

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.