 24.

³⁰ See No. ICC-02/11-01/15-61, 11 May 2015, p. 5.

³¹ See the Impugned Decision, *supra* note 1, paras. 4-5.

27. Moreover, contrary to the Defence's contention,³² the reference in the Impugned Decision to the "*limited nature of the detention review under Article 60(3) of the Statute*" cannot reasonably be read as a way for the Chamber to relieve the Prosecution of any duty to prove that Mr. Gbagbo's detention is still warranted.

28. The sentence quoted above is accompanied in the Impugned Decision by a reference to a judgment of the Appeals Chamber in the *Gbagbo* case.³³ Said judgment expressly clarifies that the review under Article 60(3) is comparatively more "limited" than that under Article 60(2) of the Rome Statute because the latter requires hearing the submissions of the Defence for the first time and hence a *de novo* or *ab initio* review of the conditions of Article 58(1), whereas Article 60(3) refers to the review of a prior decision on detention.³⁴

*ii. Alleged error of law by not reviewing the conditions underpinning detention*³⁵

29. The Defence argues that the Chamber erred because the lack of an obligation for the Chamber to review *de novo* each factor underpinning detention means that it "*does not have to enter findings on the circumstances already decided upon in the ruling on detention*",³⁶ but it does not relieve the Chamber from the "*need[s] to consider whether there are 'changed circumstances', i.e. whether there is 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 In this regard, the Defence argues in different parts of the Document in Support of the Appeal that although there is no

³² See the Public Document in Support of the Appeal, *supra* note 7, para. 23.

³³ See the Impugned Decision, *supra* note 1, para. 3, footnote 12.

³⁴ See No. ICC-02/11-01/11-278-Red OA, 26 October 2012, paras. 23-24. See also No. ICC-01/05-01/08-1019 OA4, 19 November 2010, para. 56.

³⁵ See the Public Document in Support of the Appeal, *supra* note 7, section 1.3.

³⁶ *Idem*, para. 27.

³⁷ *Ibid.*, paras. 28 and 30.

need to re-establish circumstances that have already been established, it must be proven that what was true in the past remains true at present.³⁸

30. The Common Legal Representative opposes this ground in whole because the challenged findings in the Impugned Decision are not misdirected on a question of law.³⁹

31. The Appeals Chamber has not only clarified that a Chamber reviewing detention under article 60(3) of the Rome Statute is not required to make a decision on detention *de novo* or *ab initio*,⁴⁰ but it has also determined that “[i]t is first for the [Pre-]Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a *de novo* manner to ‘determine whether any of these had changed’”.⁴¹

32. Accordingly, the Impugned Decision rightly states that under Article 60(3) of the Rome Statute the Chamber “*need only consider whether any changed circumstances exist [to warrant the disturbing of a previous ruling on detention], rather than conducting a de novo review of the conditions underpinning detention*”.⁴² As argued above,⁴³ the Appeals Chamber has clearly explained that a *de novo* or *ab initio* review is only merited under Article 60(2) of the Rome Statute.

33. Moreover, since there is no error in the Impugned Decision in the manner in which the Chamber concluded that a *de novo* review of the conditions underpinning detention is not necessary under article 60(3) of the Rome Statute, the Common Legal Representative finds it immaterial to determine the temporal point of reference for

³⁸ *Ibid.*, para. 22. See also *ibid.*, paras. 16 and 33.

³⁹ See *supra* para. 17.

⁴⁰ See No. ICC-01/05-01/08-1019 OA4, 19 November 2010, para. 53. See also No. ICC-01/05-01/08-2151-Red OA10, 5 March 2012, para. 31; and No. ICC-02/11-01/11-278-Red OA, 26 October 2012, paras. 23-24.

⁴¹ See No. ICC-02/11-01/11-548-Red OA4, 29 October 2013, para. 53.

⁴² See the Impugned Decision, *supra* note 1, para. 3.

⁴³ See *supra* note 34.

any potential *de novo* review, *i.e.* either by reference to the time of the first decision on detention or by reference to the time of each subsequent *de novo* review, as the Defence appears to suggest.⁴⁴

*iii. Alleged error of law by not addressing the new arguments submitted by the Defence and alleged error of fact by relying on the new material provided by the Prosecution*⁴⁵

34. The Defence argues that the Chamber erred by refusing to entertain its allegedly new arguments on the existence of changed circumstances requiring the release of Mr. Gbagbo.⁴⁶ Moreover, the Defence claims that the Chamber wrongly agreed with the Prosecution on the existence of a pro-Gbagbo network.⁴⁷

35. The Common Legal Representative opposes this ground in whole because the challenged findings in the Impugned Decision are not misdirected on a question of law, and are not based on a misappreciation or disregard of the relevant facts.⁴⁸

36. In fact, contrary to the Defence's contention,⁴⁹ the Chamber expressly noted and considered the Defence's arguments that "(i) the conditions underpinning detention must be re-assessed to maintain consistency with human rights principles; (ii) there is currently no organised network of people supporting Mr Gbagbo; (iii) the calls for Mr Gbagbo's release are legitimate; and (iv) Mr Gbagbo's release will have positive consequences on the national reconciliation process".⁵⁰

⁴⁴ See *supra* note 38.

⁴⁵ See the Public Document in Support of the Appeal, *supra* note 7, sections 1.4 and 1.5.

⁴⁶ *Idem*, paras. 31-32.

⁴⁷ *Ibid.*, paras. 36-37.

⁴⁸ See *supra* para. 17.

⁴⁹ See the Public Document in Support of the Appeal, *supra* note 7, para. 35.

⁵⁰ See the Impugned Decision, *supra* note 1, para. 5.

37. Moreover, the Chamber explained that it refused to entertain the Defence's submissions in points (i), (iii) and (iv) above because they were not new and had been *"raised previously and already dismissed by the Chamber as irrelevant to its assessment of Mr Gbagbo's detention under Article 60(3) of the Statute"*.⁵¹

38. By way of example,⁵² the Chamber referred to one of its past decisions under Article 60(3) of the Rome Statute addressing these three arguments, namely the impact of the passage of time on the assessment of Article 58(1) conditions,⁵³ *"the apparent desire of certain people for Mr Gbagbo's release"*,⁵⁴ and the consequences of an eventual release of Mr. Gbagbo on the national reconciliation process.⁵⁵ In said decision, the Chamber found these three circumstances not to be relevant for the purposes of assessing whether Mr. Gbagbo's detention is still justified.⁵⁶

39. The Common Legal Representative submits that the Chamber's decision not to adjudicate any further the three arguments referred to above is reasonable and in line with the relevant jurisprudence.⁵⁷

40. In this regard, the Appeals Chamber has found that when reviewing the circumstances underpinning detention pursuant to Article 60(3) of the Rome Statute, it is relevant not only whether the Defence can demonstrate that the change of circumstances it puts forward has occurred, but first and foremost whether the alleged change refers to circumstances that underpinned the previous ruling of the Chamber on the need for the detention of the Accused, and whether there are any

⁵¹ *Idem*, para. 6 (emphasis added).

⁵² *Ibid.*, footnote 22, referring to No. ICC-02/11-01/11-718-Red, 11 November 2014, paras 50-52, 54, and 58-60. The same arguments were also addressed and found irrelevant in No. ICC-02/11-01/11-633, 12 March 2014, paras. 23 and 26; and No. ICC-02/11-01/11-668, 11 July 2014, paras. 26, 31 and 37.

⁵³ See No. ICC-02/11-01/11-718-Red, 11 November 2014, para. 50.

⁵⁴ *Idem*, para. 51.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, paras. 50-51. The Chamber noted that *"the Pre-Trial Chamber already ruled that considerations of this type were not relevant for the purpose of determining the need for Mr Gbagbo's detention"*. *Ibid.*, para. 51.

⁵⁷ See No. ICC-01/05-01/08-1019 OA4, 19 November 2010, para. 53. See also No. ICC-02/11-01/11-668, 11 July 2014, para. 37.

new circumstances that have a bearing on the conditions under Article 58(1) of the Rome Statute.⁵⁸ Moreover, as noted in the Impugned Decision,⁵⁹ the Appeals Chamber has determined that the Chamber does not have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions.

41. Applying these standards, none of the three arguments put forward by the Defence and referred to above amount to changed circumstances under article 60(3) of the Rome Statute. As noted in the Impugned Decision,⁶⁰ they had already been dismissed by the Chamber as irrelevant for assessing Mr. Gbagbo's detention.

42. Moreover, the powers of the Appeals Chamber in interlocutory appeals are limited to the "decision appealed", which means that the appellant cannot raise errors in assessments made in other decisions as grounds of appeal to challenge subsequent decisions on the same matter.⁶¹ Otherwise, no matter could ever achieve the legal condition of *res judicata*. Therefore, the Defence of Mr. Gbagbo should have appealed the first ruling by the Chamber dismissing these three issues.

43. By contrast, the Chamber found that the existence of the pro-Gbagbo network was a circumstance underlying the previous decisions on the need for Mr. Gbagbo's continued detention.⁶² Consequently, contrary to the Defence's submissions, the Chamber determined whether there were any changed circumstances in this regard after considering the arguments put forward by the Defence.⁶³

⁵⁸ See No. ICC-01/05-01/08-1019 OA4, 19 November 2010, para. 52. See also No. ICC-01/05-01/13-611, 5 August 2014, para. 2; and No. ICC-01/05-01/08-743, 1 April 2010, para. 26.

⁵⁹ See the Impugned Decision, *supra* note 1, para. 6, referring to No. ICC-01/05-01/08-1019 OA4, 19 November 2010, para. 53.

⁶⁰ See *supra* note 52.

⁶¹ See *supra* note 15.

⁶² See the Impugned Decision, *supra* note 1, para. 7.

⁶³ Cf. the Public Document in Support of the Appeal, *supra* note 7, paras. 33-34, 40 and 42, and the Impugned Decision, *supra* note 1, paras. 5 and 9.

44. However, the Defence's mere submission to the Appeals Chamber of arguments already considered by the Chamber cannot *per se* yield any fruit.⁶⁴ The Appeals Chamber may not conduct a *de novo* review of the same arguments,⁶⁵ especially when the Defence only refers to a disagreement with the Impugned Decision rather than to conclusions that the Chamber could not have reasonably reached from the evidence submitted to it.⁶⁶

*iv. Alleged error of law/fact by not providing reasons in the Impugned Decision*⁶⁷

45. The Defence argues that the Chamber erred because it failed to clarify which particular evidence and arguments submitted by the parties led it to issue the Impugned Decision.⁶⁸

46. The Common Legal Representative opposes this ground in whole because the challenged finding in the Impugned Decision is not misdirected on a question of law, and does not disregard relevant facts or takes into account facts extraneous to the *sub judice* issues.⁶⁹

47. Admittedly, the Chamber's analysis of the arguments submitted to it is brief, but nonetheless said analysis is sufficiently detailed and reasoned. In this regard, there is no obligation for the Chambers of the Court to provide a full explanation for each and every aspect of their decisions. This is consistent with the jurisprudence of the European Court for Human Rights, which has constantly stated that "*Article 6 § 1 [ensuring fair trial guarantees] obliges courts to give reasons for their decisions, but cannot*

⁶⁴ See the Public Document in Support of the Appeal, *supra* note 7, paras. 38-44.

⁶⁵ See *supra* para. 18.

⁶⁶ See *supra* para. 20.

⁶⁷ See the Public Document in Support of the Appeal, *supra* note 7, section 1.6.

⁶⁸ *Idem*, paras. 46-48.

⁶⁹ See *supra* para. 17.

be understood as requiring a detailed answer to every argument”,⁷⁰ and that “the extent to which [the] duty to give reasons applies may vary according to the nature of the decision and can only be determined in the light of the circumstances of the case”.⁷¹

48. Consistently with the abovementioned approach, the Chamber mentions the arguments of the parties and refers to the evidence submitted by them before passing a reasoned ruling thereon.⁷²

49. As expressly noted in the Impugned Decision, the core reason for maintaining Mr. Gbagbo in detention lies with the fact, undisputed by the Defence in its submissions, that several opposition parties in Côte d’Ivoire currently advocate for Mr. Gbagbo’s release.⁷³ Nonetheless, the Chamber also makes express reference to other arguments supporting its ruling on the lack of changed circumstances under Article 60(3) of the Rome Statute, such as the calls by Mr. Gbagbo’s supporters “*to release political prisoners, and ‘primarily President Laurent Gbagbo’*”, and that “*the recognition by FPI hardliners that the Accused is the president of the party, the visits of presidential candidates at the ICC detention centre and the CNC advocating for Gbagbo’s release, exemplify how the Accused remains a staple of Ivorian politics*”.⁷⁴

50. In these circumstances, the Common Legal Representative contends that the Chamber did indicate the elements submitted by the Prosecution on which it relied upon. Moreover, as argued above,⁷⁵ the Chamber did consider the arguments submitted by the Defence and rightly decided to disregard those previously submitted and ruled irrelevant.

⁷⁰ See ECHR, *Perez v. France*, Application No. 47287/99, 12 February 2004, para. 81; *García Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, para. 26; *Van de Hurk v. The Netherlands*, Application No. 16034/90, 19 April 1994, para. 61.

⁷¹ See ECHR, *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, para. 29; *Hiro Balani v. Spain*, Application No. 18064/91, 9 December 1994, para. 27.

⁷² See the Impugned Decision, *supra* note 1, paras. 8-11.

⁷³ *Idem*, para. 11.

⁷⁴ *Ibid.*, footnote 31, referring *inter alia* to No. ICC-02/11-01/15-90-Red, 11 June 2015, paras. 16 and 19, respectively.

⁷⁵ See *supra* paras. 36-41.

4. On the grounds of appeal pertaining to conditional release

- i. Alleged errors of law by not considering a request for conditional release as pending before the Chamber and by inviting the Defence to file said request*⁷⁶

51. The Defence argues that the Chamber erred by ruling that it is not currently seized of a request for conditional release from Mr. Gbagbo, and that the Defence may file said request at any time.⁷⁷

52. The Common Legal Representative opposes these grounds in whole because the challenged findings in the Impugned Decision are not misdirected on a question of law.⁷⁸

53. Despite not having been allowed to participate in the *ex parte* status conference convened by the Chamber on 16 June 2015 in order to discuss [REDACTED],⁷⁹ and although the Document in Support of the Appeal transmitted to the Common Legal Representative still contains some redactions on these grounds of appeal not expressly authorised by the Appeals Chamber,⁸⁰ the Common Legal Representative contends that there is no apparent error in the finding that the request for conditional release filed by the Defence [REDACTED] is not currently pending before the Chamber and that the Defence may file a new request for the said purpose at any time.

54. It is true that, as claimed by the Defence,⁸¹ the decisions on review of detention issued by the Pre-Trial and Trial Chambers between [REDACTED] 2012 and 11 May 2015 make reference to the said request for conditional release. However, the

⁷⁶ See the Public Document in Support of the Appeal, *supra* note 7, sections 2.1 and 2.2.

⁷⁷ *Idem*, paras. [REDACTED], 58 and 64.

⁷⁸ See *supra* para. 17.

⁷⁹ See No. ICC-02/11-01/15-80, 26 May 2015.

⁸⁰ See *supra* para. 12.

⁸¹ See the Public Document in Support of the Appeal, *supra* note 7, para. 56.

Impugned Decision expressly indicates that the Chamber ruled orally on 16 June 2015 that “‘requests for conditional release can [...] be made at any time’ and that it [the Chamber] does not consider that it is currently seised of any such request”.⁸² Moreover, the Impugned Decision also makes reference to an *ex parte* request for leave to appeal filed by the Defence under article 82(1)(d) of the Rome Statute against said oral decision on 22 June 2015.⁸³

55. In these circumstances, it appears evident that the Appeal against the Impugned Decision cannot produce effects over the Single Judge’s finding that a request for conditional release is not currently pending before the Chamber. This is a matter for consideration in the eventual appeal against the 16 June 2015 decision. Otherwise, the Defence may impermissibly get a “second bite of the cherry”, namely the possibility to challenge the same issue under article 82(1)(b) in the current Appeal and subsequently, if its pending request for leave to appeal is granted, under article 82(1)(d) of the Rome Statute.

56. The same argument is applicable to the alleged error of the Chamber by inviting the Defence to submit a new request for conditional release. The alleged invitation does not stem from the Impugned Decision but from the 16 June 2015 decision.⁸⁴

57. Finally, assuming *arguendo* that the Chamber committed one or both of these errors, the Chamber would not have rendered a decision substantially different from the Impugned Decision if it had not made them.⁸⁵ In fact, the Chamber relied upon the challenged findings only to dismiss the Defence’s suggestion to [REDACTED]. At

⁸² See the Impugned Decision, *supra* note 1, para. 12.

⁸³ *Idem*, footnote 35, referring to No. ICC-02/11-01/15-97-Conf-Exp, 22 June 2015.

⁸⁴ *Ibid.*

⁸⁵ See *supra* para. 19.

the same time, on the basis of a ruling of the Appeals Chamber,⁸⁶ it also considered that this proposal was not concrete enough to merit consideration.

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

It is hereby certified that this document contains a total of 5,438 words and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court.⁸⁷



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Principal Counsel

Dated this 20th day of August 2015

At The Hague, The Netherlands

⁸⁶ See the Impugned Decision, *supra* note 1, footnote 36, referring to No. ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 79.

⁸⁷ This statement (25 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.