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No. ICC-02/11-01/11 OA
Date: 26 October 2012

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT KOUDOU GBAGBO

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'"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'" of 13 July 2012 (ICC-02/11-01/11-180-Conf),

After deliberation,

By majority, Judge Anita Ušacka and Judge Erkki Kourula dissenting,

Delivers the following

JUDGMENT

The Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo" is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. In circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release. However, where the Pre-Trial Chamber is of the view that no condition could mitigate the identified risks there is no obligation on the Chamber to address the State's proposals any further.

2. Medical reasons can play a role in decisions on interim release in at least two ways. First, the medical condition of a detained person may have an effect on the risks under article 58 (1) (b) of the Statute, potentially negating those risks. Second, the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 23 November 2011, Pre-Trial Chamber III, composed of Judge Fernández de Gurmendi (presiding), Judge Odio Benito and Judge Fulford, issued the "Warrant

of Arrest For Laurent Koudou Gbagbo".[1] On 30 November 2011, Pre-Trial Chamber III rendered the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo"[2] (hereinafter: "Arrest Warrant Decision"). Following his surrender to the Court, Mr Laurent Koudou Gbagbo (hereinafter: "Mr Gbagbo") first appeared before Pre-Trial Chamber III on 5 December 2011.[3] He has been in detention at the Court since.

4. On 15 March 2012, the Presidency re-assigned the situation in Côte d'Ivoire to Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber"), composed of Judge Kaul, Judge Van den Wyngaert and Judge Fernández de Gurmendi.[4]

5. On 27 April 2012, Mr Gbagbo filed the "Defence application for the interim release of President Gbagbo"[5] (hereinafter: "Application for Interim Release"), submitting that the grounds for detention under article 58 (1) (b) of the Statute are not met, that [REDACTED] (hereinafter: "[REDACTED]") has offered to receive Mr Gbagbo and to afford all necessary guarantees, and that Mr Gbagbo should be released to allow him to recover from the ill-treatment he is said to have suffered while in detention in Côte d'Ivoire, in order to be fit to stand trial.[6]

6. On 19 June 2012, Mr Gbagbo filed the "Defence application for additional medical and psychological evaluation of President Gbagbo",[7] requesting the Pre-Trial Chamber to commission an expert report to assess whether Mr Gbagbo's health allowed him to participate "efficiently and effectively in the pre-trial proceedings".[8]

7. On 26 June 2012, the Pre-Trial Chamber issued the "Order to conduct a medical examination",[9] whereby it appointed three experts to examine Mr Gbagbo to determine whether he was fit to participate in the proceedings against him.

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[1] ICC-02/11-01/11-1 <http://www.legal-tools.org/doc/80881e/>.
[2] ICC-02/11-01/11-9-US-Exp; pubic redacted version: ICC-02/11-01/11-9-Red <http://www.legal-tools.org/doc/f8bdcb/>.
[3] See Transcript of 5 December 2011, ICC-02/11-01/11-T-1-ENG.
[4] "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations", ICC-02/11-01/11-59 <http://www.legal-tools.org/doc/7c3f4c/>.
[5] ICC-02/11-01/11-105-Conf-tENG.
[6] Application for Interim Release, para. 1.
[7] ICC-02/11-01/11- 158-Conf-Exp-tENG.
[8] ICC-02/11-01/11-158-Conf-Exp-tENG, para. 62.
[9] ICC-02/11-01/11-164-Conf-tENG.

8. On 13 July 2012, having sought[10] and received submissions on the Application for Interim Release from the Prosecutor[11] (hereinafter: "Response to Application for Interim Release"), the Kingdom of the Netherlands,[12] [REDACTED][13] and the Registrar,[14] the Pre-Trial Chamber, Judge Fernández de Gurmendi acting as single judge, rendered the "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"[15] (hereinafter: "Impugned Decision"), rejecting the Application for Interim Release.

B. Proceedings before the Appeals Chamber

9. On 23 July 2012, Mr Gbagbo filed the "Defence appeal against Pre-Trial Chamber I's decision denying the interim release of President Gbagbo".[16]

10. Having sought[17] and obtained[18] an extension of the time limit for the filing of his document in support of the appeal, Mr Gbagbo filed, on 13 August 2012, the "Document filed in support of the Defence appeal against the Single Judge's decision denying the interim release of President Gbagbo"[19] (hereinafter: "Document in Support of the Appeal").

11. On 21 August 2012, the Prosecutor filed the "Prosecution's response to Defence document in support of appeal against the Decision on the Defence request for

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[10] "Decision requesting observations on the Defence Request for Interim Release", 8 May 2012, ICC-02/11-01/11-109-Conf.
[11] "Prosecution's response to Defence request for provisional release pursuant to Article 60(2)", 4 June 2012, ICC-02/11-01/11-137-Conf.
[12] "Transmission of the observations on the Request for Interim Release from the Kingdom of the Netherlands and [REDACTED]", 28 May 2012, ICC-02/11-01/11-130-Conf-Anx2.
[13] "Transmission of the observations on the Request for Interim Release from the Kingdom of the Netherlands and [REDACTED]", 28 May 2012, ICC-02/11-01/11-130-Conf-Anx4 and -Anx5.
[14] "Registry's report on the management of Mr. Laurent Gbagbo's health conditions while in custody at the Court's Detention Centre", 28 May 2012, ICC-02/11-01/11-132-Conf-Exp; confidential redacted version: ICC-02/11-01/11-132-Conf-Red.
[15] ICC-02/11-01/11-180-Conf; public redacted version: ICC-02/11-01/11-180-Red <http://www.legal-tools.org/doc/cb20a2/>.
[16] ICC-02/11-01/11-193-Conf-tENG.
[17] "Application for the suspension of the time limits under rule 154(1) of the Rules of Procedure and Evidence and regulation 64(5) of the Regulations of the Court until the end of the judicial recess on Monday, 6 August 2012", 16 July 2012, ICC-02/11-01/11-185-Conf-tENG (OA).
[18] "Decision on the 'Requête aux fins de suspension des délais prévus par la Règle 154(1) du Règlement de procédure et de preuve et par la Norme 64(5) du Règlement de la Cour jusqu'à la fin des vacances judiciaires, fixée au lundi 6 août 2012'", 19 July 2012, ICC-02/11-01/11-189-Conf (OA).
[19] ICC-02/11-01/11-210-Conf-tENG (OA).

provisional release of Laurent Gbagbo",[20] to which she filed a corrigendum on the following day[21] (hereinafter: "Response to the Document in Support of the Appeal").

12. The Appeals Chamber notes that the Impugned Decision was issued confidentially and that all filings in this appeal were also made confidentially. However, on 16 July 2012, the Pre-Trial Chamber issued a public redacted version of the Impugned Decision.[22] In light of this, the Appeals Chamber issues this judgment both in a confidential and in a public redacted form and will issue a separate order for the parties to file public redacted versions of their filings.

III. MERITS

A. First ground of appeal

13. As his first ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber applied an incorrect standard when deciding on the Application for Interim Release.

1. Relevant part of the Impugned Decision

14. In the Impugned Decision, the Pre-Trial Chamber recalled articles 58 (1) and 60 (2) of the Statute.[23] With reference to the judgment of the Appeals Chamber of 9 June 2008 in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[24] (hereinafter: "*Katanga OA 4 Judgment*"), the Pre-Trial Chamber stated that "[i]n assessing whether the conditions under article 58(1) of the Statute continue to be met, the Chamber must address anew the issue of detention in light of the material placed before it and may sustain or modify its ruling if it is satisfied that changed circumstances so require".[25] The Pre-Trial Chamber continued by making reference to the judgment of the Appeals Chamber of 2 December 2009 in *Prosecutor v. Jean-Pierre Bemba Gombo*[26]

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[20] ICC-02/11-01/11-223-Conf (OA).
[21] "Corrigendum to the 'Prosecution's response to Defence document in support of the appeal against the Decision on the Defence request for provisional release of Laurent Gbagbo'", 22 August 2012, ICC-02/11-01/11-223-Conf-Corr (OA), correcting typographical errors on the cover page of the document.
[22] ICC-02/11-01/11-180-Red.
[23] Impugned Decision, paras 43-44.
[24] "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", ICC-01/04-01/07-572 (OA 4) <http://www.legal-tools.org/doc/69bee9/>.
[25] Impugned Decision, para. 47.
[26] "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,

(hereinafter: "*Bemba OA 2 Judgment*") and stated that "[a]s underlined by the Appeals Chamber, the notion of 'changed circumstances' imports 'either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying the Chamber that a modification of its prior ruling is necessary'".[27]

15. When considering specifically whether the requirements of article 58 (1) of the Statute were met, the Pre-Trial Chamber noted that Mr Gbagbo's arguments related only to article 58 (1) (b) of the Statute.[28] In relation to article 58 (1) (a) of the Statute (whether there are reasonable grounds to believe that the suspect committed a crime in the jurisdiction of the Court), the Pre-Trial Chamber, in the absence of any submissions from Mr Gbagbo, merely "recall[ed] the findings of the [Arrest Warrant Decision]".[29]

16. With respect to article 58 (1) (b) (i) of the Statute, the Pre-Trial Chamber, after noting Mr Gbagbo's submissions that he had been cooperative since his surrender and provided an undertaking not to abscond,[30] recalled the finding in the Arrest Warrant Decision that Mr Gbagbo's detention was necessary to secure his attendance in Court and stated that it considered that "the conclusions reached by Pre-Trial Chamber III at the time of such decision continue to be valid to date".[31] It also recalled that Pre-Trial Chamber III "already found" in the Arrest Warrant Decision that Mr Gbagbo has a well-organised network of political supporters and stated that there was "no indication that the support network has ceased activity in the period since the [Arrest Warrant Decision]", citing supporting material submitted by the Prosecutor with his Response to the Application for Interim Release.[32]

17. In relation to article 58 (1) (b) (ii) of the Statute the Pre-Trial Chamber recalled the finding in the Arrest Warrant Decision that Mr Gbagbo's detention "was necessary to ensure that he does not use his political or economic resources to obstruct

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and the Republic of South Africa'", ICC-01/05-01/08-631-Conf (OA 2); public redacted version: ICC-01/05-01/08-631-Red (OA 2) <http://www.legal-tools.org/doc/5bc6b2/>.
[27] Impugned Decision, para. 47.
[28] Impugned Decision, para. 53.
[29] Impugned Decision, para. 53.
[30] Impugned Decision, para. 55.
[31] Impugned Decision, para. 57.
[32] Impugned Decision, para. 60.

or endanger the investigation".[33] After addressing Mr Gbagbo's arguments, the Pre-Trial Chamber concluded that his "continued detention [...] appears necessary",[34] considering that "there is information that Mr Gbagbo enjoys the support of an elaborate network of supporters, and appears to have the motivation to obstruct the investigation of crimes he has allegedly committed".[35]

18. Similarly, in respect of article 58 (1) (b) (iii) of the Statute, the Pre-Trial Chamber first noted the finding in the Arrest Warrant Decision that the arrest of Mr Gbagbo was necessary to prevent the commission of further crimes.[36] It then went on to address the material placed before it and concluded that "Mr Gbagbo could indeed utilise the network of his supporters to commit crimes within the jurisdiction of the Court".[37]

2. Mr Gbagbo's submissions before the Appeals Chamber

19. Recalling the relevant human rights provisions and the principle that liberty must be the rule and detention the exception, Mr Gbagbo submits that the decision under article 60 (2) of the Statute must be a fresh decision on interim release, and not merely a confirmation of the decision on the warrant of arrest, in particular because that decision is issued without any participation of the defence.[38] In his view, if it were otherwise, this would amount to a "*de facto* reversal of the burden of proof".[39] He also notes that the decision under article 60 (2) must establish that the detention is justified at the time of the decision, and not at the time of the warrant of arrest.[40] He submits that a review of the Impugned Decision reveals that the Pre-Trial Chamber took the Arrest Warrant Decision as the starting point, and based a large part of the Impugned Decision thereon, thereby applying an incorrect standard.[41]

20. Mr Gbagbo notes that the Pre-Trial Chamber stated in the Impugned Decision that it had to consider whether there was a change in circumstances.[42] Mr Gbagbo

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[33] Impugned Decision, para. 64.
[34] Impugned Decision, para. 67.
[35] Impugned Decision, para. 65.
[36] Impugned Decision, para. 68.
[37] Impugned Decision, para. 69.
[38] Document in Support of the Appeal, paras 4-8.
[39] Document in Support of the Appeal, para. 6.
[40] Document in Support of the Appeal, para. 7.
[41] Document in Support of the Appeal, paras 8-9.
[42] Document in Support of the Appeal, para. 10.

argues that this standard was incorrect because it applied to review decisions under article 60 (3) but not to decisions under article 60 (2) of the Statute.[43] In his submission, as the Pre-Trial Chamber used an incorrect standard, the Impugned Decision is vitiated.[44]

3. The Prosecutor's submissions before the Appeals Chamber

21. In response, the Prosecutor accepts that the Pre-Trial Chamber referred to "changed circumstances" when talking about the standard of review and referred to jurisprudence of the Appeals Chamber relating to article 60 (3) rather than article 60 (2).[45] Notwithstanding these statements, in the Prosecutor's submission, the Pre-Trial Chamber nevertheless made a fresh decision under article 60 (2), based on the correct standard.[46] In this regard, the Prosecutor points to the parts of the Impugned Decision that indicate that the Pre-Trial Chamber made an assessment *de novo*.[47] The Prosecutor also submits that when deciding on interim release under article 60 (2), the Pre-Trial Chamber does not have to ignore the fact that it previously rendered a decision under article 58 (1) of the Statute.[48]

4. Determination by the Appeals Chamber

22. The principal question raised under the first ground of appeal is whether the Pre-Trial Chamber applied the correct standard when deciding on the Application for Interim Release.

23. The Appeals Chamber's jurisprudence shows that there is a clear difference between the standard of a decision under article 60 (2) of the Statute and under article 60 (3) of the Statute. Under article 60 (2) of the Statute, "the person shall continue to be detained" if "the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met". According to the Appeals Chamber, in reaching a decision under article 60 (2) of the Statute, the Pre-Trial Chamber has to "inquire anew into the existence of facts justifying detention"; the Pre-Trial Chamber's power is "not conditioned by its previous decision to direct the issuance of a warrant of

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[43] Document in Support of the Appeal, para. 12.
[44] Document in Support of the Appeal, para. 13.
[45] Response to the Document in Support of the Appeal, para. 11.
[46] Response to the Document in Support of the Appeal, paras 11-12.
[47] Response to the Document in Support of the Appeal, paras 14-15.
[48] Response to the Document in Support of the Appeal, paras 12-13.

arrest".[49] The Pre-Trial Chamber's decision must be taken "in light of the material placed before it".[50] Thus, the decision under article 60 (2) of the Statute is a decision *de novo*, in the course of which the Pre-Trial Chamber has to determine whether the conditions of article 58 (1) are met. It is imperative that the Pre-Trial Chamber is deciding *de novo* because it is hearing the submissions of the defence for the first time. In contrast, the decision under article 60 (3) of the Statute is a review of a prior decision on detention. Under article 60 (3), the Pre-Trial Chamber may modify its ruling on release or detention if "it is satisfied that changed circumstances so require". The Appeals Chamber has clarified that in the course of a review under article 60 (3), the Pre-Trial Chamber "needs to consider whether there are 'changed circumstances'".[51] The Appeals Chamber continued:

> If 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. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.[52]

24. Thus, 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.

25. The Appeals Chamber notes that the Impugned Decision was a decision under article 60 (2) of the Statute as it was the first decision on an application for interim release by Mr Gbagbo. The Pre-Trial Chamber was therefore required to "inquire anew into the existence of facts justifying detention". In line with this obligation, at paragraph 47 of the Impugned Decision the Pre-Trial Chamber, in the section that summarises the applicable law, recalled the Appeals Chamber's jurisprudence on the applicable standard for decisions under article 60 (2) of the Statute. However, the Pre-Trial Chamber then referred to "changed circumstances" and to jurisprudence of the

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[49] *Katanga OA 4 Judgment*, para. 10.
[50] *Katanga OA 4 Judgment*, para. 12.
[51] *Prosecutor v. Jean-Pierre Bemba Gombo*, "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"'", 5 March 2012, ICC-01/05-01/08-2151-Conf (OA 10); public redacted version: ICC-01/05-01/08-2151-Red (OA 10) <http://www.legal-tools.org/doc/ca5ff9/> (hereinafter: "*Bemba OA 10 Judgment*"), para. 1.
[52] *Bemba OA 10 Judgment*, para. 1.

Appeals Chamber relating to decisions under article 60 (3). This indicates that the Pre-Trial Chamber misstated the applicable standard. Notwithstanding this, the Appeals Chamber finds for the reasons discussed below, that the Pre-Trial Chamber nevertheless carried out a *de novo* assessment in light of the material placed before it, as is required under article 60 (2) of the Statute.

26. In respect of article 58 (1) (b) (i), the Pre-Trial Chamber evaluated the arguments raised by Mr Gbagbo for the first time.[53] It also found that the conclusions reached in the Arrest Warrant Decision concerning Mr Gbagbo's political motivations, his political contacts and funds to abscond "continue to be valid to date".[54] In particular, the Pre-Trial Chamber re-examined those conclusions in the light of the new evidence tendered by the Prosecutor.[55] In respect of article 58 (1) (b) (ii), the Pre-Trial Chamber considered that Mr Gbagbo had now received the Prosecutor's evidence and therefore had extensive knowledge of the investigation – a factor that did not exist at the time of the Arrest Warrant Decision.[56] Similarly, in respect of article 58 (1) (b) (iii), the Pre-Trial Chamber relied on a witness statement [REDACTED] and found anew that the continued detention of Mr Gbagbo appears necessary to prevent him from continuing with the commission of crimes within the jurisdiction of the Court.[57] Finally, in its conclusion, the Pre-Trial Chamber noted that it "*is* satisfied [...] that all of the requirements for detention found in article 58(1)(b)(i) to (iii) *are* met and that the continued detention of Mr Gbagbo appears necessary"[58] (emphasis added). The use of the present tense in its overall conclusion and the lack of any reference to "changed circumstances" throughout its assessment confirm that the Pre-Trial Chamber indeed carried out a *de novo* review.

27. Furthermore, the Appeals Chamber is not persuaded by Mr Gbagbo's contention that the Pre-Trial Chamber's reliance on the Warrant of Arrest Decision as a "starting point" for its assessment under article 60 (2) of the Statute, was erroneous because it demonstrated that the Pre-Trial Chamber merely examined whether there was a change in circumstances since the issuance of the Warrant of Arrest Decision, instead

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[53] Impugned Decision, para. 55.
[54] Impugned Decision, para. 57.
[55] Impugned Decision, paras 58-61.
[56] Impugned Decision, para. 66.
[57] Impugned Decision, para. 69-70.
[58] Impugned Decision, para. 71.

of conducting a *de novo* review.[59] As the Appeals Chamber has previously stated, a Chamber's determination under article 60 (2) of the Statute is "not conditioned by its previous decision to direct the issuance of a warrant of arrest".[60] Nevertheless, the factors underpinning the decision on a warrant of arrest may be the same as those for the decision under article 60 (2) of the Statute. Thus, in a decision under article 60 (2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chamber's decision. As explained above at paragraph 26, in the present case, the Pre-Trial Chamber did make a *de novo* examination.

28. Accordingly, the Appeals Chamber finds that Mr Gbagbo's arguments under this ground of appeal must be dismissed.

B. Second ground of appeal

29. As his second ground of appeal, Mr Gbagbo submits that the Impugned Decision is devoid of factual reasoning or is based on manifestly incorrect, factual reasoning.[61]

1. Relevant part of the Impugned Decision

30. In the section on article 58 (1) (b) (i) of the Impugned Decision, the Pre-Trial Chamber addressed the arguments that Mr Gbagbo had raised in this regard in the Application for Interim Release. Notably, the Pre-Trial Chamber considered that Mr Gbagbo had pledged not to abscond, but found that this was "not *per se* sufficient to grant interim release, and [was] outweighed by factors in favour of his continued detention".[62] The Chamber recalled that Mr Gbagbo was charged with four counts of crimes against humanity and that the gravity of the charges and the "lengthy prison sentence that may ensue in the event of conviction, constitute an incentive for him to abscond".[63] The Pre-Trial Chamber also noted that it had found, in the Arrest Warrant Decision, that Mr Gbagbo had political motivations and contacts as well as funds that

[59] Document in Support of the Appeal, paras 8-9.
[60] *Katanga OA 4 Judgment*, para. 10.
[61] Document in Support of the Appeal, paras 3 and 14.
[62] Impugned Decision, para. 55 (footnote omitted).
[63] Impugned Decision, para. 56.

would allow him to abscond, stating that it considered that "the conclusions reached by Pre-Trial Chamber III at the time of such decision continue to be valid to date".[64]

31. The Pre-Trial Chamber also stated that Mr Gbagbo's assertion that he had only a limited scope of action, in relation to the means at his disposal, was contradicted by other information.[65] In this regard, with reference to documents annexed to the Response to the Application for Interim Release, the Pre-Trial Chamber found that "certain assets belonging to Mr Gbagbo or his wife may not have been frozen to date".[66] The Pre-Trial Chamber also found that he had a large and well-organised network of political supporters.[67] Recalling the finding in the Arrest Warrant Decision, the Pre-Trial Chamber noted that Mr Gbagbo had political contacts abroad and that there was no indication that this was no longer the case, referring to documents annexed to the Response to the Application for Interim Release,[68] and attaching particular importance to a press statement of February 2012 by Mr Gbagbo's political party, calling *inter alia* for Mr Gbagbo's liberation.[69]

32. In relation to article 58 (1) (b) (ii) of the Statute, the Pre-Trial Chamber recalled the finding in the Arrest Warrant Decision that Mr Gbagbo's continued detention appeared necessary to avoid obstruction or endangerment of the investigation or court proceedings.[70] While noting Mr Gbagbo's arguments in this regard, the Pre-Trial Chamber stated, with reference to its findings regarding the risk of flight, that there was information that Mr Gbagbo enjoyed the support of a network of supporters and that he appeared to have the motivation to obstruct the investigation against him.[71] The Pre-Trial Chamber also noted, that because the Prosecutor had disclosed evidence to Mr Gbagbo, the risk to the investigation in case of his release was amplified.[72] The Pre-Trial Chamber explained that this did not "give rise to a general principle that full disclosure of incriminating evidence will necessarily lead to continued detention of the suspect", but was "a factual circumstance that must be taken into account when

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[64] Impugned Decision, para. 57.
[65] Impugned Decision, para. 58.
[66] Impugned Decision, para. 59.
[67] Impugned Decision, para. 60.
[68] Impugned Decision, para. 60.
[69] Impugned Decision, para. 61.
[70] Impugned Decision, para. 64.
[71] Impugned Decision, para. 65.
[72] Impugned Decision, para. 66.

assessing the level of risk for the investigation and the court proceedings in the event of interim release of the suspect".[73]

33. In relation to article 58 (1) (b) (iii) of the Statute, recalling the findings in the Arrest Warrant Decision,[74] the Pre-Trial Chamber found that there was material that indicated that Mr Gbagbo's supporters sought to restore him to power, and, based on the statement of a witness, [REDACTED], and concluded that Mr Gbagbo could use those supporters to commit further crimes and that his continued detention was therefore necessary also under article 58 (1) (b) (iii) of the Statute.[75]

2. Mr Gbagbo's submissions before the Appeals Chamber

34. Mr Gbagbo submits that the Pre-Trial Chamber's findings were devoid of any factual reasoning or based on manifestly incorrect factual reasoning.[76] In respect of the gravity of the crimes Mr Gbagbo is alleged to have committed and the expected sentence as factors relevant to the determination that there is a risk of flight, Mr Gbagbo emphasises that no charges have been confirmed against him yet and that he enjoys the presumption of innocence.[77] He submits that since all crimes under the jurisdiction of the Court are serious, taking gravity into account when deciding to order the continued detention would create "a *de facto* irrebuttable presumption" against the suspect and therefore a reversal of the burden of proof.[78] He supports this argument by reference to a decision of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY"), which found that "the expectation of a lengthy sentence cannot be held against an accused in abstracto because all accused before [the ICTY], if convicted, are likely to face heavy sentences".[79] He recalls that the sentence under the Statute may run from zero to 30 years (and life imprisonment in cases of extreme gravity), and that there is therefore no basis for the Pre-Trial

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[73] Impugned Decision, para. 66.
[74] Impugned Decision, para. 68.
[75] Impugned Decision, paras 69-70.
[76] Document in Support of the Appeal, para. 14.
[77] Document in Support of the Appeal, para. 15.
[78] Document in Support of the Appeal, para. 16.
[79] Document in Support of the Appeal, para. 17, citing ICTY, Trial Chamber II, *P. v. Haradinaj et al.*, "Decision on Ramush Haradinaj's Motion for Provisional Release", 6 June 2005, IT-04-84-PT <http://www.legal-tools.org/doc/50e888/>, para. 24.

Chamber's assumption that he would face a long prison sentence in case of a conviction.[80]

35. In respect of the findings relating to Mr Gbagbo's financial means, Mr Gbagbo notes that the Pre-Trial Chamber simply accepted the Prosecutor's submission that certain of Mr Gbagbo's assets *may* not have been frozen, but that there is no indication that the Pre-Trial Chamber verified this submission.[81] He notes that the Pre-Trial Chamber failed to mention a report by the Registry in respect of legal aid regarding Mr Gbagbo's indigence and submits that this failure amounts to an error.[82] He also submits that the Pre-Trial Chamber did not address the contradictions in the Prosecutor's submissions, for instance how Mr Gbagbo could access his wife's funds or rely on assets that, according to the Prosecutor, were about to be frozen.[83]

36. As to the existence of a support network, Mr Gbagbo submits that the Pre-Trial Chamber based its finding on documents dating from September 2011, ten months before the Impugned Decision was rendered.[84] He also notes that the Pre-Trial Chamber confuses support for Mr Gbagbo coming from legal political parties and the alleged existence of a support network with illegal objectives[85] and argues that the Pre-Trial Chamber failed to explain how support from a political party could amount to a risk under article 58 (1) (b) (i) of the Statute.[86] He submits that there is nothing in the Prosecutor's submissions that would indicate that the leaders of the FPI political party intend to liberate Mr Gbagbo by the use of force and that the onus was on the Prosecutor to establish such intent.[87] In his submission, the Pre-Trial Chamber failed to question the absence of evidence and simply accepted the Prosecutor's submissions.[88] He avers that the Pre-Trial Chamber seemed to have based its decision *in abstracto* on Mr Gbagbo's political position, reasoning that would apply to any other suspect before the Court.[89]

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[80] Document in Support of the Appeal, para. 17.
[81] Document in Support of the Appeal, para. 19.
[82] Document in Support of the Appeal, para. 20.
[83] Document in Support of the Appeal, para. 21.
[84] Document in Support of the Appeal, para. 23.
[85] Document in Support of the Appeal, para. 23.
[86] Document in Support of the Appeal, para. 24.
[87] Document in Support of the Appeal, para. 25.
[88] Document in Support of the Appeal, para. 26.
[89] Document in Support of the Appeal, para. 26.

37. As to the necessity of detention to avoid obstruction or endangerment of the investigation or the court proceedings, Mr Gbagbo submits that the Pre-Trial Chamber failed to establish any concrete risk in this regard.[90] As to the alleged support network that the Pre-Trial Chamber cited in support of its finding, Mr Gbagbo argues that only the existence of a political party has been established, that if a support network existed, one would have expected it to manifest itself, given that Mr Gbagbo has been in detention for more than a year,[91] and that even if the Prosecutor had encountered difficulties in her investigations, she would have to demonstrate that Mr Gbagbo was responsible for them.[92] He also points out that the Pre-Trial Chamber did not establish in any way his intention to obstruct the investigation but simply referred to two other paragraphs in the Impugned Decision that dealt with the risk of flight instead of the intention to obstruct investigations.[93] As to the disclosure of evidence, Mr Gbagbo submits that the Pre-Trial Chamber failed to explain why such disclosure enhanced the risk of obstruction.[94] In his view, the Pre-Trial Chamber's findings were baseless and went against the spirit of the Statute because they prevented the interim release of any suspect who has received disclosure, as no specific circumstances had been identified by the Chamber.[95]

38. As to the necessity of detention to avoid the further commission of crimes, Mr Gbagbo submits that in light of the presumption of innocence, this ground of detention must be applied particularly cautiously.[96] He submits that there was no evidence to support the finding that [REDACTED].[97] He recalls that he is a man of politics and that it is not a crime for people to ask for his return to power.[98]

39. In conclusion, Mr Gbagbo notes that he is aware that the Pre-Trial Chamber's decision was not based on a single factor alone; he submits, however, that the alleged errors taken together vitiate the decision. [99]

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[90] Document in Support of the Appeal, para. 27.
[91] Document in Support of the Appeal, para. 28.
[92] Document in Support of the Appeal, para. 29.
[93] Document in Support of the Appeal, para. 30.
[94] Document in Support of the Appeal, para. 33.
[95] Document in Support of the Appeal, para. 33.
[96] Document in Support of the Appeal, para. 34.
[97] Document in Support of the Appeal, paras 35-37.
[98] Impugned Decision, para. 38.
[99] Document in Support of the Appeal, para. 39.

3. The Prosecutor's submissions before the Appeals Chamber

40. In response, the Prosecutor submits that although Mr Gbagbo classifies the alleged errors as errors of law they appear to be, in fact, allegations of factual errors[100] and recalls the deferential standard of review and jurisprudence of the Appeals Chamber in respect of such errors.[101] She then responds to the individual alleged errors. Notably, the Prosecutor avers that Mr Gbagbo's arguments relating to the gravity of the crimes are unfounded because he is alleged to have committed very serious crimes and the Pre-Trial Chamber was therefore correct in taking this into account.[102]

41. As to Mr Gbagbo's financial means, the Prosecutor submits that the Pre-Trial Chamber's findings were based on documentary evidence that she had presented, [REDACTED] which were not frozen, which demonstrated that possibly not all of his assets had been seized,[103] contrary to what Mr Gbagbo had argued in the Application for Interim Release.[104] Regarding the Registry's report in relation to legal aid, the Prosecutor submits that the Pre-Trial Chamber did not have to consider such report because it was based on limited evidence only.[105]

42. As to the arguments relating to Mr Gbagbo's network of supporters, the Prosecutor argues that the Pre-Trial Chamber had "extensive evidence" before it, "most of which was new evidence", which demonstrated the ability of the support network, *inter alia* by mobilising over 140.000 phone calls to the Court from Côte d'Ivoire.[106] She submits that the Pre-Trial Chamber did not have to distinguish between political supporters and other networks as it was convinced that "the various components of the network had a joint objective".[107]

43. As to Mr Gbagbo's arguments on the risk of obstruction or endangerment of the investigation, the Prosecutor submits that in the Response to the Application for Interim Release, evidence demonstrating Mr Gbagbo's motivation to obstruct the

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[100] Response to the Document in Support of the Appeal, para. 17.
[101] Response to the Document in Support of the Appeal, paras 17-19.
[102] Response to the Document in Support of the Appeal, para. 21.
[103] Response to the Document in Support of the Appeal, para. 23.
[104] Application for Interim Release, para. 54.
[105] Response to the Document in Support of the Appeal, para. 24.
[106] Response to the Document in Support of the Appeal, para. 26.
[107] Response to the Document in Support of the Appeal, para. 26.

investigation had been submitted and that the Pre-Trial Chamber's findings were based on this and other evidence.[108] In her view, the Pre-Trial Chamber was right to give some weight to the fact that the Prosecutor had disclosed evidence to Mr Gbagbo because this refuted his submission in the Application for Interim Release that he was unaware of the scope of the Prosecutor's investigation.[109]

44. As to Mr Gbagbo's arguments relating to the further commission of crimes, the Prosecutor submits that there was evidence before the Chamber, including a witness statement, [REDACTED].[110]

4. Determination by the Appeals Chamber

45. Mr Gbagbo raises several interrelated and overlapping arguments under the second ground of appeal. For the sake of clarity, those arguments are addressed below in two groups: (a) arguments relating to the alleged failure to provide a sufficiently reasoned decision, and (b) arguments alleging that the Pre-Trial Chamber's factual conclusions were erroneous.

(a) Failure to provide a sufficiently reasoned decision

46. Mr Gbagbo essentially submits that the Pre-Trial Chamber failed to provide a sufficiently reasoned decision. The Appeals Chamber recalls that, in the context of disclosure decisions, it has previously held that insufficient reasoning may amount to an error of law.[111] The Appeals Chamber found that:

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[112]

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[108] Response to the Document in Support of the Appeal, para. 29.
[109] Response to the Document in Support of the Appeal, para. 30.
[110] Response to the Document in Support of the Appeal, para. 31.
[111] "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773 (OA5) <http://www.legal-tools.org/doc/883722/>, (hereinafter : "*Lubanga OA5 Judgment*"); see also the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-774 (OA6) <http://www.legal-tools.org/doc/2b7ca3/>.
[112] *Lubanga OA5 Judgment*, para. 20.

47. The Appeals Chamber considers that the same applies to decisions on applications for interim release under article 60 (2) of the Statute, in particular because there is an automatic right to appeal such decisions under article 82 (1) (b) of the Statute.[113] The Appeals Chamber emphasises the importance of the reasoning in decisions on interim release. It is the reasoning that allows the parties – and, in case of an appeal, the Appeals Chamber – to understand how the Pre-Trial Chamber reached the conclusions it did. This will help avoid misunderstandings as to the Pre-Trial Chamber's approach. Thus, the question that the Appeals Chamber has to address is whether, as is required under its aforementioned jurisprudence, the reasoning in the Impugned Decision "indicates with sufficient clarity the basis of the decision".

48. The Appeals Chamber notes that the reasoning in the Impugned Decision in relation to article 58 (1) (b) of the Statute was relatively sparse. In particular, the Pre-Trial Chamber did not set out in much detail how it analysed the evidence presented by the Prosecutor or how it reached its factual conclusions. Rather, in stating its conclusions, the Pre-Trial Chamber simply made reference in the footnotes to the items of evidence it relied upon. Nevertheless, and despite those shortcomings of the Impugned Decision, the Appeals Chamber does not consider that the decision is so lacking in reasoning that it can be said that the Pre-Trial Chamber failed to comply with its obligation to provide a reasoned decision and therefore made an error of law.

49. This is because even though the reasoning is relatively sparse, it is still comprehensible how the Pre-Trial Chamber reached the conclusions it did, enabling

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[113] See also ICTY, *P. v. Milutinovic et al*, "Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release", 1 November 2005, IT-05-87-AR65.1 <http://www.legal-tools.org/doc/ef12f6/>, para. 11, where the Appeals Chamber of the ICTY held that "as a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision"; ICTY, *P. v. Haradinaj and others*, Appeals Chamber, "Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release", 9 March 2006, IT-04-84-AR65.2 <http://www.legal-tools.org/doc/a6a55d/>, para 10: "The Appeals Chamber recalls that in any given case, the Trial Chamber only needs to examine those factors that a reasonable Trial Chamber would take into account. These include those which are relevant to its taking a fully informed and reasonable decision as to whether, pursuant to Rule 65(B), the accused will appear for trial if provisionally released. A Trial Chamber is not obliged to deal with all possible factors when deciding whether it is satisfied that the requirements of Rule 65(B) are fulfilled, but at a minimum, must provide reasoning to support its findings regarding the substantive considerations relevant to its decision. Pursuant to these previous findings, the Appeals Chamber considers that the Impugned Decision provides no reasons explaining how the uncertainty of the Appellant's ability to earn a livelihood, and the vagueness of his plans would have an impact upon the likelihood that he would not appear for trial if provisionally released. For the foregoing reasons, this ground of appeal is allowed" (footnotes omitted).

Mr Gbagbo to exercise his right to appeal. In particular, if the reasoning provided in the Impugned Decision is read together with the evidence referred to in the footnotes and the submissions of Mr Gbagbo and the Prosecutor, it is clear not only what conclusions the Chamber reached in relation to the grounds of detention under article 58 (1) (b) (i) to (iii) of the Statute, but also on what basis. Thus, while the Pre-Trial Chamber should have provided fuller reasoning, the Impugned Decision still meets the minimum threshold for a reasoned decision, as established in the *Lubanga OA 5 Judgment* referred to above. In the case at hand, the Pre-Trial Chamber did explain how it reached its conclusions, albeit in a somewhat condensed way. To this extent, the Appeals Chamber strongly emphasises 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.

50. In sum, the Appeals Chamber is not persuaded by Mr Gbagbo's argument that the Pre-Trial Chamber failed to meet its obligation to provide a reasoned decision.

(b) Alleged factual errors

51. The remainder of Mr Gbagbo's arguments under the second ground of appeal relate to alleged factual errors, challenging the Pre-Trial Chamber's findings in respect of article 58 (1) (b) (i) to (iii) of the Statute. The Appeals Chamber has explained its approach to factual errors in respect of decisions on interim release as follows:

> The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber. In determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will "defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention". Therefore, the Appeals Chamber "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."[114]

[114] *Bemba OA 10 Judgment*, para. 16 (footnotes omitted).

52. In its judgment in *Prosecutor v. Callixte Mbarushimana* of 14 July 2011[115] (hereinafter: "*Mbarushimana OA Judgment*"), the Appeals Chamber noted that the appellant's mere disagreement with the conclusions that the Pre-Trial Chamber drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.[116] The Appeals Chamber has assessed Mr Gbagbo's arguments against this standard of review.

(i) Article 58 (1) (b) (i) of the Statute

53. In respect of the necessity of continued detention to ensure Mr Gbagbo's appearance at the trial, the Appeals Chamber recalls that the Pre-Trial Chamber found that detention was justified on the basis of Mr Gbagbo's intention to abscond, which it inferred from the fact that he was facing serious charges that can lead to a lengthy prison sentence, and his political motivation;[117] and the availability of means to abscond, namely funds (based on the consideration that not all of his assets may have been frozen),[118] and international contacts and a support network with the stated aim being the liberation of Mr Gbagbo.[119] In respect of each of those findings, Mr Gbagbo raises challenges.

54. As to the argument that the Pre-Trial Chamber's reasoning regarding the gravity of the charges applies to any suspect before the Court and therefore amounts to an irrebuttable presumption, the Appeals Chamber recalls that it has previously accepted that the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors for decisions on interim release.[120] The Appeals Chamber does not consider that relying on those factors, amongst others, amounts to an "irrebutable presumption". What is important is whether a given factor exists in respect of the particular detained person. In the case at hand, there can be no doubt that the charges that the Prosecutor has brought against Mr Gbagbo and for which the warrant of arrest against him was issued – crimes against humanity of murder, rape

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[115] "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"'", ICC-01/04-01/10-283 (OA) <http://www.legal-tools.org/doc/64a283/>.
[116] *Mbarushimana OA Judgment*, paras 21, 31.
[117] Impugned Decision, paras 56-57.
[118] Impugned Decision, paras 58-59.
[119] Impugned Decision, paras 60-61.
[120] See *Mbarushimana OA Judgment*, para. 21, with further references.

and other forms of sexual violence, as well as other inhumane acts and persecution[121] – are serious and may lead to a lengthy sentence in case of conviction. Whether charges may be similarly serious in respect of some or all other suspects who are brought before the Court is irrelevant because even if this were the case, this does not detract from the fact that the charges against Mr Gbagbo *are* serious.[122] Thus, Mr Gbagbo's argument that reliance on gravity creates an irrebuttable presumption must be rejected. This is one factor that the Pre-Trial Chamber was entitled to take into account.

55. As to Mr Gbagbo's arguments relating to his access to financial resources, the Appeals Chamber notes that, contrary to Mr Gbagbo's submission that "his few assets [have] been frozen",[123] there was evidence before the Pre-Trial Chamber indicating that there were assets belonging to Mr Gbagbo or his wife that had not yet been frozen.[124] In light of the existence of such assets, it was not unreasonable for the Pre-Trial Chamber to infer that Mr Gbagbo may have other assets that the Court was still unaware of, as the Prosecutor had argued in the Response to the Application for Interim Release.[125]

56. As to Mr Gbagbo's argument that the Pre-Trial Chamber did not establish that there actually were other assets that had not been frozen, but only that there *may* be such assets, the Appeals Chamber considers that it was sufficient for the Pre-Trial Chamber to establish that it was *possible* that Mr Gbagbo had the necessary assets to abscond. In this regard, it is recalled that the Appeals Chamber held in the *Katanga OA 4 Judgment* that, when determining whether detention appears necessary under article 58 (1) (b) of the Statute, "[t]he question revolves around the possibility, not the inevitability, of a future occurrence".[126] Thus, it was sufficient for the Pre-Trial Chamber to establish that there was a risk, established on the basis of concrete evidence, that Mr Gbagbo had the financial means to abscond.

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[121] See Arrest Warrant Decision, paras 55 et seq.
[122] See also Mbarushimana OA Judgment, para. 24, where the Appeals Chamber explained, in respect of financial support networks, that "whether all other suspects are likely to possess financial support networks has no bearing on the question of whether Mr Mbarushimana had potential access to such a network".
[123] Application for Interim Release, para. 54.
[124] See the documents referenced in footnote 74 of the Impugned Decision.
[125] Response to Application for Interim Release, para. 20.
[126] *Katanga OA 4 Judgment*, para. 21.

57. As to the alleged failure of the Pre-Trial Chamber to take into account the Registry's findings about Mr Gbagbo's financial situation made in the context of legal aid, the Appeals Chamber notes that the Registrar's decision to grant Mr Gbagbo legal aid paid by the Court was provisional and subject to the results of further investigations by the Registry as to his financial situation. The Registry's decision specifically noted that public sources referred to property belonging to Mr Gbagbo.[127] Thus, contrary to Mr Gbagbo's submission, the Registry did not make any conclusive finding as to Mr Gbagbo's indigence and the Pre-Trial Chamber therefore cannot be faulted for not discussing the Registry's decision in the Impugned Decision.

58. Mr Gbagbo's argument that the Pre-Trial Chamber did not address what he calls "contradictions" in the Prosecutor's submissions – namely the questions of whether the identified assets would be sufficient to organise the flight of Mr Gbagbo, how he could access his wife's assets, and how he could rely on assets that were about to be frozen[128] – is misdirected. As set out above, the Pre-Trial Chamber inferred from the existence of assets that were recently identified that Mr Gbagbo may also possess *other* assets that have not yet been discovered. Accordingly, the Pre-Trial Chamber did not have to address whether Mr Gbagbo would be able to access the recently identified assets or whether their value was high enough to allow Mr Gbagbo to abscond.

59. As to the existence of a support network, Mr Gbagbo argues in essence that all that the Pre-Trial Chamber could establish was that there was a political party, the FPI, providing him with political support, but that there was no evidence of the FPI leader's intention to assist him to abscond. In the view of the Appeals Chamber, these arguments do not establish a clear error in the Impugned Decision. The existence of a political party that supports the detained person is a factor that is relevant to the determination of whether the continued detention appears necessary under article 58 (1) (b) (i) of the Statute, because such support could indeed facilitate absconding. In addition, the Appeals Chamber recalls that the Pre-Trial Chamber, in the Impugned Decision, noted that the supporters had been "able to mobilise more than 140,000

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[127] "Corrigendum à la « Décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par M. Laurent Gbagbo »", 3 January 2012, ICC-02/11-01/11-22-Anx-Corr <http://www.legal-tools.org/doc/cc5813/>, pp. 3, 5.
[128] See Document in Support of the Appeal, para. 21.

telephone calls to the Court over a short time period in December 2011".[129] Contrary to Mr Gbagbo's submissions, this does demonstrate the capacity of the support network for him.

60. The argument that the Pre-Trial Chamber relied only on material dating from September 2011 when it found that there was no indication that the support network had ceased its activities is factually incorrect:[130] in support of this finding, the Pre-Trial Chamber referred, in footnotes 77 to 79 of the Impugned Decision, to various documents, including documents as recent as the end of May 2012. The Appeals Chamber notes furthermore that Mr Gbagbo does not take issue with the content or reliability of any specific item relied upon by the Pre-Trial Chamber to establish the existence of a support network. As set out above, it is not enough for the appellant merely to express disagreement with the conclusions that the Pre-Trial Chamber drew in a decision on interim release. Rather, the appellant has to identify a clear error in the impugned decision.

61. In sum, the Appeals Chamber cannot identify any clear error in respect of the Pre-Trial Chamber's finding that Mr Gbagbo's continued detention appeared necessary to ensure his appearance at the trial.

(ii) Article 58 (1) (b) (ii) of the Statute

62. With regard to article 58 (1) (b) (ii), the Appeals Chamber recalls that the Pre-Trial Chamber found that the continued detention appeared necessary to ensure that Mr Gbagbo does not obstruct or endanger the investigation or the court proceedings based on the existence of a support network, his motivation to obstruct the investigation of his alleged crimes, and the fact that he has extensive knowledge of the evidence against him.[131] Mr Gbagbo raises arguments in relation to all three aspects of the Pre-Trial Chamber's finding.

63. As to Mr Gbagbo's arguments relating to the support network,[132] the Appeals Chamber notes that in the section of the Impugned Decision that addresses article 58 (1) (b) (ii) of the Statute, the Pre-Trial Chamber referred to its findings in this regard

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[129] Impugned Decision, para. 60.
[130] Document in Support of the Appeal, para. 23.
[131] Impugned Decision, paras 65, 66.
[132] Document in Support of the Appeal, paras 28-29.

made in the section on article 58 (1) (b) (i). In the view of the Appeals Chamber, making such a reference is unassailable because it is not unreasonable to assume that a support network that may assist in the absconding of the detained person may also assist in obstructing or endangering the investigation or the court proceedings. As set out above,[133] the Pre-Trial Chamber did not make any error in respect of its finding as to the support network. Accordingly, Mr Gbagbo's arguments in this regard are dismissed.

64. As to Mr Gbagbo's argument that the Pre-Trial Chamber's finding that he has the intent to obstruct the investigation against him was unsupported by evidence, the Appeals Chamber recalls that in support of this finding, the Pre-Trial Chamber referred to its findings as to Mr Gbagbo's intent and resources to abscond, including the political motivation to do so (paragraphs 56 and 57 of the Impugned Decision). The Appeals Chamber considers that the intent to abscond and the intent to obstruct or endanger the investigation have the same ultimate objective because both are directed towards preventing the trial from taking place or at the very least from being based upon all of the relevant evidence. Thus, the findings in respect of both the intent to abscond and the intent to obstruct or endanger the investigation were based on evidence that overlapped. While it would have been preferable for the Pre-Trial Chamber to explain its finding in more detail, Mr Gbagbo's argument that the Pre-Trial Chamber's finding that he has the intent to obstruct the investigation was unsupported, is therefore unpersuasive.

65. As to Mr Gbagbo's argument that the Pre-Trial Chamber should have explained the specific circumstances that made Mr Gbagbo's release impossible because of the disclosure of evidence that he had received, the Appeals Chamber notes that the Pre-Trial Chamber found that the disclosure of evidence "amplified" the risk to the investigation and the court proceedings in case of Mr Gbagbo's release.[134] In the view of the Appeals Chamber, this finding cannot be faulted. Disclosure enhances the detainee's knowledge of the Prosecutor's investigation. Therefore under article 58 (1) (b) (ii) of the Statute it may be a relevant factor. Accordingly, the Appeals Chamber considers that the Pre-Trial Chamber did not have to explain the specific

[133] Paragraphs 59 et seq.
[134] Impugned Decision, para. 66.

circumstances relating to the disclosure of evidence and how they amplified the risk. The Appeals Chamber emphasises, however, that this does not mean that the fact that evidence is disclosed means that the detainee cannot be released. The disclosure of evidence is but one factor that the Pre-Trial Chamber may take into account when determining whether continued detention appears necessary under article 58 (1) (b) (ii) of the Statute. Thus, the Appeals Chamber dismisses Mr Gbagbo's arguments.

66. In sum, the Appeals Chamber cannot identify any clear error in respect of the Pre-Trial Chamber's finding that Mr Gbagbo's continued detention appeared necessary to ensure that he did not obstruct or endanger the investigation or the court proceedings.

(iii) Article 58 (1) (b) (iii) of the Statute

67. As to article 58 (1) (b) (iii), the Appeals Chamber recalls that the Pre-Trial Chamber found that Mr Gbagbo's continued detention appeared necessary because there was information that his supporters sought his return to power. In particular, the Pre-Trial Chamber relied on the statement of a witness [REDACTED].

68. The Appeals Chamber is not persuaded by Mr Gbagbo's argument that the Pre-Trial Chamber made its finding in relation to article 58 (1) (b) (iii) of the Statute in the absence of any evidence. In relation to the [REDACTED], the Pre-Trial Chamber specifically referred to a witness statement. To the extent that Mr Gbagbo claims that it is common knowledge that the leaders of the opposition parties were forced to leave the country [REDACTED],[135] the Appeals Chamber notes that Mr Gbagbo merely presents a different reading of the evidence, which, as stated above, is not sufficient to establish a clear error in the Impugned Decision.

69. The Appeals Chamber does not consider that the fact that the Prosecutor did not present fresh evidence in this regard leads to a clear error in the Impugned Decision. As stated above, in relation to the first ground of appeal,[136] when deciding on a request for interim release under article 60 (2) of the Statute, the Pre-Trial Chamber has to inquire anew into the existence of facts justifying detention. This, however, does not mean that the Pre-Trial Chamber cannot base its decision on evidence that

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[135] Document in Support of the Appeal, para. 36.
[136] See paragraph 23.

was already before it when it issued the warrant of arrest, as long as it is persuaded that the evidence, at the time of the decision under article 60 (2) of the Statute, justifies the finding in question. Mr Gbagbo's argument in this regard is therefore not convincing.

70. Mr Gbagbo's argument that the Pre-Trial Chamber did not specify why it considered that crimes would be committed [REDACTED], or what kind of crimes they would be, is not persuasive. The reason for detention under article 58 (1) (b) (iii) of the Statute is the risk that further crimes may be committed – therefore the issue is *future* crimes, which by their nature cannot be specified in detail. In the context of the Impugned Decision, it is clear that the "further crimes" to which the Pre-Trial Chamber was referring would be similar to those Mr Gbagbo is alleged to have committed and for which he was brought before the Court. This is because Mr Gbagbo is alleged to have committed crimes against humanity in the course of a power-struggle over the presidency in Côte d'Ivoire; [REDACTED]. The Appeals Chamber does not consider that the Pre-Trial Chamber's approach violates the presumption of innocence. Under article 66 (1) of the Statute, Mr Gbagbo enjoys the presumption of innocence in the determination of the charges against him; in relation to article 58 (1) (b) (iii) of the Statute, however, the Pre-Trial Chamber was entitled to take into account that he is suspected of having committed crimes against humanity and that, in the specific circumstances and in light of the information before the Chamber, there is a risk that he may commit further crimes if released. Finally, the Appeals Chamber is not persuaded by Mr Gbagbo's submission that the Pre-Trial Chamber apparently considered that asking for Mr Gbagbo's return to power would in itself amount to a crime. It is clear from the context of the Impugned Decision that this is not what the Pre-Trial Chamber meant.

71. In conclusion, the Appeals Chamber cannot identify any clear error in the Pre-Trial Chamber's finding that Mr Gbagbo's continued detention appeared necessary to prevent him from committing further crimes.

C. Third ground of appeal

72. As his third ground of appeal, Mr Gbagbo argues that the Pre-Trial Chamber's decision in respect of conditional release lacks a legal basis.

1. Relevant part of the Impugned Decision

73. In response to Mr Gbagbo's request to be granted conditional release to [REDACTED], the Pre-Trial Chamber recalled, with reference to the Appeals Chamber's judgments of 19 August 2011[137] and 23 November 2011[138] in *Prosecutor v. Jean-Pierre Bemba Gombo* (hereinafter: "*Bemba OA 7 Judgment*" and "*Bemba OA 9 Judgment*", respectively), that, having found that his continued detention was necessary, the Chamber had discretion to consider whether the risks under article 58 (1) (b) could be mitigated through the imposition of conditions.[139] The Pre-Trial Chamber noted the assurances and proposals made by [REDACTED][140] but concluded that "there is no condition short of detention which would be sufficient to mitigate [the risks under article 58 (1) (b) of the Statute]".[141] In particular, the Pre-Trial Chamber found that "the mere possibility for Mr Gbagbo to communicate effectively with members of his network would enable him to abscond, interfere with the investigation or court proceedings, or commit crimes within the jurisdiction of the Court" and that those risks could "only effectively be managed in detention at the seat of the Court".[142] The Pre-Trial Chamber therefore rejected the request for conditional release.[143]

2. Mr Gbagbo's submissions before the Appeals Chamber

74. Mr Gbagbo submits that the Pre-Trial Chamber's rejection of the request for conditional release lacks a legal basis. He argues that the Pre-Trial Chamber failed to consider in any detail the proposed conditions of release and the fact that [REDACTED] had proposed to implement any condition ordered by the Chamber.[144] In his submission, without any evaluation of the concrete proposals, a successful

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[137] "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", ICC-01/05-01/08-1626-Conf (OA 7); public redacted version: ICC-01/05-01/08-1626-Red (OA 7) <http://www.legal-tools.org/doc/64dc49/>.
[138] "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011'", ICC-01/05-01/08-1937-Conf (OA 9); public redacted version: ICC-01/05-01/08-1937-Red2 (OA 9) <http://www.legal-tools.org/doc/0195e1/>.
[139] Impugned Decision, para. 72.
[140] Impugned Decision, para. 73.
[141] Impugned Decision, para. 74.
[142] Impugned Decision, para. 74.
[143] Impugned Decision, para. 74.
[144] Document in Support of the Appeal, paras 41-42.

request for conditional release is *de facto* impossible.[145] He also avers that the Pre-Trial Chamber's reasoning that [REDACTED] was unable to monitor effectively Mr Gbagbo's communications lacked an evidentiary basis.[146] He recalls that the Prosecutor argued in the Response to the Application for Interim Release that [REDACTED], insinuating that [REDACTED] was unreliable.[147] He submits that the Pre-Trial Chamber accepted those arguments, [REDACTED].[148]

3. The Prosecutor's submissions before the Appeals Chamber

75. In response, the Prosecutor recalls that the Appeals Chamber has held that the consideration of conditions of release was discretionary and notes that in the case at hand, the Pre-Trial Chamber *did* consider whether conditional release would be possible, but, having found that it was not, was not obliged to consider the proposals and guarantees of [REDACTED].[149]

4. Determination by the Appeals Chamber

76. The issue arising under the third ground of appeal is whether the Pre-Trial Chamber erred because it did not address in detail the proposals and guarantees made by [REDACTED] and merely made a general statement that there was "no condition short of detention that would be sufficient to mitigate [the risks under article 58 (1) (b) of the Statute]".[150] The Appeals Chamber has previously addressed conditional release and how a Pre-Trial Chamber should attend to proposals by a State to accept a detained person on conditional release. Notably, in the *Bemba OA 2 Judgment*, the Appeals Chamber explained that:

> [A] decision on interim release [...] is not discretionary. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) (b) of the Statute are not met, it shall release the person, with or without conditions. If, however, the release would lead to any of the risks described in article 58 (1) (b) of the Statute, the Chamber may [...] examine appropriate conditions with a view to mitigating the risk. [...] The result of this two-tiered examination is a single unseverable decision that grants interim release on the basis of specific and enforceable conditions.[151]

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[145] Document in Support of the Appeal, para. 43.
[146] Document in Support of the Appeal, para. 44.
[147] Document in Support of the Appeal, paras 45-46.
[148] Document in Support of the Appeal, para. 47.
[149] Response to the Document in Support of the Appeal, paras 34-35.
[150] Impugned Decision, para. 74.
[151] *Bemba OA 2 Judgment*, para. 105.

77. In the *Bemba OA 7 Judgment*, the Appeals Chamber stated:

> In relation to conditional release, the Appeals Chamber recalls that the examination of conditions of release is discretionary and that conditional release is possible in two situations: (1) where a Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release. Therefore, in a situation such as the present, where the Trial Chamber has found that detention is necessary to ensure the person's appearance at trial, the Chamber has the discretion to consider whether the risk of flight can be mitigated by the imposition of conditions and to order conditional release. However, given that a person's personal liberty is at stake if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber. Depending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State's observations are insufficient to enable the Chamber to make an informed decision. That is not to say that the Chamber upon receiving observations from the State is obliged to grant conditional release. It only means that the Chamber must seek information that would enable it to make an informed decision on the matter.[152]

78. In the *Bemba OA 9 Judgment*, the Appeals Chamber explained:

> The obligations identified by the Appeals Chamber in the *Bemba OA 7 Judgment* to specify possible conditions of release and, if necessary, to seek further information must be understood in that context. They are only triggered when: (a) the Chamber is considering conditional release; (b) a State has indicated its general willingness and ability to accept a detained person into its territory; and (c) the Chamber does not have sufficient information before it to make an informed decision.[153]

79. It follows from this jurisprudence that if one or more of the risks listed in article 58 (1) (b) of the Statute are present – as in the case at hand – the Pre-Trial Chamber nevertheless has discretion to consider conditional release. In this regard the Appeals Chamber observes that the Pre-Trial Chamber's discretion to consider conditional release must be exercised judiciously and with full cognizance of the fact that a person's personal liberty is at stake. Thus, in circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release. On the other hand, where no such

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[152] *Bemba OA 7 Judgment*, para. 55.
[153] *Bemba OA 9 Judgment*, para. 35.

proposals for conditional release are presented and none are self-evident the Pre-Trial Chamber's discretion to consider conditional release is unfettered.

80. In the case at hand, the Appeals Chamber notes that the Pre-Trial Chamber did not disregard the [REDACTED] proposals but expressly took note of them.[154] However, despite these proposals the Pre-Trial Chamber rejected Mr Gbagbo's request for conditional release since in its view no condition could mitigate the identified risks. While this finding could have been explained in more detail the Pre-Trial Chamber nevertheless went on to note the risks associated with Mr Gbagbo's communication with the outside world and found that the risks could only be effectively managed in the Court's detention centre.[155] In the course of so doing, the Pre-Trial Chamber referred to the submissions that the Prosecutor had raised before it in this respect in the Response to the Application for Interim Release. Having rejected the possibility for conditional release the Pre-Trial Chamber was under no obligation to address the [REDACTED] proposals any further. The Appeals Chamber can discern no error in the Pre-Trial Chamber's treatment of the [REDACTED] proposals and accordingly Mr Gbagbo's arguments under this ground must be dismissed.

D. Fourth ground of appeal

81. As his fourth ground of appeal, Mr Gbagbo submits that the Pre-Trial Chamber made a legal error when finding that ill health cannot be the basis for interim release.

1. Relevant part of the Impugned Decision

82. In the Application for Interim Release, Mr Gbagbo argued that he should be granted interim release *inter alia* because of his ill health.[156] He noted that the trial would be unfair if he is unfit to stand trial. In light of his illness Mr Gbagbo contended that a fair trial was not possible and submitted that "a person's health is a factor to be taken into account when considering an application for release".[157] In addition, Mr Gbagbo argued that "[o]n the basis that [he] is unable to prepare for and participate in his trial in his current state of health, [...] he should be released in order

[154] Impugned Decision, para. 73.
[155] Impugned Decision, para. 74.
[156] Application for Interim Release, paras 95 et seq.
[157] Application for Interim Release, para. 101.

that he placed in the most propitious conditions for recovering all his faculties and consequently participate in his trial".[158]

83. The Pre-Trial Chamber dismissed these arguments in the Impugned Decision. It noted that the Statute, Rules of Procedure and Evidence, Regulations of the Court and Regulations of the Registry "provide for specific procedures when the health of a suspect is in question" but that they "do not envisage interim or conditional release as a remedy in such situations".[159] The Pre-Trial Chamber noted that under the Regulations of the Court the medical treatment of a detained person should take place as far as possible in detention and in any event in continuous detention.[160] The Chamber noted furthermore that rule 135 of the Rules of Procedure and Evidence provides for a specific procedure if the person's fitness to stand trial is at issue, that Mr Gbagbo had triggered this procedure, and that the experts' reports of Mr Gbagbo's physical, psychological and psychiatric examination were expected shortly.[161] The Chamber concluded that "interim or conditional release cannot be ordered on the basis of the alleged health conditions of Mr Gbagbo".[162]

2. Mr Gbagbo's submissions before the Appeals Chamber

84. Mr Gbagbo argues that the Pre-Trial Chamber's approach is too strict and amounts to an error of law, in disregard of his fundamental rights.[163] He recalls that in the *Bemba* case, the Pre-Trial Chamber granted a request for release on humanitarian grounds and submits that release based on humanitarian and health grounds is current practice at the ICTY.[164] He submits that in the present case, release is essential for Mr Gbagbo to regain his health.[165] In his submission, the Pre-Trial Chamber incorrectly limited its consideration to whether release was a remedy foreseen in the legal texts, when the question was whether Mr Gbagbo's state of health was a *reason* for his release.[166] He submits that his release was the only realistic measure to improve his

[158] Application for Interim Release, para. 103.
[159] Impugned Decision, para. 75.
[160] Impugned Decision, para. 76.
[161] Impugned Decision, paras 77-78.
[162] Impugned Decision, para. 79.
[163] Document in Support of the Appeal, para. 48.
[164] Document in Support of the Appeal, paras 49-50.
[165] Document in Support of the Appeal, para. 51-52.
[166] Document in Support of the Appeal, paras 52-53.

health, and that the Chamber, as guardian of the rights of the accused, should have therefore ordered his release.[167]

3. The Prosecutor's submissions before the Appeals Chamber

85. In response, the Prosecutor argues that the Pre-Trial Chamber was correct in treating the question of Mr Gbagbo's health under rule 135 of the Rules of Procedure and Evidence and in finding that release could not be granted for health reasons.[168] She submits that the reference to the *Bemba* case does not support Mr Gbagbo's arguments because Mr Bemba was at all times kept in custody "albeit briefly outside the Court's detention centre".[169] In her view, the reference to ICTY practice is unhelpful because the legal framework at that tribunal is different from the Court's.[170] She submits furthermore that having found that conditional release was not possible, the Pre-Trial Chamber did not have to consider the merits of Mr Gbagbo's argument that it should be granted for health reasons.[171]

4. Determination by the Appeals Chamber

86. As the Pre-Trial Chamber noted, there is no provision in the Court's legal texts that specifically provides for the interim or conditional release of a detained person on health grounds. Regulation 103 of the Regulations of the Court assumes that medical problems of detained persons are treated within the detention centre and that, in case of hospitalisation, the detained person should remain continuously detained.[172] Rule 135 of the Rules of Procedure and Evidence provides for the medical examination of the accused to determine his or her fitness to stand trial. Articles 60 and 58 of the Statute and rule 119 of the Rules of Procedure and Evidence do not refer to the medical condition of the detained person when dealing with interim or conditional release.

87. Nevertheless, the Appeals Chamber considers that medical reasons can play a role in decisions on interim release in at least two ways. First, the medical condition of a detained person may have an effect on the risks under article 58 (1) (b) of the Statute, for instance on his or her ability to abscond, potentially negating those risks.

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[167] Document in Support of the Appeal, paras 54-55.
[168] Response to the Document in Support of the Appeal, paras 37-39.
[169] Response to the Document in Support of the Appeal, para. 40.
[170] Response to the Document in Support of the Appeal, para. 40.
[171] Response to the Document in Support of the Appeal, para. 41.
[172] See regulation 103 of the Regulations of the Court.

Second, the medical condition of the detained person may be a reason for a Pre-Trial Chamber to grant interim release with conditions. As stated above, the Pre-Trial Chamber enjoys discretion when deciding on conditional release; the ill health of a detained person may be a factor in the exercise of its discretion.

88. Turning to the Impugned Decision, the statement of the Pre-Trial Chamber that the legal texts of the Court do not provide for release as a *remedy* in case of the ill health of the detained person[173] is, as such, correct. However, the statement stops short of acknowledging the potential impact of medical reasons on the risks identified under article 58 (1) (b) of the Statute. In this regard, it should be noted that Mr Gbagbo, in the Application for Interim Release, raised his medical condition as a separate ground for his release, based on his fitness to stand trial and its effect on his right to a fair trial. Mr Gbagbo made these arguments before the Pre-Trial Chamber without linking them to article 58 (1) (b) or the question of conditional release.[174] When understood in this context the Pre-Trial Chamber's conclusion that "interim or conditional release cannot be ordered on the basis of the alleged health conditions of Mr Gbagbo"[175] was not a categorical finding as to the law, but a direct response to Mr Gbagbo's submissions.

89. Furthermore, as mentioned in paragraph 6 above, the Pre-Trial Chamber noted that Mr Gbagbo had not only made a request for interim release, but he had also triggered the procedure under rule 135 of the Rules of Procedure and Evidence.[176] In response, the Pre-Trial Chamber had ordered, on 26 June 2012, three experts to carry out medical, psychiatric and psychological examinations of Mr Gbagbo and to submit their reports by 19 July 2012.[177] Thus, at the time of the Impugned Decision, which was rendered on 13 July 2012, the questions of Mr Gbagbo's health and his fitness to stand trial were in any event under consideration in the context of proceedings under rule 135. In the circumstances the Appeals Chamber considers that any decision by

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[173] See Impugned Decision, paras 75-77.
[174] See Application for Interim Release, paras 95 et seq.
[175] Impugned Decision, para. 78.
[176] See "Defence application for additional medical and psychological evaluation of President Gbagbo", 19 June 2012, ICC-02/11-01/11-158-Conf-Exp-tENG; see also "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012", 5 June 2012, ICC-02/11-01/11-140-Conf, asking for a postponement of the confirmation hearing based primarily on medical grounds.
[177] "Order to conduct medical examination", ICC-02/11-01/11-164-Conf-tENG.

the Pre-Trial Chamber on Mr Gbagbo's release or detention, based on medical reasons would have been premature.

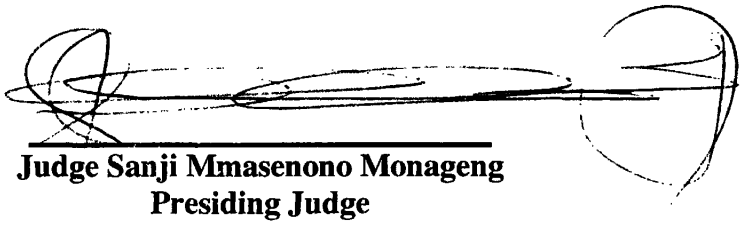
90. Thus, even though the Pre-Trial Chamber's statement as to the relevance of medical reasons for decisions on interim or conditional release was incomplete because it did not mention that medical reasons may play a role in determining the risk under article 58 (1) (b) of the Statute or as a reason for granting conditional release, the Appeals Chamber finds for the reasons expressed above, that the Pre-Trial Chamber did not err by not taking medical reasons into account in the circumstances of the case. The fourth ground of appeal is therefore dismissed.

IV. APPROPRIATE RELIEF

91. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision as it was not materially affected by any error. Consequently, the appeal is dismissed.

Judge Anita Ušacka and Judge Erkki Kourula append dissenting opinions to this judgment.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 26th day of October 2012
At The Hague, The Netherlands

DISSENTING OPINION OF JUDGE ANITA UŠACKA

1. I am filing this Dissent because, in my assessment, the "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'"[1] (hereinafter: "Impugned Decision") does not conform to the standards required of a reasoned decision on detention. I therefore cannot agree with the majority that the Impugned Decision should be confirmed; I would reverse the Impugned Decision and remand the resolution of Mr Gbagbo's request for interim release to Pre-Trial Chamber I for a new determination. The reasons for my Dissent are summarised below.

V. BACKGROUND TO AND PARTICULAR FEATURES OF THE IMPUGNED DECISION

2. Towards the end of 2010, violence erupted in the Republic of Côte d'Ivoire (hereinafter: "Côte d'Ivoire") following the presidential elections. In its aftermath, Mr Ouattara was proclaimed the new President of Côte d'Ivoire, taking over from Mr Gbagbo. There are still ongoing tensions between the governing party of Côte d'Ivoire and the former leading party, now in opposition.

3. While Côte d'Ivoire is not a party to the Rome Statute, in 2003 under Mr Gbagbo's Presidency, that State made a declaration pursuant to article 12 (3) of the Statute accepting the jurisdiction of the Court. Questions relevant to this declaration and related matters were raised by Mr Gbagbo in parallel proceedings before the Pre-Trial Chamber and are also currently before the Appeals Chamber.[2]

4. Based on this declaration, on 23 June 2011, the Prosecutor filed a request with Pre-Trial Chamber III for the authorisation of an investigation pursuant to article 15 of the Statute.[3] On 3 October 2011, Pre-Trial Chamber III authorised the investigation into the situation in Côte d'Ivoire pursuant to article 15 (4) of the Statute, specifically including in the scope of the investigation crimes allegedly committed by all sides to

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[1] ICC-02/11-01/11-180-Conf; public redacted version: ICC-02/11-01/11-180-Red.
[2] "Corrigendum to the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", 29 May 2012, ICC-02/11-01/11-129-Corr-tENG.
[3] "Request for authorisation of an investigation pursuant to article 15", 23 June 2011, ICC-02/11-3.

the conflict.[4] Pre-Trial Chamber III later extended the temporal scope of the investigation.[5] The Arrest Warrant against Mr Gbagbo was issued on 23 November 2011[6] and the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo", (hereinafter: "Arrest Warrant Decision") was rendered on 30 November 2011.[7] Mr Gbagbo was surrendered to the Court on 29 November 2011.

5. Upon his detention with the Court, the doctors who examined his medical condition found that Mr Gbagbo suffered from ill health, which they linked to the conditions of his prior detention in Côte d'Ivoire.[8] In parallel proceedings, Pre-Trial Chamber I is currently assessing Mr Gbagbo's fitness to stand trial.[9]

6. As of 15 March 2012, the Presidency reassigned the situation in Côte d'Ivoire from Pre-Trial Chamber III to Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber"), a differently composed Chamber except for the Presiding Judge.[10]

7. On 27 April 2012, Mr Gbagbo filed his request for interim release, which is the subject of the current proceedings.[11] The Impugned Decision was issued by the Presiding Judge in her function as single judge. Mr Gbagbo raises four grounds of appeal against the Impugned Decision. Lack of reasoning is alleged by Mr Gbagbo as his second ground of appeal. I find that a lack of reasoning pervades the entire Impugned Decision.

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[4] "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", 3 October 2011, ICC-02/11-14 (hereinafter: "Decision Authorising Investigation"); a corrigendum to the decision was issued on 15 November 2011, ICC-02/11-14-Corr.
[5] "Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010", 22 February 2012, ICC-02/11-36.
[6] "Warrant of Arrest For Laurent Koudou Gbagbo", 23 November 2011, ICC-02/11-01/11-1.
[7] ICC-02/11-01/11-9-Red.
[8] ICC-02/11-01/11-105-Conf-Anx8, *see also* ICC-02/11-01/11-105-Conf-Anx3 and ICC-02/11-01/11-105-Conf-Anx4.
[9] "Order scheduling a hearing in relation to Mr Gbagbo's fitness to take part in the proceedings against him", 12 September 2012, ICC-02/11-01/11-241. The oral hearing took place on 24 and 25 September 2012.
[10] "Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations", 15 March 2012, ICC-02/11-01/11-59.
[11] ICC-02/11-01/11-105-Conf-tENG.

VI. THE NECESSITY TO PROVIDE REASONS FOR A DETENTION DECISION

8. Reasoning is at the heart of a judicial decision and an important aspect of the right to a fair trial. Articles 64 (2) and 67 (1) of the Statute require the Court to conduct a fair trial. Beyond that, article 21 (3) of the Statute stipulates that the legal texts of the Court must be interpreted and applied in accordance with internationally recognised human rights, to which the principle of a fair trial belongs.[12] Therefore, article 60 (2) of the Statute, which is the legal basis for the Impugned Decision, needs to be applied in accordance with internationally recognised human rights, as the Appeals Chamber has repeatedly held.[13]

9. The need to have reasoned judicial decisions is supported by the jurisprudence of human rights bodies, including the European Court of Human Rights (hereinafter: "ECtHR"), the Inter-American Court of Human Rights,[14] the African Commission on Human and Peoples' Rights,[15] and the United Nations Human Rights Committee.[16] The jurisprudence and opinions of all these bodies clarify that providing reasoning is a requirement of a fair trial that contributes to the acceptance of the decision by the parties and to preserving the rights of the defence. It requires that courts indicate with sufficient clarity the grounds upon which they base their decisions. While they are not obliged to give a detailed answer to every argument raised, the courts must base their

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[12] *Prosecutor v. Thomas Lubanga Dyilo,* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 (OA 3), para. 11; "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772 (OA 4), para. 37.

[13] *Prosecutor v. Jean-Pierre Bemba Gombo,* "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"'", 5 March 2012, ICC-01/05-01/08-2151-Conf (OA 10) (hereinafter: "*Bemba OA 10 Judgment*"), para. 40, *Prosecutor v. Jean-Pierre Bemba Gombo,* "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-Pieere Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'", 19 November 2010, ICC-01/05-01/08-1019 (OA 4) (hereinafter: "*Bemba OA 4 Judgment*"), para. 49.

[14] Inter-American Court of Human Rights (hereinafter: "IACtHR"), *Apitz Barbera et al. v. Venezuela*, "Judgment", 5 August 2008, Series C, no. 182, paras 77-78; *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, "Judgment", 21 November 2007, Series C, no. 170, para. 107; *Yatama v. Nicaragua*, "Judgment", 23 June 2005, Series C, no. 127, paras 152-153.

[15] African Commission on Human and Peoples' Rights, *Amnesty International and others v. Sudan*, 15 November 1999, communication no. 48/90, 50/91, 52/91, 89/93 (1999), para. 59.

[16] United Nations Human Rights Committee (hereinafter: "UN Human Rights Committee"), *Currie v. Jamaica*, "Views", 29 March 1994, communication no. 377/1989, para. 13.5; *Hamilton v. Jamaica*, "Views", 23 March 1994, communication no. 333/1988, paras 8.3 and 9.1; *Little v. Jamaica*, "Views", 1 November 1991, communication no. 283/1988, para. 8.5.

reasoning on objective arguments and it must be clear from the decision that the essential issues of the case have been addressed.[17] Further, and importantly, reasoning is the basis for raising an appeal and allows the appellate body to review a decision.[18]

10. The jurisprudence of international criminal tribunals, which have to uphold the rights of the defence and the right to a fair trial, also focuses on the need for adequate reasoning.[19] Further, the Appeals Chamber of this Court has held from its early jurisprudence that judicial decisions need to be reasoned. In this respect, the Appeals Chamber remanded a decision relevant to redactions imposed by the Pre-Trial Chamber, a decision that contained insufficient reasoning,[20] and held, after analysing the relevant human rights jurisprudence:

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. The Statute and the Rules of Procedure and Evidence emphasise in various places the importance of sufficient reasoning (by way of example, see, in the context of evidentiary matters, rule 64 (2) of the Rules of Procedure and Evidence, which requires a Chamber to "give reasons for any rulings it makes").[21]

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[17] ECtHR, Grand Chamber, *Taxquet v. Belgium*, "Judgment", 16 November 2010, application no. 926/05, paras 90-91; Chamber, *Hadjianastassiou v. Greece*, "Judgment", 16 December 1992, application no. 12945/87, para. 33; Chamber, *Ruiz Torija v. Spain*, "Judgment", 9 December 1994, application no. 18390/91, para. 29; Chamber, *Van de Hurk v. the Netherlands*, "Judgment", 19 April 1994, application no. 16034/90, para. 61; Chamber, *Boldea v. Romania*, "Judgment", 15 February 2007, application no. 19997/02, para.30.

[18] ECtHR, Chamber, *Suominen v. Finland*, "Judgment", 1 July 2003, application no. 37801/97, (hereinafter: "*Suominen v. Finland*"), para. 37.

[19] International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY"), Appeals Chamber, *Prosecutor v. Momir Nikolic*, "Judgement on Sentencing Appeal", 8 March 2006, IT-02-60/1-A, para. 96; ICTY, Appeals Chamber; *Prosecutor v. Dragoljub Kunarac et al.*, "Judgement", 12 June 2002, IT-96-23 & 23/1-A, para. 41; International Criminal Tribunal for Rwanda (hereinafter: "ICTR"), Appeals Chamber, *Prosecutor v. Aloys Simba*, "Judgement", 27 November 2007, ICTR-01-76-A, para. 152; ICTR, Appeals Chamber, *Prosecutor v. François Karera*, "Judgement", 2 February 2009, ICTR-01-74-A, para. 20.

[20] "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773 (OA 5) (hereinafter: "*Lubanga OA 5 Judgment*"), para. 20; *see also* the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-774 (OA 6).

[21] *Lubanga OA 5 Judgment*, para. 20.

11. This jurisprudence has since been confirmed – "albeit in a different context" – by the Appeals Chamber in the *Bemba OA 5 OA 6 Judgment*.[22]

12. In the case at hand, the Impugned Decision was rendered pursuant to article 60 (2) of the Statute, i.e. it is a decision on a first request for interim release of a detained person. At issue is therefore the fundamental right to freedom of Mr Gbagbo. Limitations to the right to liberty for the purposes of conducting criminal proceedings are the subject of many decisions of human rights bodies and international criminal courts.[23] They hold that reasoning for a decision on detention must conform to a high standard. For example, the ECtHR has held that: "[j]ustification for any period of detention, no matter how short, must be *convincingly demonstrated* by the authorities" (emphasis added).[24] It has held that reasons given to justify continued detention must

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[22] "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/-05-01/08-1386 (OA 5) (OA 6), para. 59.

[23] ICTY, *Prosecutor v. Popovic et al.*, "Decision on Miletic Request for Provisional Release During the Break in the Proceedings", 9 April 2008, IT-05-88-T, para. 27 ("The Appeals Chamber's jurisprudence emphasises that a decision on a request for provisional release must address all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision and include a reasoned opinion indicating its view on the relevant factors and the weight given to them"); ICTY, Appeals Chamber, *Prosecutor v. Haradinaj and others*, "Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release", 9 March 2006, IT-04-84-AR65.2, para 10: "The Appeals Chamber recalls that in any given case, the Trial Chamber only needs to examine those factors that a reasonable Trial Chamber would take into account. These include those which are relevant to its taking a fully informed and reasonable decision as to whether, pursuant to Rule 65(B), the accused will appear for trial if provisionally released. A Trial Chamber is not obliged to deal with all possible factors when deciding whether it is satisfied that the requirements of Rule 65(B) are fulfilled, but at a minimum, must provide reasoning to support its findings regarding the substantive considerations relevant to its decision. Pursuant to these previous findings, the Appeals Chamber considers that the Impugned Decision provides no reasons explaining how the uncertainty of the Appellant's ability to earn a livelihood, and the vagueness of his plans would have an impact upon the likelihood that he would not appear for trial if provisionally released. For the foregoing reasons, this ground of appeal is allowed" (footnotes omitted). The relevant precedent relied upon in *Haradinaj* to support this principle includes *Prosecutor v. Slobodan Milosevic*, "Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case", 20 January 2004, IT-02-54-AR73.6, in which the Appeals Chamber determined that the Trial Chamber had an obligation to provide reasons for its decision, although the Trial Chamber need not have provided its reasoning in detail; ICTY, Appeals Chamber, *Prosecutor v. Momir Nikolic*, "Judgment on Sentencing Appeal", 8 March 2006, IT-02-60/1-A, para. 96. *See also* ECtHR, Chamber, *Jablonski v. Poland*, "Judgment", 21 December 2000, application no. 33492/96, para. 83; ECtHR, Chamber, *Kaszczyniec v. Poland*, "Judgment", 22 May 2007, application no. 59526/00, para. 57; ECtHR, Chamber, *Wemhoff v. Germany*, "Judgment", 27 June 1968, application no. 2122/64 (hereinafter: "*Wemhoff v. Germany*"), p. 20, para. 10; ECtHR, Chamber, *W v. Switzerland*, "Judgment", 26 January 1993, application no. 14379/88 (hereinafter: "*W. v. Switzerland*"), para. 30; IACtHR, *Goiburú et al. v. Paraguay*, "Judgment", 22 September 2006, Series C, no. 150, para. 127, where the Court held that lack of reasons, *inter alia*, "constitutes a *serious obstacle* for the effectiveness of the proceedings" (emphasis added); UN Human Rights Committee, *General Comment No. 8: Article 9 (Right to liberty and security of persons)*, 30 June 1982, HRI/GEN/1/Rev.9 (Vol. I), p. 179, para. 4.

[24] Chamber, *Belchev v. Bulgaria*, "Judgment", 8 April 2004, application no. 39270/98, para. 82.

be "relevant and sufficient".[25] In establishing whether the reasons are "sufficient", the ECtHR has consistently reviewed whether the domestic court's reasons addressed and assessed specific facts in relation to the detained person, and sanctioned reliance on abstract or stereotypical factors, such as, for example, the gravity of the charges alone.[26] It has also consistently held that merely referring to an abstract risk unsupported by any evidence was insufficient.[27] In establishing whether the reasons are "relevant", the same court has consistently referred to "the applicant's personality, his behaviour before and after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty".[28] In sum, the ECtHR has repeatedly found domestic courts' reasons on detention matters neither relevant nor sufficient whenever a domestic court merely repeated abstract and stereotypical grounds, instead of indicating reasons why they considered those abstract statements to be well-founded in the case before them.[29]

13. It transpires from this jurisprudence that, where a detention decision is at issue that requires a risk analysis based on the facts before the Chamber, this risk analysis may not only be based on abstract factors, but must be supported by concrete evidence and relate specifically to the circumstances of the person who was arrested. The reasoning must show why the facts support this specific risk assessment by the Chamber.

14. In relation to the jurisprudence of the Appeals Chamber, it is recalled that in the *Lubanga OA 7 Judgment* and the *Bemba OA Judgment* deplored sparse reasoning in decisions on interim release pursuant to article 60 (2) of the Statute, but did not

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[25] Chamber, *Wemhoff v. Germany*, "Judgment", 27 June 1968, application no. 2122/64, p. 21, para. 12; *See also* Chamber, *Yacgi and Sargin v. Turkey*, "Judgment", 8 June 1995, application nos. 16419/90 and 16426/90, para. 50.

[26] For the most recent jurisprudence, *see* Grand Chamber, *Idalov v. Russia*, "Judgment", 22 May 2012, application no. 5826/03, paras 139, 145-146; Chamber, *Grishin v. Russia*, "Judgment", application no. 14807/08 (hereinafter: "*Grishin v. Russia*"), paras 139, 143-144, 146-149, 154-155; Chamber, *Piruzyan v. Armenia*, "Judgment", 26 June 2012, application no. 33376/07 (hereinafter: "*Piruzyan v. Armenia*"), paras. 95-97, 99-100; Chamber, *Valeriy Kovalenko v. Russia*, "Judgment", 29 May 2012, application no. 41716/08, paras 44-48; Chamber, *Malkhasyan v. Armenia*, ""Judgment", 26 June 2012, application no. 6729/07, paras 74-76; Chamber, *Kalashnikov v. Russia*, "Judgment", 15 July 2002, application no. 47095/99, paras 114-118.

[27] *Grishin v. Russia*, para. 148.

[28] *W. v. Switzerland*, para. 36; *Grishin v. Russia*, para. 148.

[29] *Piruzyan v. Armenia*, no. 33376/07, paras 95-100; Chamber, *Trzaska v. Poland*, "Judgment", 11 July 2000, application no. 25792/94, para. 95.

reverse the impugned decisions in those cases on that ground.[30] Similarly, in the present Judgment, the majority considers that the Impugned Decision is sufficiently reasoned. I note, however, that the majority has to correct errors, clarify findings, and interpret the findings in the Impugned Decision regarding the application of article 60 (2) of the Statute. With all due respect for the majority, I find that the reasoning provided by the Pre-Trial Chamber does not conform to the standards required of a reasoned decision pursuant to article 60 (2) of the Statute, as will be shown below in the discussion of the Impugned Decision.

VII. THE IMPUGNED DECISION

A. The legal basis

15. The Impugned Decision is a decision pursuant to article 60 (2) of the Statute. Such a decision serves, according to the Appeals Chamber, the following goal:

> Article 60 (2) of the Statute aims to provide the detainee with an early opportunity to contest his or her arrest and sequential detention. This he may do by reference to article 58 of the Statute, which defines the legal framework within which justification of his detention may be examined. Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it.[31]

16. In this respect, the Appeals Chamber has also held that a Pre-Trial Chamber's power is "not conditioned by its previous decision to direct the issuance of a warrant of arrest".[32] A Pre-Trial Chamber's decision must be taken "in light of the material placed before it".[33] Thus, a decision under article 60 (2) of the Statute is a decision *de novo*, in the course of which the Pre-Trial Chamber has to determine whether the conditions of article 58 (1) of the Statute are met, hearing the submissions of the defence for the first time.

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[30] *See Prosecutor v. Jean-Pierre Bemba Gombo,* "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323 (OA), paras 53, 66; (hereinafter: "*Bemba OA Judgment*"); *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 136.

[31] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4) (hereinafter: "*Katanga OA 4 Judgment*"), para. 12.

[32] *Katanga OA 4 Judgment*, para. 10.

[33] *Katanga OA 4 Judgment*, para. 12.

17. In addition, a decision pursuant to article 60 (2) of the Statute also has to be considered in light of the fact that this is the decision that the Pre-Trial Chamber will review, either periodically or upon request, as provided for in article 60 (3) of the Statute and rule 118 of the Rules of Procedure and Evidence. The Appeals Chamber has held repeatedly that under article 60 (3) of the Statute, a Pre-Trial Chamber may modify its ruling on release or detention (i.e. its ruling under article 60 (2) of the Statute), if "it is satisfied that changed circumstances so require". The Appeals Chamber has clarified that, in the course of a review under article 60 (3) of the Statute, a Pre-Trial Chamber "needs to consider whether there are 'changed circumstances'"[34] and that "[t]he requirement of 'changed circumstances' imports either 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".[35] The Appeals Chamber further stated that:

> If 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. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.[36]

18. In other words, for a review pursuant to article 60 (3) of the Statute to be possible, a decision under article 60 (2) of the Statute must clearly show the factors that form the basis for the detention, how those factors were analysed, and how the analysis led to the conclusion. Without such explanation, it will be difficult to determine whether and which circumstances may have changed. Therefore, the fact that the decision pursuant to article 60 (2) of the Statute is subject to further review proceedings makes it, once more, incumbent upon the Pre-Trial Chamber to clearly establish and express the factual basis for its decision and conclusions based on those facts.

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[34] *Bemba OA 10 Judgment*, para. 1.
[35] *Prosecutor v. Jean-Pierre Bemba Gombo*, "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'", 2 December 2009, ICC-01/05-01/08-631-Conf (OA 2); public redacted version: ICC-01/05-01/08-631-Red (OA 2)" (hereinafter: "*Bemba OA 2 Judgment*"), para. 60.
[36] *Bemba OA 10 Judgment*, para. 1.

19. This straightforward jurisprudence of the Appeals Chamber was incorrectly recalled and interpreted by the Pre-Trial Chamber in the Impugned Decision.[37] In explaining the legal test to be carried out pursuant to article 60 (2) of the Statute, the Pre-Trial Chamber made reference to "changed circumstances", a standard which applies to decisions made pursuant to article 60 (3) of the Statute only, and held:

> In assessing whether the conditions under article 58(1) of the Statute continue to be met, the Chamber must address anew the issue of detention in light of the material placed before it and may sustain or modify its ruling *if it is satisfied that changed circumstances so require* [emphasis added].[38]

20. As expressed by the majority, this confusion of legal standards establishes a legal error and is raised as such under the first ground of appeal. However, the majority finds that the Pre-Trial Chamber nevertheless applied, in its factual evaluation, the correct legal standard and the error therefore did not materially affect the Impugned Decision. I cannot agree with the majority on this point because the reasoning in the Impugned Decision does not support this conclusion. To the contrary, the many references in the Impugned Decision to the evaluations made already earlier in the Arrest Warrant Decision create the opposite impression, namely that the Pre-Trial Chamber indeed considered whether there was a change in circumstances, thereby applying an incorrect standard.[39]

B. Article 58 (1) (a) of the Statute

21. Article 60 (2) of the Statute refers to the "conditions set forth in article 58, paragraph 1" and therefore requires the Pre-Trial Chamber to satisfy itself that the conditions under articles 58 (1) (a) and 58 (1) (b) of the Statute are met. As previously held by the Appeals Chamber, the Pre-Trial Chamber needs to address whether "there are reasonable grounds to believe that [the person] has committed a crime within the jurisdiction of the Court".[40] However, the Pre-Trial Chamber merely held: "In relation to the requirement under article 58(1)(a) of the Statute, the Single Judge recalls the findings of the Decision on the Article 58 Application".[41] It is evident that the Pre-Trial Chamber thus fully incorporated the findings made in the Arrest Warrant

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[37] Impugned Decision, para. 47; *see also* Majority Judgment, paras 24-28.
[38] Impugned Decision, para. 47.
[39] Impugned Decision, paras 53, 57, 60, 64, 68.
[40] *Bemba OA Judgment*, para. 24.
[41] Impugned Decision, para. 53.

Decision into the Impugned Decision. However, this is not only questionable because of the requirement that the Pre-Trial Chamber decide "anew" when rendering a decision pursuant to article 60 (2) of the Statute.[42] It is even more questionable because of the fact that the Arrest Warrant Decision was issued by a different Chamber, i.e. by Pre-Trial Chamber III, in *ex parte* proceedings. In the *Katanga OA 4 Judgment*, the Appeals Chamber disapproved of the incorporation of decisions of a single judge of the same Chamber in the decision of another single judge.[43] The fact that the judge who issued the Impugned Decision as a single judge was also part of Pre-Trial Chamber III does not justify this strong reliance on the Arrest Warrant Decision. Given the importance of the decision under article 60 (2) of the Statute and the fact that two of the Judges of the Pre-Trial Chamber did not participate in the Arrest Warrant Decision,[44] it would have been preferable for the full bench of the Pre-Trial Chamber to decide on Mr Gbagbo's application for interim release.[45]

22. Another concern is that the burden of proof for the criteria of article 58 (1) of the Statute should lie on the Prosecutor and not on the detained person.[46] This means that the basis for a decision pursuant to articles 60 (2) and 58 (1) (a) of the Statute is what the Prosecutor, not the detained person, brings before the Chamber. Therefore, as in the case at hand, even where the detained person in the application for interim release pursuant to article 60 (2) of the Statute does not submit arguments or evidence relevant to article 58 (1) (a) of the Statute, the Pre-Trial Chamber is required to analyse, based on the evidence brought before it by the Prosecutor, whether there are indeed reasonable grounds to believe that the person committed a crime within the

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[42] *See* para. 16 of this Dissent.
[43] *See Katanga OA 4 Judgment*, para. 26, where the Appeals Chamber held that: "[w]hat is missing is the evaluation of the relevant facts by the Single Judge in the present proceedings. In this case the Single Judge adopted the findings made by another Single Judge in other proceedings; this is impermissible. A judge, the Single Judge in this case, is duty-bound to appraise facts bearing on sub judice matters, determine their cogency and weight and come to his/her findings, as the Single Judge was bound to do in this case but failed to do".
[44] It may be noted further that changes to the composition of a Pre-Trial Chamber are not unusual: six of the 18 Judges of the Court are newly elected every three years, the composition of the Divisions is not static and changes at the very least at the same interval, and an arrest warrant can be issued well before a person is finally surrendered to the Court.
[45] This is notwithstanding the fact that the decision under article 60 (2) of the Statute does not fall in the category of decisions that are specifically excluded from the jurisdiction of the single judge (*see* article 57 (2) (a) of the Statute).
[46] *Bemba OA 4 Judgment*, para. 51; *see also* ECtHR, Chamber, *Ilijkov v. Bulgaria*, "Judgment", 26 July 2001, application no. 33977/96, para. 85.

jurisdiction of the Court. In this respect, there is no indication in the Impugned Decision that the Pre-Trial Chamber carried out such an analysis.

C. Article 58 (1) (b) of the Statute

23. The Pre-Trial Chamber's finding that Mr Gbagbo should be detained was based on all three grounds for detention mentioned in article 58 (1) (b) of the Statute. Mr Gbagbo's large and well-organised network of political supporters (with financial means) and his alleged political aspirations seem to be the main basis for the Pre-Trial Chamber's decision to detain Mr Gbagbo. It is the major factor for the determination that there is a risk of flight (article 58 (1) (b) (i) of the Statute), that he would obstruct and endanger the investigation and court proceedings (article 58 (1) (b) (ii) of the Statute) and that he would continue to commit crimes as described in article 58 (1) (b) (iii) of the Statute.

24. Apart from relying on the Arrest Warrant Decision, the Pre-Trial Chamber established the political aspirations of Mr Gbagbo and the existence of a network of political supporters on the basis of articles published in various press magazines and even internet blogs.[47] These sources dated mostly from 2011 and were used already for the Arrest Warrant Decision. The Pre-Trial Chamber did not explain why it gave weight to these sources, which would have been necessary, in particular because it cannot be excluded that many of those articles and blogs emanate from political opponents of Mr Gbagbo. In this context, it is recalled that the Pre-Trial Chamber authorised the Prosecutor to investigate crimes alleged to have been committed by all sides to the conflict.[48] Further, the political network identified by the Pre-Trial Chamber appears to be a recognised political party of Côte d'Ivoire. The Pre-Trial Chamber also appears to have shifted the burden of proof from the Prosecutor onto the Defence when it stated that "there is no indication that the support network has ceased activity in the period since the Decision on the Article 58 Application".[49] Thus, the Impugned Decision's reasoning is lacking in many respects, a fact which is further explained below in respect of the Pre-Trial Chamber's findings on the specific grounds of detention.

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[47] Impugned Decision, para. 60, and footnotes thereto.
[48] *See* Decision Authorising Investigation.
[49] Impugned Decision, para. 60.

1. Article 58 (1) (b) (i) of the Statute

25. As to the risk of absconding, it is unclear how the Pre-Trial Chamber reached the conclusion that Mr Gbagbo would abscond based on his political supporters' demand that their (former) political leader should go free. In fact, it even appears that Mr Gbagbo's political supporters requested "the peaceful return of the exiles, the freedom of all prisoners and the restoration of democracy" in Côte d'Ivoire.[50] The Pre-Trial Chamber did not explain why this statement was of "particular relevance" for its conclusion that "Mr Gbagbo would use the means that his support network could provide in order to abscond in the event that he is granted interim release". Furthermore, there is no explanation as to why the alleged desire to become once again the leader of a country would lead to a risk of absconding. In addition, the Pre-Trial Chamber failed to assess Mr Gbagbo's character, whether he is still interested in returning to political office, and whether his apparent medical condition has an impact on his ability to abscond.

26. The next factor relied upon in establishing the risk of flight is that Mr Gbagbo might still have funds available that would allow him to abscond and that the support network would also support him financially. With respect to the support network, it is not clear how the political party's demand to set Mr Gbagbo free would actually facilitate his absconding. As to Mr Gbagbo's own financial funds, it remains unclear in the Impugned Decision whether two bank accounts existing in [REDACTED][51] that were recently discovered by the Prosecutor have been frozen in the meantime. This is surprising as it is the only fact to which the Pre-Trial Chamber actually refers in the Impugned Decision, which was rendered more than two months after the Prosecutor requested the freezing of those assets. Whether Mr Gbagbo may have more assets was not further addressed in the Impugned Decision. Therefore, once again, reasoning that would substantiate the Pre-Trial Chamber's conclusion and concrete circumstances which could be a subject of future review pursuant to article 60 (3) of the Statute are missing.

27. The last remaining factor on which the Pre-Trial Chamber relied in assessing whether there is a flight risk is indeed a relevant one – namely the gravity of the

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[50] Impugned Decision, para. 61.
[51] *See* Impugned Decision, para. 79.

allegations against Mr Gbagbo and the risk of a lengthy prison sentence in case of conviction. However, this abstract factor on its own cannot justify the finding of a flight risk. As explained above, the finding of a flight risk must be based on additional, more concrete factors. As shown, the Impugned Decision does not sufficiently refer to such additional factors. Therefore, the Pre-Trial Chamber needs to address anew the question of whether there is a risk that Mr Gbagbo would abscond.

2. Article 58 (1) (b) (ii) and (iii)

28. The other two grounds on the basis of which the Pre-Trial Chamber found that Mr Gbagbo has to be detained were equally based on the fact that Mr Gbagbo has an "elaborate network of supporters",[52] in particular his political party, which appears "to be directed at the restoration of his power".[53] Without any further explanation and by simply referring to the fact that this political party has the "goal of restoring Mr Gbagbo to power", the Pre-Trial Chamber concluded in the next sentence that "Mr Gbagbo could indeed utilise the network of his supporters to commit crimes within the jurisdiction of the Court". The Pre-Trial Chamber did not explain why it considered that this political party has criminal intentions, or how the political party would contribute to obstructing or endangering the investigation. It should also be noted that in addition to the newspaper and internet sources, the Pre-Trial Chamber relied on a redacted witness statement, disclosed between the Prosecutor and Mr Gbagbo for the purposes of the confirmation hearing. The summary of this statement was already used for the purposes of the Arrest Warrant Decision. In the Impugned Decision, the Pre-Trial Chamber did not analyse this witness statement or explain why it gave weight to it. However, it appears to be the most important source relied upon by the Pre-Trial Chamber to establish that the political network has the goal of restoring Mr Gbagbo to power by using illegal means.[54]

29. Two additional factors were considered by the Pre-Trial Chamber in respect of its finding that Mr Gbagbo must be prevented from obstructing or endangering the investigation or the court proceedings.

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[52] Impugned Decision, para. 65.
[53] Impugned Decision, para. 69.
[54] Impugned Decision, footnote 89 [redacted]. It should in particular be underlined that the anonymous witness of the redacted statement refers to "rumours" only and that his statement includes several inconsistencies. In addition, whether the nicknamed person is actually the witness is also questionable.

30. First, it found that Mr Gbagbo has the motivation to obstruct the investigation of crimes.[55] How and where Mr Gbagbo has shown such motivation is not explained. How this finding relates, for example, to the fact that he personally made an undertaking not to obstruct the investigation is not even addressed.[56] Again, the Impugned Decision appears to infer Mr Gbagbo's motivation from abstract factors, but not from specific facts relating to Mr Gbagbo.

31. Second, the Pre-Trial Chamber found that "[t]he risk to the investigation and the court proceedings [...] is amplified" by Mr Gbagbo's extensive knowledge of the sources of evidence against him.[57] The Pre-Trial Chamber then stated that the fact that the process of disclosure between the parties had started "must be taken into account when assessing the level of risk".[58] Whether the Pre-Trial Chamber indeed took disclosure into account as a criterion or not remains unclear. Irrespective of that, however, a detention decision cannot be based alone on the abstract factor that the disclosure process has started. As also pointed out by the Appeals Chamber in the proceedings *Prosecutor v. Jean-Pierre Bemba Gombo*, "there must be a link between the detained person and the risk of witness interference".[59]

32. There is a complete lack of reference to Mr Gbagbo's current state of health and the impact of his condition on his ability to pose a risk to witnesses or the court proceedings as such, or to further commit crimes.

33. These two grounds for Mr Gbagbo's detention are therefore lacking any assessment based on concrete facts or circumstances and therefore do not comply with the standards of reasoning required of a detention decision. Further, the Impugned Decision, as it stands, will make any future assessment of "changed circumstances" pursuant to article 60 (3) of the Statute very challenging because, in the absence of concrete findings, 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

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[55] Impugned Decision, para. 65.
[56] ICC-02/11-01/11-105-Conf-Anx11.
[57] Impugned Decision, para. 66.
[58] Impugned Decision, para. 66.
[59] "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011'", 23 November 2011, ICC-01/05-01/08-1937-Conf (OA 9); public redacted version: ICC-01/05-01/08-1937-Red2 (OA 9) (hereinafter: "*Bemba OA 9 Judgment*"), para. 67.

determine which circumstances might have changed since the issuance of the Impugned Decision.

34. In my opinion, the lack of reasoning in respect of these two grounds of detention alone would have made it necessary to remand the matter to the Pre-Trial Chamber in order for it to clarify the concrete basis for its assessment that those risks exist.

D. Conditional Release

35. The Appeals Chamber has held that, if the Pre-Trial Chamber is satisfied that one or more of the conditions set forth in article 58 (1) of the Statute are met, the Chamber nevertheless has discretion to consider whether the risks can be mitigated by imposing conditions restricting the accused's liberty while on interim release.[60] While this discretion exists, it must be exercised judicially, i.e. it needs to be reasoned and is also subject to review. Human rights jurisprudence provides that "a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice".[61] As mentioned above, reasoning is specifically important in a case where the liberty of a person is at stake.[62] Therefore, especially in exercising this discretion, the reasons must show that the Pre-Trial Chamber indeed considered alternative measures and explained why and how the Chamber drew its conclusions. It is therefore essential that the Pre-Trial Chamber, in dealing with conditional release, provides reasons that explain, based on the specific facts of the case, the decision taken.

36. In the Impugned Decision, the Pre-Trial Chamber stated, after referring back to the assurances given by the State to which Mr Gbagbo seeks to be released, "there is no condition short of detention which should be sufficient to mitigate these risks".[63] To me, this is a blanket statement, utterly abstract and not based on any facts that

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[60] *Bemba OA 2 Judgment*, para. 105; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", 19 August 2011, ICC-01/05-01/08-1626-Conf (OA 7); public redacted version: ICC-01/05-01/08-1626-Red (OA 7), para. 55; *Bemba OA 9 Judgment*, para. 34.
[61] *Suominen v. Finland*, para. 37.
[62] *See* para. 12 of this Dissent.
[63] Impugned Decision, para. 74.

would allow such a conclusion, except on the assertion of the Prosecutor that this would indeed be the case.[64] This way of treating Mr Gbagbo's request not only raises the question of with whom the burden of proof lies, but this reasoning does not assess Mr Gbagbo's personal situation and the specific possibilities that the State to which Mr Gbagbo seeks to be released could or could not offer. Would interim release to this State make it possible for Mr Gbagbo to be in contact with his political party (if that poses the risk)? If yes, why, and which measures could be taken that would effectively pre-empt such contact?

37. In addition, and in relation to the fourth ground of appeal, the Pre-Trial Chamber did not take into account the health situation of Mr Gbagbo when issuing the Impugned Decision. I agree with the majority that the health of a person may be relevant for an assessment of a request for interim release in two ways – it is important in determining whether there is a risk pursuant to article 58 (1) (b) of the Statute and in determining whether to impose conditional release. This, however, leads me to the conclusion that the Pre-Trial Chamber should have taken Mr Gbagbo's health situation into account. The fact that there are parallel proceedings that may lead to a permanent or intermediate stay of proceedings because of a possible permanent or temporary unfitness of Mr Gbagbo to stand trial is different from the question of whether, because of his condition, he should be granted interim release. The Pre-Trial Chamber should have addressed the question of his health also in the context of Mr Gbagbo's request for interim release, specifically in the reasoning relevant to imposing conditional release measures.

38. Finally, the Pre-Trial Chamber did not address whether the costs arising from implementing interim release measures in the State to which Mr Gbagbo wished to be released could be covered, be it by the Court or the State in question. Submissions in this respect were made before it. It needs to be pointed out in this context that an effective exercise of the human right to liberty requires that conditional release can be implemented in reality.

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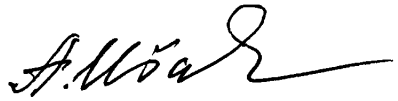
[64] Impugned Decision, para. 74.

VIII. CONCLUSION

39. This discussion has shown that the Impugned Decision did not provide reasons that conform to the standards required of a detention decision as the Pre-Trial Chamber in the Impugned Decision did not assess specific evidence or show why such evidence supported the Pre-Trial Chamber's assessment. In addition, it relied heavily on abstract factors. Reliance on abstract factors alone, however, makes the right to liberty meaningless. Further, the Impugned Decision cannot be subject to a future review pursuant to article 60 (3) of the Statute, as it does not set out the concrete facts and circumstances on which is the Pre-Trial Chamber was relying. The analysis has also shown that the Impugned Decision was fraught with additional legal errors pertaining to the applicable legal standard and the role of Mr Gbagbo's health. Therefore, the Impugned Decision should have been reversed and the matter remanded to the Pre-Trial Chamber. It would then be the Pre-Trial Chamber's task to establish a proper legal and factual basis for the detention of Mr Gbagbo, if any such basis exists.

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



Judge Anita Ušacka

Dated this 26th day of October 2012

At The Hague, The Netherlands

DISSENTING OPINION OF JUDGE ERKKI KOURULA

1. I agree with the Majority that grounds 1, 3 and 4 of the appeal must be dismissed. I also agree with the Majority's conclusion in relation to article 58 (1) (b) (i) of the Statute, under the second ground of appeal.

2. Nevertheless, I respectfully disagree with the remaining assessment of the second ground of appeal by the Majority, relating to the Pre-Trial Chamber's findings under article 58 (1) (b) (ii) and (iii) of the Statute, and, on that part only, I agree with Judge Ušacka (paragraphs 29-31 and 33-34 of her dissent).

3. In my view, the reasoning provided in paragraphs 64 to 67 and 68 to 71 of the Impugned Decision is insufficient to support a finding that there is a risk that Mr Gbagbo would obstruct or endanger the investigation or the court proceedings, or that he would continue to commit any of the crimes he is alleged to have committed or any related crimes. As stated above, I agree with the Majority's assessment of the Pre-Trial Chamber's conclusion that there is currently a risk of flight under article 58 (1) (b) (i) of the Statute, which justifies Mr Gbagbo's detention, and I am aware that the grounds for detention in article 58 (1) (b) are in the alternative. Nevertheless, I am concerned about the impact of the insufficient reasoning in relation to the two other grounds for detention on future reviews of Mr Gbagbo's detention under article 60 (3) of the Statute. This is because, in the absence of sufficient reasoning, an assessment of "changed circumstances" will be problematic. I would therefore reverse the Impugned Decision and remand the assessment of those two grounds for detention to the Pre-Trial Chamber.

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

Judge Erkki Kourula

Dated this 26th day of October 2012
At The Hague, The Netherlands